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EMPLOYMENT STANDARDS

Defining and Regulating the Employment Relationship

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Q: Why do you need to define the employment relationship?

Answer

In these days of downsizing and changing technologies, companies and their managers are all too often faced with overburdened staff, special projects, and the need for specialized knowledge and skills. To meet such needs, many organizations look for assistance from special-skills providers on an as-needed basis.

However, the human resources department is not always aware of the arrangements made by individual departments. For these departments to properly do their jobs, the nature of the working relationships established must be properly defined and communicated to the human resources department.

Properly defining an individual’s working relationship with the organization as either “employee” or “independent contractor” is extremely important. Employer obligations under employment standards (i.e., payment of wages, vacation and vacation pay, maternity leave, notice of termination, etc.) arise only with respect to employees. Payments to employees are processed through the payroll department and require the accurate withholding and remittance of various deductions (i.e., tax, Employment Insurance, and CPP/QPP). These withholdings and remittances require corresponding employer contributions that are a large cost of doing business. On the other hand, payments to independent contractors are not considered part of payroll activity, do not require corresponding employer contributions, and are usually handled through the accounts payable section of the organization.

Failure to properly define the working relationship can be costly to the organization and may result in inconvenient and expensive audits, penalties for failure to withhold and remit, and employment standards complaints.

Q: Is there a definition for “employee”?

Answer

Defining the nature of the working arrangement is not easily done. While each province’s employment standards legislation imposes various duties and obligations on an employment relationship, there is no legislation that provides a complete definition of “employee”. In order to determine who is an employee and who is an independent contractor, we must turn to case law.

The leading case in this area is Wiebe Door Services Ltd. v. The Minister of National Revenue, Federal Court of Appeal, June 18, 1986 (87 DTC 5025). In this
case, Wiebe was in the business of installing and repairing overhead doors. It carried on its business through the services of a considerable number of door installers and repairers with the specific understanding that the workers would be running their own businesses and would therefore be responsible for their own taxes and contributions to workers’ compensation, Unemployment Insurance (now called Employment Insurance), and the Canada Pension Plan. However, the government assessed Wiebe for UI (EI) premiums and CPP contributions in respect of these persons.

The Court determined that the door installers were independent contractors and not employees by applying what is now known as the “four-in-one test.” This test considers the following factors: degree of control exercised by the payer, ownership of tools and materials, chance of profit and risk of loss faced by the worker, and the degree the worker is integrated into the business. The Court went on to examine the “integration test” (the integration of the workers into the company’s business) and noted that it was a useful test but only if applied from the worker’s perspective and not the company’s perspective. In cases that followed Wiebe, the four-in-one test has been consistently applied, while the integration test has been given little weight by the courts.

Q: How do employers apply the employment relationship four-in-one test?

Answer

To help define the employment relationship, a chart is provided below. The chart uses the elements set out in the four-in-one test: degree of control exercised by the payer, ownership of tools and materials, chance of profit and risk of loss faced by the worker, and the degree the worker is integrated into the business. These factors help indicate how the employment relationship would be defined in a given situation.
### Independent Contractor vs. Employee Status

<table>
<thead>
<tr>
<th>Factors Indicating an Independent Contractor Relationship</th>
<th>Factors Indicating an Employee–Employer Relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Payer Control</strong></td>
<td><strong>Payer Control</strong></td>
</tr>
<tr>
<td>• No set hours of work or restrictions on vacation</td>
<td>• Company sets hours of work and vacation entitlement</td>
</tr>
<tr>
<td>• Work is assigned but how work is done is not supervised</td>
<td>• Company supervises what the worker does and how the work is done</td>
</tr>
<tr>
<td>• Worker not required to work on company premises</td>
<td>• Worker is required to work on company premises on a regular basis</td>
</tr>
<tr>
<td>• Worker not limited to services for one company</td>
<td>• Worker works exclusively for one company</td>
</tr>
<tr>
<td>• Worker not required to perform services personally but can hire others</td>
<td>• Worker required to perform services personally</td>
</tr>
<tr>
<td><strong>Ownership of Tools</strong></td>
<td><strong>Ownership of Tools</strong></td>
</tr>
<tr>
<td>• Worker owns and maintains tools and equipment</td>
<td>• Company pays for and provides worker with all tools and equipment</td>
</tr>
<tr>
<td><strong>Chance of Profit and Risk of Loss</strong></td>
<td><strong>Chance of Profit and Risk of Loss</strong></td>
</tr>
<tr>
<td>• Worker paid by percentage of sales or hourly billing rate</td>
<td>• Worker paid salary or hourly wage</td>
</tr>
<tr>
<td>• Worker not paid if services not provided or work not performed</td>
<td>• Worker paid even if deadlines not met or quality of work poor</td>
</tr>
<tr>
<td>• Worker pays own expenses related to work performed (e.g., supplies, office rent)</td>
<td>• Worker is not required to pay expenses related to work performed</td>
</tr>
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<td>• Company pays benefits such as health, dental, or disability insurance</td>
</tr>
<tr>
<td>• No bonus, or bonus may be tied to early completion</td>
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<tr>
<td>• No pension plan or RRSP</td>
<td>• Pension plan or RRSP provided</td>
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<tr>
<td><strong>Total Relationship</strong></td>
<td><strong>Total Relationship</strong></td>
</tr>
<tr>
<td>• Written contract indicating independent contractor relationship</td>
<td>• No written contract indicating independent contractor relationship</td>
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<td>• Contract for specific project or period of time</td>
<td>• Contract for indefinite period of time</td>
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<tr>
<td>• Invoices submitted by worker for payment</td>
<td>• No invoices submitted by worker</td>
</tr>
<tr>
<td>• Worker charges GST for work performed</td>
<td>• No GST charged by worker</td>
</tr>
<tr>
<td>• Employer pays through accounts payable dept.</td>
<td>• Employer pays through payroll dept.</td>
</tr>
</tbody>
</table>
Q: What is meant by jurisdiction?

Answer

Jurisdiction is the power or authority to pass laws. In Canada, jurisdiction is divided between the federal government and the provinces/territories.

The federal government has the authority to regulate and control the industries and undertakings of an interprovincial, national, or international nature. This includes the following industries: transportation, communication, radio and television broadcasting, banking, uranium mining, grain elevators and flour and feed operations, companies whose operations have been declared for the “general advantage” of Canada or of two or more provinces, and Crown corporations such as the Canadian National Railways and the Canadian Broadcasting Corporation.

The federal government enacts legislation that sets minimum standards and conditions of employment for workers engaged in the above occupations and industries. The principal legislation is the Canada Labour Code (R.S.C. 1985, c. L-2.). It is supplemented by a number of regulations that establish standards such as the minimum hourly wage. It is also supplemented by other Acts that affect holidays, hours of labour, and equal pay for work of equal value.

The provinces have exclusive jurisdiction over property and civil rights, which includes the power to pass laws regulating the employment relationship. Therefore, each province has the authority to pass laws and set minimum standards to regulate the employment relationships within its borders. With certain exceptions, local works and undertakings are also within provincial jurisdiction.

Each province regulates the working conditions for employees, industries, and occupations principally through an Employment Standards Act or Labour Standards Act (or similarly named statute). In each of the provinces, additional statutes and regulations exist that govern particular industries or particular conditions of employment.

The territorial Councils have been granted powers similar to those of the provinces for enacting legislation relating to property and civil rights. Each of the three territories has an Employment Standards Act or a Labour Standards Act that regulates the working conditions for employees, industries, and occupations in that territory.
Q: Why is it important to know which employment standards laws apply?

Answer

While employment standards laws are fairly similar across Canada, there are still differences between federal and provincial/territorial provisions, as well as differences from province to province. For example, British Columbia requires overtime to be paid at double time for all hours over 11 in a day, Saskatchewan uses a unique formula for calculating vacation pay, and only Ontario and federal laws declare Boxing Day a statutory holiday.

In cases where an organization has employees in more than one province, it is extremely important to ensure that each employee’s protections and rights with respect to wages, vacations, leaves of absence, termination, etc., are calculated based on the requirements of the province where the employee is working, and not the province where the organization has its head office.

Q: How do I determine which employment standards laws apply to me?

Answer

Although this issue appears to be straightforward, it is not necessarily so. There have been numerous instances where the jurisdiction under which a workplace falls has been called into question. If you are unsure about which employment standards laws apply to you, or which provincial payroll deduction table to use, you can contact the employment standards office nearest you.

Q: If the law in a particular province is silent on a particular topic, do the federal labour provisions in the Canada Labour Code apply?

Answer

No. A common mistake made by HR departments is to assume that the labour standards provisions of the Canada Labour Code apply when the provincial law does not mention an issue. The provisions of the Canada Labour Code only apply to employees in federally regulated industries.

Where provincial law is silent on a particular topic, it may mean one of a number of things:
● the activity is not allowed;
● the employer has discretion in developing policies and procedures in that area;
● the issue has been addressed in the administrative policies of the province’s employment standards division; or
● the common law (court decisions or case law) has determined the issue.

If you have a particular question about a topic not addressed in your province’s/territory’s legislation, you should contact the employment standards division for your province/territory or consult an employment law lawyer.

Q: We have employees in a number of provinces. Can we establish one set of labour standards for all employees?

Answer

Yes, but only if the highest standards are used.

For example, a company has employees in Ontario, New Brunswick, and Alberta and wants to establish a company-wide policy for bereavement leave. New Brunswick requires that employees be given up to 5 consecutive days of leave on the death of a person in a close family relationship. Ontario does not provide for bereavement leave specifically, but does provide for what is called “emergency” leave. In Ontario, employers with 50 or more employees must grant employees up to 10 days of unpaid leave per year for things such as the death of immediate family member. Alberta does not require employers to grant any bereavement leave. If a company-wide set of employment standards were established, all employees, including those in Alberta, would need to be granted the bereavement leave established by Ontario.

To develop a complete company policy, this exercise would need to be repeated for all employment standards requirements.

Q: How does the law regulate the employment relationship?

Answer

There are a number of different types of laws governing the employment relationship:
Employment standards legislation: Employment standards legislation has been passed by each of the provincial and territorial governments, as well as by the federal government. Employment standards legislation sets out minimum standards for the working conditions of employees, and covers such issues as minimum wages, payment of wages, employee records, hours of work and overtime, vacations with pay, leaves of absence, statutory holidays, and termination of employment.

Human rights legislation: Human rights legislation attempts to ensure equality of treatment for groups that have historically faced discrimination. One of the areas covered by human rights legislation is the employment relationship. Human rights legislation prohibits employers from discriminating in the provision or conditions of employment. As well, there are some statutes dealing specifically with equality issues in employment, such as pay equity and employment equity statutes.

Labour relations legislation: Labour relations legislation regulates the relationship between employers and trade unions, details the circumstances under which unions may be certified to represent employees, and sets out the conditions for negotiation and administration of collective agreements between unions and employers.

Common law: Common law has evolved over the centuries through the decisions in various courts of individual cases. The common law has developed a number of principles that directly affect the employment relationship. Where legislation has been passed on a particular topic, that legislation overrides any common law on that issue. However, there are a number of areas, such as the termination of employment, in which the common law remains important.

Employment contracts: Often employers will enter into agreements with individual employees as to the conditions that will govern and sever the working relationship. These contracts may be formalized in writing, or they may simply be implied. These agreements are legally binding on employers and employees, unless they violate other legislation. The employment contract may include not only the individual document signed and agreed to at the commencement of employment, but also conditions and benefits included in an organization’s policies and programs.
Q: Does employment law cover all employees?

Answer

Human rights legislation applies to all employees, without exception. However, employment standards legislation does not; some employees are exempt from its coverage. These exemptions vary across the country, but in most parts of the country, persons exempted include managerial and supervisory staff; professionals such as lawyers, doctors, architects, and dentists; and students training for these professions. In some parts of the country, agricultural workers are specifically exempted.

As well, employment standards legislation in some cases exempts certain types of employees from particular provisions of the Act. For example, British Columbia exempts teachers, live-in home support workers, hunting guides, police officers, and firefighters from its requirements on hours of work and overtime.

A common misconception is that temporary, part-time, or casual employees are not covered by employment standards legislation. This is not the case. Employment standards legislation protects all employees, with the exception of those noted above.

Exclusions from employment standards legislation are detailed and vary across the country. If you have a concern about coverage under employment standards legislation, contact your jurisdiction’s employment standards office for information.

Q: What if an employment contract’s or collective agreement’s provisions differ from employment law requirements?

Answer

An employment contract or collective agreement will often cover many areas and issues that are not specifically addressed in human rights or employment standards law, in which case there is no conflict.

Where a contract or agreement conflicts with human rights law, the contract or agreement will have no force or effect, as the courts have stated that workers cannot contract out of their human rights. Employment standards laws across the country state that where an employment contract, collective agreement, or policy provides rights and benefits that are more favourable than those conferred by employment standards laws, the more favourable provisions will prevail. Where provisions in the employment contract or collective agreement fall below the minimum standards set out in employment standards law, the employment standards protections will prevail.
However, in British Columbia, in some circumstances the law allows employment standards to be compared as a package. For example, if an employment contract provided for lengthier vacation entitlements than those guaranteed under employment standards law, but placed greater restrictions on the timing of these vacations than permitted in the legislation, the provisions in the employment contract might still prevail over those in the legislation.

In Prince Edward Island, employees who are covered by a collective agreement are exempted from all employment standards provisions except those relating to maternity and child care leaves, harassment, and certain payroll-related provisions.

Q: If an employer sells the business or merges with another company, do employees lose rights that have been built up?

Answer

In today’s world of business mergers and acquisitions, companies can suddenly find themselves with whole new divisions and large groups of “new” employees. HR departments charged with blending two or more organizations into one can sometimes run into difficulties sorting out the issues of employee rights and employer obligations.

With respect to employment standards, where an employer sells, buys, leases, merges, or otherwise transfers the business to another employer, the employment of the employees of that business is deemed to be continuous. It would be as if the employees had continued to work for the same employer with no interruption. The rights of the employees with respect to vacations with pay, vacation pay, notice of termination or pay in lieu of notice of termination, statutory holidays, maternity and parental leave, and other miscellaneous leaves are preserved.

When blending the organizations and making decisions as to vacation schedules and entitlement, leaves of absence, or terminations due to downsizing, the seniority of all employees should be determined first, in order to ensure that employment standards requirements are met.
Minimum Age

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Q: What is the reason for minimum age requirements for employment?

Answer

Restrictions on child labour were among the first employment laws to be enacted; they were developed to ensure access to education and a safe and normal development for children. The federal and provincial/territorial governments have all established minimum age requirements respecting a wide range of employment. The usual practice is to set a general minimum age standard that is qualified by special provisions for specific occupations or industries.

Q: Are employers prohibited from hiring young people?

Answer

The federal and provincial/territorial governments have established minimum age requirements respecting a wide range of employment. While details of the minimum age laws vary across the jurisdictions, the usual practice is to set a general minimum age standard that is qualified by special provisions for specific occupations or industries.

Minimum age laws cover not only employment in industrial and commercial businesses, but also jobs such as newspaper vending and performing at public amusements. As well, where young people can be employed, there are often special limitations on their employment conditions that do not apply to adult workers.

Q: Must young people be treated differently from adult employees?

Answer

Young people who are employees are entitled to all of the same protections as their adult co-workers. In addition, most jurisdictions recognize the unique vulnerabilities and circumstances of young workers by setting out the following special protections:

- Work must not interfere with school for those young people who are required to attend. The hours of work may be limited to ensure that work does not interfere with attendance and success at school. The number of hours that a young person can work on a school day is usually limited to 2 or 3 hours; students are permitted to work longer hours on days when school attendance is not required.
• The work must not endanger the health and safety or proper development of the young person.
• There are restrictions on young persons working at night. Because of concerns about the safety of young persons left to work alone at night, the federal jurisdiction and most provinces/territories either severely restrict or completely prohibit young people from working between the hours of 10:00 p.m. or 11:00 p.m. to 6:00 a.m.
• In some provinces, the employer must obtain the written consent of a parent or guardian, or of the Director of Employment Standards. The requirement for consent is generally limited to circumstances where the worker is under the age of 16.

Q: Are there exceptions to the laws regarding young workers?

Answer
Some jurisdictions specifically exclude certain types of jobs (such as babysitting and newspaper vending) and certain types of agricultural work from the protections described in the previous question. As well, work-study programs or vocational training programs are also permitted in most cases.

Q: What are the minimum age requirements across Canada?

Answer
The minimum age requirements are set out below.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Minimum Age</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>17</td>
</tr>
<tr>
<td>Alberta</td>
<td>15</td>
</tr>
<tr>
<td>British Columbia</td>
<td>15</td>
</tr>
<tr>
<td>Manitoba</td>
<td>16</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>16</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>16</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>16</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Minimum Age</td>
</tr>
<tr>
<td>-----------------</td>
<td>-------------</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>14</td>
</tr>
<tr>
<td>Nunavut</td>
<td>17</td>
</tr>
<tr>
<td>Ontario</td>
<td>Not specified(^1)</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>16</td>
</tr>
<tr>
<td>Quebec</td>
<td>Not specified</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>16 (14 subject to conditions)</td>
</tr>
<tr>
<td>Yukon</td>
<td>17</td>
</tr>
</tbody>
</table>

Please note that there are additional industry-specific age requirements in each jurisdiction.

\(^{1}\) In Ontario, employment standards legislation does not provide any minimum with respect to age of employment. Instead, minimum age requirements are found under the *Occupational Health and Safety Act* and the *Industrial Establishments Regulation*. Under the regulation, the minimum age of a worker or a person who is permitted to be in or about an industrial establishment is 16 years of age in a logging operation, 15 years of age in a factory other than a logging operation, and 14 years of age in a workplace other than a factory. Under the Act, “industrial establishment” is defined as an office building, factory, arena, shop or office, and any land, buildings, and structures appertaining thereto.
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Q: What is the reason for hours of work and overtime pay requirements?

Answer

In order to ensure that employees receive sufficient rest and are not overworked, governments across Canada have passed laws restricting the hours of work of employees. These laws set standard hours of work, provide extra payment (overtime) for hours worked over the standard, and provide rest and meal breaks.

Q: Are there limits on the number of hours that an employee can be required to work in a day or in a week?

Answer

All jurisdictions set standard hours of work. If employees work beyond these hours, employers must pay overtime. Some jurisdictions simply set standard weekly hours, while others regulate hours per day as well as hours per week. However, some jurisdictions also place absolute limits on the number of hours employees can be required to work in a day or a week, even if overtime pay is provided.

All of the jurisdictions that set a standard working day do so at 8 hours. The standard number of hours in a work week varies from 40 to 60 hours. To find the standard and maximum working hours allowed in your workplace, please refer to the chart below (please note that some specific industries have special hours-of-work provisions that are not listed here).

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Minimum Hours To Be Paid</th>
<th>Maximum Hours Permitted</th>
<th>Required Rest Periods</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>3</td>
<td>8 per day; 48 per week</td>
<td>1 full day of rest per week, on Sunday if possible</td>
</tr>
<tr>
<td>Alberta</td>
<td>3</td>
<td>8 per day; 44 per week</td>
<td>1 day per week; 2 days in each 14-day period; 3 days in each 21-day period; or 4 days in each 28-day period</td>
</tr>
<tr>
<td>British Columbia</td>
<td>4 if scheduled to work 8; 2 otherwise</td>
<td>8 per day; 40 per week</td>
<td>32 consecutive hours per week</td>
</tr>
<tr>
<td>Manitoba</td>
<td>3</td>
<td>8 per day; 40 per week</td>
<td>24 consecutive hours in each 7-day period</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Minimum Hours To Be Paid</td>
<td>Maximum Hours Permitted</td>
<td>Required Rest Periods</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>--------------------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>3 if paid less than twice the minimum wage</td>
<td>No limit on the number of hours in any day, week, or month; overtime paid after 44 hours</td>
<td>24 consecutive hours per week, on Sunday if possible</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>3</td>
<td>40 per week</td>
<td>24 consecutive hours per week, on Sunday if possible</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>4</td>
<td>8 per day (standard); 10 per day (maximum); 40 per week (standard); 60 per week (maximum)</td>
<td>1 day of rest in each work week; 2 consecutive days of rest in each period of two consecutive work weeks; or 3 consecutive days of rest in each period of three consecutive work weeks</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>3</td>
<td>48 per week</td>
<td>24 consecutive hours in each 7-day period, on Sunday if possible</td>
</tr>
<tr>
<td>Nunavut</td>
<td>4</td>
<td>8 per day (standard); 10 per day (maximum); 40 per week (standard); 60 per week (maximum)</td>
<td>1 full day per week, on Sunday if possible</td>
</tr>
<tr>
<td>Ontario</td>
<td>3</td>
<td>8 per day; 48 per week (60 per week with employee agreement; overtime payable after 44 hours)</td>
<td>24 consecutive hours per week or at least 48 consecutive hours after each 2-week period of work</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>3</td>
<td>48 per week</td>
<td>24 consecutive hours in each 7 days, on Sunday if possible</td>
</tr>
<tr>
<td>Quebec</td>
<td>3</td>
<td>40 per week</td>
<td>32 consecutive hours per week</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>3</td>
<td>8 per day; 40 per week</td>
<td>1 day in every 7 days (persons usually employed for 20 hours or more in any 1 week); 2 days in every 7 days (more than 10 employees in any establishment), one of which is Sunday if possible</td>
</tr>
<tr>
<td>Yukon</td>
<td>2</td>
<td>8 per day; 40 per week</td>
<td>2 full days per week, one on Sunday if possible</td>
</tr>
</tbody>
</table>
Q: Is an employee who is waiting for work to be assigned considered to be working for the purpose of calculating hours of work?

Answer

Only four jurisdictions — Manitoba, New Brunswick, Nova Scotia, and Quebec — directly deal with this issue in their employment standards legislation. In these provinces, a person who is at his or her place of employment and is required to wait for work to be assigned is deemed to be working.

Q: When deciding whether the standard working hours have been reached, how is a “week” defined?

Answer

A week is a period of 7 consecutive days. In Alberta, British Columbia, Saskatchewan, and the federal jurisdiction, the week commences at midnight on Saturday. In other parts of Canada, the employer can set the work week to begin at any time, so long as the practice is consistent. This prevents employers from repeatedly shifting the start of the week in an attempt to minimize the hours worked within the weekly standard.

Q: Do standard hours of work apply to all employees?

Answer

No, not all employees are affected by standard hours laws because not all employees are covered by employment standards laws. For example, professionals are often excluded from employment standards protections. If a person is employed as an architect, lawyer, dentist, or other professional, employment standards laws may not apply.

As well, special rules about hours of work may apply to employees in certain industries, such as construction.
Q: What happens if employees work more hours than the standard?

**Answer**

Hours worked by employees beyond the standard hours set out by law are considered overtime, and employers must pay employees for overtime hours worked. The overtime rate is usually 1.5 times the regular rate of pay received by the employee. However, in New Brunswick and Newfoundland and Labrador, the overtime rate is 1.5 times the minimum wage.

Q: Are there any exceptions to the legislated hours of work?

**Answer**

The federal government, Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Saskatchewan, Northwest Territories, Nunavut, and the Yukon allow exceptions to the legislated hours of work when there is an emergency. The definition of an emergency varies, but it includes such things as accidents; interruptions to essential services (such as utilities); and urgent work to be done to equipment (in order to prevent serious interference with the functioning of the business). Generally speaking, the circumstances must be unforeseen or unpreventable, and the hours may be extended only to the extent necessary to prevent serious interference with the ordinary working of the establishment.

Q: Can an employer get permission from employment standards officials to exceed the legislated hours of work?

**Answer**

Under federal, Alberta, British Columbia, Manitoba, Nova Scotia, Prince Edward Island, Northwest Territories, and Nunavut law, employment standards officials may, when an employer applies, give the employer a permit to exceed the maximum hours.

In Ontario, an employer may permit an employee to exceed the maximum daily hours of work where the employer:

- provides non-unionized employees with the most recent version of the Ontario Ministry of Labour’s “Information for Employees About Hours of Work and Overtime Pay”; and
obtains the employee’s (or union’s, if there is one) written agreement to work the excess hours.

In Ontario, an employer may permit an employee to exceed the maximum weekly hours of work where the employer:

- provides non-unionized employees with the most recent version of the Ontario Ministry of Labour’s “Information for Employees About Hours of Work and Overtime Pay”;
- obtains the employee’s (or union’s, if there is one) written agreement to work the excess hours; and
- receives an approval from the Director of Employment Standards.

If the Director has not made a decision within 30 days of receiving the application, employees can still start working between 48 and 60 hours a week (depending on what they agreed to), provided that the following conditions are met:

- the employer has obtained signed employee agreements;
- the employer has served the Director with the application;
- the employer has posted the notice of the application;
- the application applies to the employees who will do the work;
- the employer has not been notified that the application has been refused; and
- the most recent previous application or approval was not refused or revoked.

The Director’s approval must first be received before employees are allowed to work more than 60 hours a week.

An employee may revoke his or her consent to such an agreement by giving the employer 2 weeks’ written notice, and the employer may revoke the agreement by giving the employee reasonable notice.

In other parts of Canada where such permits are issued, the employer must usually show some special circumstances, such as the seasonal or intermittent nature of the industry.
Q: Can the hours of work be averaged over a longer period of time?

Answer

In Alberta, British Columbia, Manitoba, Ontario, Quebec, Saskatchewan, the Northwest Territories, Nunavut, the Yukon, and the federal jurisdiction, employers are permitted to comply with standard hours laws (e.g., not pay overtime) by averaging out the number of hours that employees work over a number of weeks. With this system, an employee could work 50 hours one week, 10 the next, 45 the next, and still comply with a maximum 40-hour work week because the average hours of work in each week over the 3-week period is only 35, which is still well below the maximum. Except in the federal jurisdiction, employers must obtain the agreement of the employees or trade union representing the employees and/or permission from employment standards officials before they can put an averaging system into place.

Averaging agreements are often limited to a specific period of time. For example, in British Columbia, hours of work may be averaged over 1, 2, 3, or 4 weeks.

In Ontario, where the employee (or union, if there is one) agrees and the employer receives an approval from the Director of Employment Standards, hours of work may be averaged over periods of at least 2 weeks. To be valid, an employee’s agreement to average hours of work must be in writing and must:

- include the names of the parties to the agreement (i.e., the employer’s name and the employee’s name);
- specify the employee’s agreement to have hours of work averaged over a specified number of weeks;
- state the actual number of weeks that the employee agreed to have hours of work averaged over;
- state that the averaging of hours over the specified period will be used to calculate entitlement to overtime pay;
- provide for an expiry date; if the agreement is with an employee not represented by a union, the agreement cannot be in effect for longer than 2 years; and
- be signed by both parties.
EMPLOYMENT STANDARDS

If the Director has not made a decision within 30 days of receiving the application, the employee can still start averaging hours over a 2-week period, provided that the following conditions are met:

- there are signed employee agreements on file;
- the Director has been served with the application;
- the application applies to the employees whose hours will be averaged;
- the employer has not been notified that the application has been refused; and
- the most recent previous application or approval was not refused or revoked.

The Director’s approval must first be received before an employer can average hours of work over a period that exceeds 2 weeks.

**Q:** Can an employer implement a compressed work week?

**Answer**

Compressed work weeks are scheduling schemes that allow employees to work the same number of hours in a week in fewer days. They are specifically permitted in Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Saskatchewan, the Northwest Territories, Nunavut, the Yukon, and the federal jurisdiction. In New Brunswick, Newfoundland and Labrador, Prince Edward Island, and Quebec, such provisions are not necessary, since standard daily hours are not set, only weekly hours. Thus, compressed work weeks are permitted in all parts of Canada, allowing the workday to be extended past the usual 8-hour daily maximum without overtime being paid, since fewer days will be worked in a week.

Prior to implementing a compressed work week, an employer must obtain either permission from the employment standards department and/or the agreement of the trade union that represents the employees, or, if there is no union, the agreement of a majority of the affected employees.

**Q:** How do public holidays affect standard hours calculations?

**Answer**

In most of the provinces and territories, when a week contains a public holiday to which an employee is entitled, the standard hours of work for that week are reduced.
Thus, where the standard work week is 40 hours and the standard workday is 8 hours, the standard working hours during the week of the public holiday will be 32.

Therefore, employees subject to a 40-hour work week will receive overtime pay only if, during the week of the public holiday, they work more than 32 hours on the days that are not a public holiday.

In Quebec, public holiday hours, whether worked or not, are included in the total hours for the week when calculating overtime.

In Manitoba, a general holiday does not affect the requirement to pay overtime wages or substitute for a weekly day of rest. For both overtime and a weekly day of rest, the wages paid as general holiday pay are considered hours worked and count towards the normal 40 hours of work.

In Newfoundland and Labrador, Nova Scotia, and Prince Edward Island, however, there are no special provisions that deal with how to calculate weekly overtime for a week containing a statutory holiday.

For most provinces and territories, the idea is that public holiday hours should not count towards overtime entitlement, since employees will already be compensated for working on a public holiday by higher rates of pay and/or the provision for another day off at a later date.

Q: How do employees know what their hours of work are?

Answer

In Alberta, Nova Scotia, and Saskatchewan, employers are required to post in the workplace a notice that includes information about the time at which work begins and ends.

In Manitoba, New Brunswick, Prince Edward Island, Quebec, the Northwest Territories, Nunavut, and the Yukon, employers are required to post general conditions of employment, a summary of employment standards requirements, or items required by employment standards officials. This general requirement can include changes to the standard work week, hours of work, etc.

In Ontario, employers are required to display in the workplace a government-provided poster where it is likely to be seen by employees. This poster contains a summary of parts of the Ontario legislation, including hours of work.
In Newfoundland and Labrador, employers are required to provide each employee with a written statement of the terms and conditions of employment, which would include hours of work.

Finally, federal employers are required to post hours of work when an averaging or a modified work schedule is in effect. In British Columbia, employees must receive a copy of the agreement to average hours of work before the averaging schedule begins.

Q: Are employees entitled to a weekly rest period?

Answer

Yes. All employees are entitled to have some time off during each week of work.

In the federal jurisdiction, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, the Northwest Territories, and Nunavut, employees are entitled to at least 1 full day of rest every 7 days, which should be on Sunday whenever possible.

In British Columbia and Quebec, employees are entitled to 32 hours free from work each week.

In Manitoba, employees have a right to a 24-hour rest period in each week, which may be on any day of the week.

In Alberta, employees are entitled to 1 day of rest each week, 2 consecutive days of rest in each 14-day period, 3 consecutive days of rest in each 21-day period, or 4 consecutive days of rest in each 28-day period.

In Ontario, 24 consecutive hours off each week, or at least 48 consecutive hours off after each 2-week period of work, are mandatory.

In Saskatchewan, a rest period of 1 day in every 7 is provided for all employees who usually work 20 hours or more in a week. Where there are more than 10 employees in an organization, an employer must grant a rest period of 2 consecutive days in every 7 to each employee who works 20 hours or more in a week. One of these 2 days must be Sunday, if possible.

In the Northwest Territories, employees are entitled to 1 day of rest in each work week; 2 consecutive days of rest in each period of 2 consecutive work weeks; or 3 consecutive days of rest in each period of 3 consecutive work weeks.
In the Yukon, employees are entitled to 2 full days of rest in a week, one of them to be a Sunday, if possible.

There are many exceptions to these rest provisions. For example, a number of provinces make exceptions for urgent work, seasonally operating industries, or operations in remote areas where employees would not benefit by the break.

Q: Are employees entitled to meal and rest breaks during the day?

Answer
The law makes provisions for employees to take a break during the working day to eat and rest:

In Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Prince Edward Island, Quebec, the Northwest Territories, and Nunavut, employers must allow employees a rest period of at least half an hour each time they work for more than 5 consecutive hours. In Nova Scotia, if an employee works more than 10 consecutive hours, the employee is entitled to at least one rest or eating break of at least one half hour and other rest or eating breaks totalling at least one half hour for each 5 consecutive hours of work. In Ontario, where the employee agrees, the required half-hour meal break can be broken into two shorter periods that still total 30 minutes.

In New Brunswick and Newfoundland and Labrador, the required period of rest is 1 hour after every 5 consecutive hours of work. This may be altered by collective agreement.

In Saskatchewan, there must be a half-hour meal break after every 5 consecutive hours of work for all employees who work more than 6 hours in a day.

In the Yukon, a half-hour break must be granted after 5 consecutive hours of work if the employee works fewer than 10 hours on that day, and after 6 hours if the employee works more than 10 hours.

In the federal jurisdiction, there is no specific provision for meal breaks.

Employers are not required to pay employees during these breaks.

As well, there are no provisions for coffee breaks or other similar breaks. As such, the employer has discretion in providing such breaks.
Some provinces have exceptions to these requirements. The exceptions are for such things as emergencies, accidents, or agreements reached through collective bargaining.

Q: Can employees be required to work during their meal breaks?

Answer

Of the provinces that mention daily breaks, some specify that employees may not be allowed to work during their meal breaks. For example, in the Northwest Territories, Nunavut, and Saskatchewan, the legislation prohibits employers from requiring employees to work during their meal breaks.

In British Columbia, Manitoba, Quebec, and the Yukon, employees must be paid if they are required to be available for work during their meal breaks.

In Nova Scotia, where an employee has worked for 5 hours and has not been provided a rest or eating break, the employee is entitled to eat while working and consequently, if he or she is still working, would be entitled to be paid for that period.

In Quebec, an employee is deemed to be at work and is therefore entitled to be paid:

- while available to the employer at the place of employment and required to wait for work to be assigned;
- during the break periods granted by the employer;
- when travel is required by the employer; and
- during any trial or training period required by the employer.

Q: Is there any protection regarding work breaks for shift workers?

Answer

In Alberta, British Columbia, Newfoundland and Labrador, Saskatchewan, and the Yukon, workers are protected from being required to work shifts without a rest in between. In these jurisdictions, workers must be allowed at least 8 hours rest between each shift.
In Ontario, employers must give employees at least 8 hours rest between shifts, unless the successive shifts do not exceed 13 hours, or the employer and employee agree otherwise.

**Q:** Are split shifts regulated?

**Answer**

In British Columbia and the Yukon, employers must limit their employees’ standard hours of work to the 12-hour period immediately following the start of each employee’s shift.

**Q:** Is there a standard weekly day of rest?

**Answer**

Historically, Sundays were considered a day of rest in Canada. On that day, shops were closed, business was not conducted, and employees rested. However, under the *Canadian Charter of Rights and Freedoms*, the courts declared that while governments could regulate civil rights on Sundays, they could not compel people to observe Sunday as a religious holy day. Federal legislation prohibiting Sunday work was struck down. However, in some provinces, legislation governing hours of opening still places some restrictions on Sunday openings. As well, jurisdictions such as Manitoba, New Brunswick, Nova Scotia, and Ontario, have included provisions in their employment standards legislation protecting the right of workers to refuse to work on Sunday under certain conditions.

**Q:** What can an employee do if hours of work provisions under employment standards laws have been violated?

**Answer**

Employees who believe that they are being denied their rights under employment standards laws with respect to hours of work can contact the nearest employment standards office. This office can provide advice and assistance, and can enforce employee rights if the law has been violated.

As well, employees who are covered by collective agreement provisions dealing with hours of work can file a grievance through their union.
Finally, if the hours are part of an employment contract between the employee and the employer, the contract could be enforced through legal action.

**Q: When must overtime be paid and how is it calculated?**

**Answer**

Overtime is payable and calculated in one of three ways: where hours of work exceed the weekly maximum; where hours of work exceed either the daily maximum or weekly maximum; or, in the case of British Columbia, where the hours of work meet one of two overtime situations.

New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, and Quebec require that overtime be paid when the employee works any hours in excess of the weekly maximum. However, in Newfoundland and Labrador, an employer will *not* be required to pay overtime to an employee who works longer than his or her normal work hours as a result of a request by the employee for a change in his or her normal work schedule.

Alberta, Manitoba, Saskatchewan, Yukon, and the federal jurisdiction require that overtime be paid when the employee works any hours beyond the daily or weekly maximum, whichever is greater.

The Northwest Territories and Nunavut require that overtime be paid when the employee works any hours beyond the daily or weekly standard hours, whichever is greater.

British Columbia requires that overtime be paid at two levels: one overtime rate for hours worked from 8 hours to 12 hours in a day, and another overtime rate for hours worked over 12 in a day.

**Q: What rate of pay must be given for overtime work?**

**Answer**

In most provinces and territories, the overtime rate is 1.5 times the employee’s regular rate of pay. However, in New Brunswick and Newfoundland and Labrador, the overtime rate is 1.5 times the minimum wage. In British Columbia, the overtime rate is 1.5 times the regular pay for hours in excess of 8 in a day or 40 in a week; but the overtime pay is two times the regular pay for hours in excess of 12 in a day.
### Overtime Pay Rates

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Overtime Condition</th>
<th>Overtime Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>Over 8 hrs in a day or 40 hrs in a week</td>
<td>1.5 times regular wage</td>
</tr>
<tr>
<td>Alberta</td>
<td>Over 8 hrs in a day or 44 hrs in a week</td>
<td>1.5 times regular wage</td>
</tr>
<tr>
<td>British Columbia</td>
<td>Over 8 hrs in a day or 40 hrs in a week</td>
<td>1.5 times regular wage</td>
</tr>
<tr>
<td></td>
<td>Over 12 hrs in a day</td>
<td>2 times regular wage</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Over 8 hrs in a day or 40 hrs in a week</td>
<td>1.5 times regular wage</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Over 44 hrs in a week</td>
<td>1.5 times minimum wage</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Over 40 hrs in a week</td>
<td>1.5 times minimum wage</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Over 8 hrs in a day or 40 hrs in a week</td>
<td>1.5 times regular wage</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Over 48 hrs in a week</td>
<td>1.5 times regular wage</td>
</tr>
<tr>
<td>Nunavut</td>
<td>Over 8 hrs in a day or 40 hrs in a week</td>
<td>1.5 times regular wage</td>
</tr>
<tr>
<td>Ontario</td>
<td>Over 44 hrs in a week</td>
<td>1.5 times regular wage</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Over 48 hrs in a week</td>
<td>1.5 times regular wage</td>
</tr>
<tr>
<td>Quebec</td>
<td>Over 40 hrs in a week</td>
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<td>Yukon</td>
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</tr>
</tbody>
</table>

**Q:** Does overtime apply if a worker is on a shortened work week?

**Answer**

In some organizations, employees work longer hours on some days so that they may work a shorter week. This may cause workers to repeatedly exceed the daily standard hours set by legislation.

Of course, this is not of concern in those jurisdictions where only weekly standards are set out. In jurisdictions where there is a daily standard in place, the law usually sets out special provisions to allow shortened work weeks to be worked without the necessity of paying overtime.

**Q:** What if an employee’s hours of work vary from week to week?

**Answer**

In some jurisdictions, the law specifically allows employers to average the number of hours worked over a number of weeks without the necessity of paying overtime.
Q: Can employers force their employees to work overtime hours?

Answer

Employees cannot generally be forced to work overtime unless they or their trade unions consent to the extra hours, or it is defined as a clear condition of employment at the time of hire. In other words, an employer is generally prohibited from taking any sort of disciplinary action against an employee who chooses not to work overtime hours.

In British Columbia, however, an employer may require an employee to work overtime as long as the employer pays the applicable overtime wage rates, and the hours worked are not excessive or detrimental to the employee’s health or safety. However, no definition of excessive hours or what is detrimental to an employee’s health or safety is given.

Other provinces state that employees have the right to refuse hours of work over and above a certain number of daily or weekly work hours. For example, in Quebec, an employee may refuse to work more than 4 hours after regular daily working hours, or more than 14 working hours per 24-hour period, whichever period is the shortest. An employee whose daily working hours are flexible or non-continuous may refuse to work more than 12 working hours per 24-hour period. Except where an averaging agreement is in place, an employee may refuse to work more than 50 hours per week or, for an employee working in an isolated area or carrying out work in the James Bay territory, more than 60 working hours per week.

Having said this, a number of provinces, including Quebec, declare that employees may be required to work overtime in the case of an emergency or accident.

Q: Are any workers excluded from protection under overtime provisions?

Answer

Yes, some workers are exempted from overtime provisions. In most jurisdictions, professionals and persons in management positions are not allowed to claim overtime. As well, many jurisdictions exclude agricultural, emergency, and domestic workers from overtime provisions. For example, British Columbia has special rules for specific industries, i.e., high-tech and silviculture (forestry) workers. As well,
Q: Can employers give time off in lieu of overtime pay?

Answer

With the changing nature of work and the increased pressure on employees with respect to work and family responsibilities, time off instead of overtime pay is becoming increasingly popular. Time off in lieu of overtime pay is specifically permitted in seven jurisdictions: Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Ontario, Quebec, the Northwest Territories, and the Yukon.

In Alberta, an employer and an employee or a group of employees may enter into a written agreement (including through a collective agreement) to provide, either wholly or in part, time off with pay instead of overtime pay. Under this agreement, overtime hours are taken as time off in lieu (hour-for-hour worked). The time off must be at the wage rate that the employee could have worked and received wages for. The time off must be taken within 3 months of the end of the pay period in which it was earned, unless a collective agreement or permit authorizes otherwise. Banked time not taken within the 3-month period must be paid out at time-and-a-half. An agreement regarding time off in lieu of overtime pay may terminate on one month’s written notice by either party.

In British Columbia, where an employee requests it in writing, an employer may establish a time bank for an employee and credit overtime wages to the time bank instead of paying them to the employee. The wages must be credited at the overtime rate. The employee can request that the wages in the time bank be paid out, or the time bank may be used to take time off with pay at a time agreed to by the employer and the employee. The employer may close an employee’s time bank after one month’s written notice to the employee. Within 6 months of closing an employee’s time bank, the employer must do one of the following: Pay the employee all of the overtime wages credited to the time bank at the time it was closed; allow the employee to use the credited overtime wages to take time off with pay; or pay the employee for part of the overtime wages credited to the time bank at the time it was closed and allow the employee to use the remainder of the credited overtime wages to take time off with pay.

In Manitoba, there must be a written agreement between the employer and the employee to permit overtime to be credited in time off rather than overtime pay. The
time off must be not less than 150% of the number of hours or parts of hours of overtime, and the employee must be paid his or her regular wage rate for the time off taken. The time off must be provided during the employee’s regular hours, and the employee must take the time within 3 months after the end of the pay period in which the overtime occurred, unless the Director of Employment Standards has approved of a longer period. If the employee does not take the time off within the required period, overtime wages must be paid for the owed time off within 10 days of the expiration of the time limit. The hours of time off are deemed to be hours of work for the purposes of *The Employment Standards Code*, and the payment for that time off is deemed to be a wage.

In Newfoundland and Labrador, where the employer and the employee agree, the employee may be credited with one-and-one-half hours of paid time off for each hour of overtime worked instead of overtime pay. The time off instead of overtime pay is to be granted to the employee no later than 3 months after the week in which the overtime was worked or, if the employee agrees, the credited hours of time off can be accumulated or banked for up to 12 months from the week the overtime was worked. Where overtime is banked, the time off must be given to the employee within 12 months of the week the overtime was worked. Where the employment of an employee ends before the paid time off is taken, the employer shall pay the employee overtime pay for the overtime hours that were worked.

In the Northwest Territories, at the request of an employee, a majority of employees, or as part of a collective agreement, the employees and the employer may enter into a written agreement providing that instead of overtime pay, the employees will take time off with pay, either wholly or partly. The employer is to provide a copy of the written agreement to each employee affected. The written agreement must include at least the following provisions:

(a) each hour of overtime entitles the employee to 1½ hours of time off with pay instead of overtime pay;
(b) time off with pay will be provided and taken at the employee’s regular wage rate;
(c) time off with pay will be provided and taken at a time when the employee could have worked and received wages from the employer;
(d) if time off with pay is not provided or taken in accordance with (a) to (c), the employer shall pay the employee overtime pay;
HOURS OF WORK AND OVERTIME PAY

(e) time off with pay will be provided and taken within 3 months after the end of the pay period in which it was earned, unless:

(i) the agreement is part of a collective agreement and the collective agreement provides for a longer period within which the time off with pay is to be provided and taken, or

(ii) the Employment Standards Officer makes an order authorizing a longer period within which the time off with pay is to be provided and taken; and

(f) no amendment or termination of the overtime agreement is to be effective without at least 1 month’s written notice given by one party to the agreement to the other.

In Ontario, where the employer and employee agree, the employee may be credited with one-and-one-half hours of paid time off for each hour of overtime worked instead of overtime pay. The time off instead of overtime pay is to be granted to the employee no later than 3 months after the week in which the overtime was worked or, if the employee agrees, the credited hours of time off can be accumulated or banked for up to 12 months from the week the overtime was worked. Where overtime is banked, the time off must be given to the employee within 12 months of the week the overtime was worked.

In Quebec, either at the request of an employee or as provided in a collective agreement or decree, the payment of overtime may be replaced by a paid leave equivalent to the overtime worked plus 50%. The paid leave must be taken during the 12 months following the working of the overtime, at a date agreed upon between the employer and the employee.

In the Yukon, an employee or group of employees may enter a written agreement (or collective agreement) with the employer to take time off in lieu of overtime, either in whole or in part. The employee must be compensated for the overtime worked with time-and-a-half off (i.e., the wage rate for overtime must be matched). The time off must be taken within 12 months of the time it was earned.
## Minimum Wage and Call-In Pay

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</tbody>
</table>
Q: **What is the reason for minimum wage requirements?**

**Answer**

Employees are entitled to a minimum wage for their work. As such, minimum wage legislation has been established in all jurisdictions for various classes of employees. Some jurisdictions also provide a separate minimum wage for inexperienced workers and students. Minimum wage legislation is probably the most frequently revised employment standard; it is constantly updated to reflect the changing labour market and economy.

The effect of additional monies (such as tips, gratuities, and the maximum deduction for employer-supplied board and lodging) is considered in the minimum wage legislation of most jurisdictions. As well, special provisions are often made for particular industries, or in consideration of certain prevailing conditions.

Finally, minimum wage laws do not apply to all workers: certain persons are excluded from minimum wage provisions.

Q: **What are the minimum wages in Canada?**

**Answer**

The table below sets out the general minimum wages across Canada. Selected rates relating to jurisdiction-specific job categories are also presented.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Rate</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>Aligned with provincial/territorial rates</td>
<td>July 1, 1996</td>
</tr>
<tr>
<td>Alberta</td>
<td>$8.80</td>
<td>April 1, 2009</td>
</tr>
<tr>
<td>British Columbia</td>
<td>$8.00</td>
<td>November 1, 2001</td>
</tr>
<tr>
<td>(Inexperienced employees)</td>
<td>$6.00</td>
<td>November 1, 2001</td>
</tr>
<tr>
<td>Manitoba</td>
<td>$9.00</td>
<td>October 1, 2009</td>
</tr>
<tr>
<td></td>
<td>$9.50</td>
<td>October 1, 2010</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>$9.00</td>
<td>September 1, 2010</td>
</tr>
<tr>
<td></td>
<td>$9.50</td>
<td>April 1, 2011</td>
</tr>
<tr>
<td></td>
<td>$10.00</td>
<td>September 1, 2011</td>
</tr>
</tbody>
</table>
Q: Can students be paid a lower minimum wage?

Answer

A separate, lower minimum wage for students has been established in only one jurisdiction: Ontario. This wage applies to students under the age of 18 who work less than 28 hours a week or who work during a school holiday.

In the remaining provinces and territories, the general minimum wage is required for students.

---

1 Applicable to students who are employed less than 28 hours a week, or during a school holiday.
Q: Can inexperienced workers be paid a lower minimum wage?

Answer

Two jurisdictions — British Columbia and Nova Scotia — have established a separate minimum wage for inexperienced workers.

In British Columbia, the minimum wage for inexperienced employees is $6.00 per hour. Inexperienced employees are defined as employees hired on or after November 15, 2001 who have no paid work experience prior to that date. After accumulating 500 hours of paid work experience with one or more employers, these workers are entitled to receive the general minimum wage. Proof of previous employment can include any of the following: Record of Employment; pay stubs; written confirmation from a previous employer; or other reasonable proof acceptable to the employer (such as a verbal reference).

The B.C. minimum wage for inexperienced employees applies only to workers paid by the hour or on commission. Workers paid by other rates set under the Employment Standards Regulation (i.e., piece rates for fruit and vegetable pickers, daily rates for live-in home support workers or live-in camp leaders, and monthly rates for resident caretakers in apartment buildings) are not included.

In Nova Scotia, the minimum wage for inexperienced workers is $8.10 per hour. Inexperienced employees are defined as those with less than 3 months’ experience in the work for which they are employed.

Q: How is minimum wage calculated for employees who do not receive hourly wages?

Answer

The minimum wage rate applies to all employees whether or not they are paid an hourly wage; however, certain types of employees are exempt (e.g., managers and professionals). For the most part, it is left up to the employer to ensure that an employee who is paid on a non-hourly basis receives the minimum wage.

A number of provinces either specifically state that the minimum wage applies to all employees (Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec, and the Northwest Territories/Nunavut) and/or set out a specific rate to be paid or a formula for calculating whether or not an employee should receive at least the minimum wage rate (Alberta, New Brunswick, Saskatchewan, and the Yukon). Other jurisdictions provide no such formula.
EMPLOYMENT STANDARDS

As well, some provinces have specific minimum wages for specific types of employment. In British Columbia, there are special minimum wages for live-in domestics and agricultural workers. In Ontario and Quebec, there are specific minimum wages for persons who usually receive gratuities.

As a rule, vacation pay, overtime pay, and general holiday pay are not counted as part of an employee’s wages when calculating the employee’s hourly rate of pay.

**Q: Do tips and gratuities count towards minimum wage?**

**Answer**

As a rule, tips and gratuities do not count when calculating an employee’s rate of pay. While some jurisdictions specify that tips and gratuities do not form part of an employee’s wages, other jurisdictions are silent on the topic.

Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Ontario, Northwest Territories, Nunavut, and the Yukon state that tips do not form part of an employee’s wages. Manitoba and Saskatchewan are silent on the topic.

New Brunswick states that tips and gratuities as well as surcharges or other charges paid in lieu of a tip or gratuity are the property of the employee.

Prince Edward Island sets out detailed rules surrounding tips. Tips, gratuities, and any surcharges in lieu of tips are the property of the employee. An employer cannot withhold tips from the employee or treat tips and gratuities as part of the employee’s wages unless the employer and the employee agree to include tips or gratuities as additional wages of the employee. Any surcharges must be paid to the employee no later than the time of the next pay period. If an employee’s tips and gratuities are based on the billings of his or her employer in respect of banquets, bus tours, and other similar events, the employer must pay the tips and gratuities to the employee within 60 days of the date of the event. An employer may adopt the practice of pooling tips and gratuities for the benefit of some or all of the employees, but the adoption of a pooling practice does not give the employer any ownership of the pooled tips and gratuities. An employer must advise an employee, in writing, of any pooling policy in effect at the time of hiring. The owner of the workplace and the employer are forbidden to require an employee to share a tip or a gratuity with the owner or employer, and an employer is not permitted to pass on any administrative charges of the employer to an employee (e.g., credit card transaction costs).
In Quebec, any tip or gratuity paid directly or indirectly (i.e., cash or on a credit card slip) to an employee belongs to that employee and is not to be mingled with the wages owed to the employee. Employers must pay employees at least the minimum wage, without regards to any tips. Tips and gratuities are not to be counted as part of wages. An employer cannot impose a tip-sharing arrangement. A tip-sharing arrangement must result from a voluntary arrangement between the employees, and an employer cannot intervene in any tip-sharing arrangement that is established. An employer cannot require the employee to pay credit card transaction costs.

Only Ontario and Quebec set out special minimum wage rates for employees who receive tips: Quebec sets a wage for workers who receive gratuities, while Ontario sets a wage for workers who serve liquor.

**Q:** Can employers charge employees for uniforms and special clothing?

**Answer**

This varies across the country. The federal jurisdiction, Ontario, Prince Edward Island, and the Yukon make no provisions regarding charges for providing, repairing, or cleaning uniforms.

Other jurisdictions, such as Alberta, New Brunswick, Newfoundland and Labrador, Quebec, the Northwest Territories, and Nunavut, protect low-wage workers by prohibiting employers from making deductions for uniforms or upkeep of uniforms that would reduce an employee’s wages below the minimum wage.

Manitoba, in general, provides that, with the employee’s consent, an employer can make deductions from wages for things that are of direct benefit to the employee (e.g., health or insurance packages, social funds, voluntary purchases of goods or services from the employer, some types of educational expenses). Expenses that are required by employers that do not benefit employees directly must be paid by employers. For example, Manitoba prohibits employers from deducting the cost of a uniform from an employee’s wages because a uniform is a direct benefit to the employer. However, employers can deduct for laundry or dry cleaning services for uniforms if the service directly benefits employees. In most cases, employees must each have the choice to use or not use the service.

Nova Scotia prohibits employers from deducting from the minimum wage for the purchase or laundering of a uniform, but does allow employers to charge for dry cleaning where necessary.
British Columbia, Quebec, and Saskatchewan require employers to provide special clothing (i.e., clothing with the employer’s logo) to employees free of charge, where necessary, although in British Columbia an employer and a majority of the affected employees may agree otherwise.

**Q:** What kinds of deductions can employers make for room and board?

**Answer**

In most provinces/territories, the amount that employers can deduct for room and board is limited. Some jurisdictions place an absolute limit on the amount that may be charged for room and board, while others restrict the amount that wages may be reduced below minimum wage for room and board.

It should also be noted that because of the special circumstances surrounding domestics and live-in care providers, many jurisdictions make special provisions for these workers.

**Q:** Are there any workers who are not entitled to minimum wage?

**Answer**

Yes, there are numerous individuals who are excluded from protection under the minimum wage requirements. In most jurisdictions, certain professionals, such as lawyers and architects, are excluded from minimum wage protection, as are students who are articled to such professionals. As well, in many jurisdictions, students and apprentices who are registered under provincial training Acts are also excluded. In other jurisdictions, agricultural workers do not receive protection under minimum wage laws.

**Q:** What is call-in pay?

**Answer**

Call-in pay is the minimum payment that employees are entitled to if they are called in to or report to work but are not given the opportunity to work an entire shift or normal workday. Essentially, call-in pay protects workers from being called in to work at the employers’ discretion and then being sent home with no remuneration.
Q: When are employees entitled to call-in pay?

Answer

In Manitoba, Nova Scotia, the Northwest Territories/Nunavut, and the federal jurisdiction, employees are entitled to call-in pay if they are summoned to work outside of their regularly scheduled hours, only to find that little or no work is available. In these jurisdictions, the purpose of call-in pay is to provide protection to employees who are unexpectedly called in to work. In Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, Ontario, Quebec, Prince Edward Island, Saskatchewan, and the Yukon, call-in pay is also available to workers whose regularly scheduled work is cancelled or truncated after they report for a normal workday.

In New Brunswick, call-in pay is only provided for specific employees. An employee with no collective bargaining rights is entitled to receive a minimum of 3 hours’ pay at minimum wage, or pay for the hours worked at the employee’s regular wage rate, whichever is greater. The call-in pay provisions apply to employees who report for work as required by the employer, have a regular wage rate of less than twice the minimum wage rate, and are regularly employed for more than 3 consecutive hours in a shift. As well, if an employee who qualifies for call-in pay has already worked the maximum hours of work for which minimum wages may be paid (44 hours per week), the employer must pay the employee for not less than 3 hours of work at 1.5 times the minimum wage rate, or for the hours the employee works at his or her regular wage rate, whichever is greater.

Q: How much call-in pay are employees entitled to?

Answer

In the federal jurisdiction, Alberta, Manitoba, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan, workers protected by call-in pay provisions are entitled to a minimum of 3 hours’ pay.

In the Northwest Territories/Nunavut, workers are entitled to 4 hours’ call-in pay, and in the Yukon, workers are entitled to 2 hours’ call-in pay.

In British Columbia, workers are entitled to 4 hours of pay if previously scheduled to work more than 8 hours, but are only entitled to 2 hours of call-in pay in other cases.

In New Brunswick, an employee with no collective bargaining rights is entitled to receive a minimum of 3 hours of pay at minimum wage or pay for the hours...
worked at the employee’s regular wage rate, whichever is greater. The call-in pay provisions apply to employees who report for work as required by the employer, have a regular wage rate of less than twice the minimum wage rate, and are regularly employed for more than 3 consecutive hours in a shift. As well, if an employee who qualifies for call-in/reporting pay has already worked the maximum hours of work for which the minimum wages may be paid (44 hours per week — section 4 of the Minimum Wage Regulation), the employer must pay the employee for not less than 3 hours of work at 1.5 times the minimum wage rate or for the hours the employee works at his or her regular wage rate, whichever is greater.

Q: What if the cancellation of work was beyond the employer’s control?

Answer

The legislation of British Columbia, Ontario, Quebec, and the Yukon specifically states that when work is not provided because of circumstances beyond the control of the employer (e.g., fire, power failure, machinery breakdown, unsuitable weather), call-in pay provisions do not apply. Other jurisdictions are silent on the issue. Some jurisdictions, such as British Columbia and the Yukon, also make exceptions for cases where an employee who reports to work is not fit to work.

Q: Are any workers not entitled to protection under call-in pay legislation?

Answer

Yes. In most jurisdictions, there are some employees who are not covered by employment standards legislation at all, such as management and professional employees. As well, some jurisdictions include specific provisions or exemptions relating to call-in pay for certain types of workers.

In Alberta, 2 hours of call-in pay are required for students, employees of recreation or athletic programs, and school bus drivers.

In British Columbia, 2 hours of call-in pay are required for students working on school days.

In Manitoba, call-in pay is not required if the employee regularly works less than 3 hours a day. Call-in pay is also not required for children, or for employees of hotels, theatres, or restaurants in rural areas.
In Nova Scotia, call-in pay is not required for emergency work performed by firefighters, police officers, hospital workers, or certain farm workers.

In Ontario, call-in pay is not required for employees who regularly work less than 3 hours a day, or for students.

In Quebec, call-in pay is not required if the work is such that it can be performed in less than 3 hours (e.g., school bus drivers, school crossing guards, or ushers).

In Saskatchewan, call-in pay is not required for students, school bus drivers, school noon-hour supervisors, janitors, caretakers, or building cleaners.

In the Yukon, call-in pay is not required if the work takes less than 2 hours (e.g., school bus drivers).
# Payment of Wages

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<td>What happens if an employer can’t find an employee to pay him or her?</td>
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<td>What priority does an employee’s claim for unpaid wages have as compared to other creditors?</td>
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</tbody>
</table>
Q: Why is paying wages correctly so important?

Answer

Payment of wages is one of the most important duties for an employer and involves much more than just cutting a cheque or making a deposit to an employee’s bank account. Claims for unpaid wages are the most common employment standards complaints. Failure to properly pay employees the wages they are entitled to can leave an organization and its directors open to liability, penalties, and intrusive and costly investigations.

Q: How often must employees be paid their wages?

Answer

All jurisdictions have established pay periods within which employers are required to pay employees. As well, approximately half the jurisdictions also specify that each payment must include all wages earned up to a specific cut-off date. For example, in Prince Edward Island, wages must be paid at least every 16 days, and pay must include all wages earned up to 5 working days before the payment date.

### Regular and After-Termination Payment of Wages

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Payment Interval</th>
<th>Payment Interval After Termination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>Within 30 days of entitlement</td>
<td>Within 30 days of entitlement</td>
</tr>
<tr>
<td>Alberta</td>
<td>Not to exceed 1 month and within 10 days after end of pay period</td>
<td>Within 3 consecutive days after last day of employment where employment terminated with notice or pay in lieu of notice; within 10 consecutive days after last day of employment where employment terminated without notice or pay in lieu of notice</td>
</tr>
<tr>
<td>British Columbia</td>
<td>At least semi-monthly and within 8 days after end of pay period</td>
<td>Within 48 hours of termination; where employee terminates, within 6 days after the termination</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Not more than 16 days and within 10 days after end of pay period</td>
<td>Within 10 working days of termination</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Not more than 16 days; pay must include all wages earned up to no more than 7 calendar days prior to payment date</td>
<td>No later than the next regular payday; not more than 21 days from date of termination</td>
</tr>
</tbody>
</table>
### Employment Standards

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Payment Interval</th>
<th>Payment Interval After Termination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newfoundland and Labrador</td>
<td>At least semi-monthly and within 7 days after end of pay period; pay must include all wages earned in a pay period</td>
<td>Within 1 week of the date of termination</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Not more than 1 month; all wages earned during a pay period are due within 10 days after the end of the period</td>
<td>Within 10 days after termination</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>At least semi-monthly and within 5 days after end of pay period</td>
<td>Payment on expiry of termination notice</td>
</tr>
<tr>
<td>Nunavut</td>
<td>Not more than 1 month; all wages earned during a pay period are due within 10 days after the end of the period</td>
<td>Within 10 days after termination</td>
</tr>
<tr>
<td>Ontario</td>
<td>Regular payday established by employer</td>
<td>The later of 7 days after termination or the next payday</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Not more than 16 days; pay must include all wages earned up to 5 working days before the payment date</td>
<td>No later than the last day of the next pay period after termination</td>
</tr>
<tr>
<td>Quebec</td>
<td>1 month for first pay, then regular intervals of not more than 16 days or 1 month if employee is an executive or party to a contract; day before a statutory holiday if the usual pay day falls on a statutory holiday</td>
<td>Regular wages owing by the next scheduled payday after termination; payment in lieu of notice of termination at the time of termination</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>At least semi-monthly or at the end of every 14 day period; pay must include all wages earned up to 6 days before payday</td>
<td>Within 14 days of termination</td>
</tr>
<tr>
<td>Yukon</td>
<td>Not more than 16 days and within 10 days after end of pay period</td>
<td>Within 7 days of termination</td>
</tr>
</tbody>
</table>

**Q: How may wages be paid?**

**Answer**

All jurisdictions except the federal jurisdiction state that wages may be paid in Canadian currency by cash, cheque, bill of exchange, or direct deposit to a specified financial institution (e.g., bank or trust company). While the federal jurisdiction is silent with respect to how wages are to be paid, the methods set out in the provincial and territorial jurisdictions would apply.

In British Columbia, Newfoundland and Labrador, and Quebec, direct deposit can only be used if the parties have signed a written agreement or collective agreement to that effect.
As well in British Columbia, farm labour contractors are excluded from the general method of payment set out above. A farm labour contractor must pay all wages to farm workers employed by the farm labour contractor in Canadian dollars, and by deposit to the farm worker’s account in a savings institution.

Q: What if an employee is absent at the time of payment?

Answer

Generally speaking, if an employee is absent at the time fixed for the payment of wages, he or she is entitled to be paid at any time thereafter during normal working hours, upon demand.

Q: What happens if an employer can’t find an employee to pay him or her?

Answer

If an employee cannot be located for the payment of wages owing, the wages should be paid to the appropriate Director of Employment Standards. In the federal jurisdiction, employers are first required to send a written notice to the last known address of the employee, informing him or her that the wages will be paid to the government. The government will then hold the money in trust for the employee, and the employer will be considered to have fulfilled its obligation to pay the wages.

The amount of time after which wages should be paid to the Director varies from jurisdiction to jurisdiction, from 60 days to 6 months.

Q: When must wages be paid on termination of employment?

Answer

Each jurisdiction sets out different time frames within which an employer must give monies owed to a terminated employee. These monies include pay in lieu of notice and overtime pay. For example, in Ontario, all wages owing at the time of termination are to be made by 7 days after termination or by the next payday, whichever is later. The time frames for each jurisdiction are set out in the Regular and After-Termination Payment of Wages chart.
Q: What deductions can and cannot be made from an employee’s wages?

Answer

The only deductions that may be made from an employee’s wages are those required under law and those authorized by the employee. The following list provides a description of the various types of deductions:

- **Legal deductions not requiring employee authorization:** All jurisdictions permit amounts required by federal/provincial law or court order to be deducted from employees’ wages. The standard statutory deductions are:
  - Canada Pension Plan or Quebec Pension Plan;
  - Employment Insurance; and
  - income tax (federal and provincial).

  Examples of other legal deductions include garnishments, family support orders, and payroll tax (Northwest Territories/Nunavut). As well, many jurisdictions permit employers to make deductions for room and board provided to employees.

- **Deductions requiring employee authorization:** Compulsory employer deductions required as a condition of employment include pension plan and benefit plan (dental, medical, etc.) contributions and union dues (although required under a collective agreement, the employee’s authorization is often still needed). Voluntary deductions for things such as Canada Savings Bonds and charitable donations also require authorization.

- **Deductions that cannot be made:** Several jurisdictions (federal, Alberta, Manitoba, Ontario, and Prince Edward Island) specify that an employer cannot deduct wages for cash shortages or loss of property if another person other than the employee had access to the money or property. As well, other jurisdictions (Alberta, British Columbia, Manitoba, Ontario) do not permit deductions for faulty workmanship or to cover any of the employer’s business costs.

- **Deductions for overpayment of wages:** Only Newfoundland and Labrador and Manitoba specifically address the situation of overpayment of employee wages. In Newfoundland and Labrador, an employer is specifically permitted to make deductions for an overpayment of wages. In Manitoba, employers may make deductions to correct an earlier wage overpayment. Employers may also deduct the principal amount of a cash advance made to an employee. However,
employers are not allowed to deduct interest amounts, service charges, or fees in relation to a cash advance or the cashing of a cheque.

Q: **Must employees receive a statement of wages?**

**Answer**

Yes. All jurisdictions require that employers provide a statement of wages (also known as a statement of earnings) to their employees. In most parts of Canada, statements of earnings must be provided to employees at the end of each pay period or on each payday. However, some provinces, such as British Columbia and Manitoba, provide that if statements of earnings are the same from pay period to pay period, a new statement need not be given until a change occurs.

Generally speaking, a statement of wages must include the hours paid for, the rate of pay, the amount and purpose of deductions, and the net pay.

**Information To Be Recorded on a Statement of Earnings**

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<thead>
<tr>
<th>Jurisdiction</th>
<th>Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>Period for which payment is made; number of hours worked; wage rate; details of all deductions; actual sum being received by the employee</td>
</tr>
<tr>
<td>Alberta</td>
<td>Regular and overtime hours of work; wage rate and overtime rate; earnings paid with each component shown separately (i.e., regular pay, vacation pay, general holiday pay, etc.); amount and reason for each deduction; time off instead of overtime pay; period of employment covered by the statement</td>
</tr>
<tr>
<td>British Columbia</td>
<td>Name and address of employer; hours worked; wage rate and basis; overtime wage rate and hours worked at this rate; any bonus, allowance, or other payment the employee is entitled to; amount and purpose of each deduction; how wages are calculated (if paid other than by hour or salary); gross and net wages; how much money the employee has taken from his or her time bank and how much remains</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Regular hours of work and overtime for which wages are being paid; wage rate; deductions and the reasons for deductions; net wages</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Dates of pay period; gross pay; deductions; net pay</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Gross wages; pay period; wage rate and hours worked; deductions; net wages; vacation pay</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Payment period; hours for which payment is made; hours for statutory holiday pay; wage rate; details of deductions; actual sum received</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Pay period; hours of work; wage rate; details of deductions; actual sum received by employee</td>
</tr>
<tr>
<td>Nunavut</td>
<td>Payment period; hours for which payment is made; wage rate; details of deductions; actual sum received</td>
</tr>
</tbody>
</table>
## Employment Standards

<table>
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<th>Jurisdiction</th>
<th>Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ontario (General wage statements)</td>
<td>Pay period; wage rate; gross amount of wages and how amount was calculated (unless the information is provided in some other manner); amount and purpose of each deduction; net wage; any amount with respect to room or board that is deemed to be paid to the employee</td>
</tr>
<tr>
<td>Ontario (Vacation statements)</td>
<td>Amount of vacation time that the employee has earned the start of employment but has not taken prior to start of vacation entitlement year; vacation time earned during vacation entitlement year; vacation time taken during vacation entitlement year; amount of vacation time earned since the start of employment but not taken by the end of vacation entitlement year; amount of vacation pay paid during vacation entitlement year; amount of wages used to calculate vacation pay and the time period for which the wages were paid. With respect to vacation pay in Ontario, employers must keep records of an employee’s entitlement to vacation time and vacation pay. Where the employee agrees and the employer pays vacation pay on a pay-period-by-pay-period basis throughout the year: (a) the amount of vacation pay paid must appear on the pay statement separately from the amount of other wages being paid; or (b) a separate vacation pay statement setting out the amount of vacation pay for the pay period must be given to the employee at the same time the statement of wages is provided. Where an employee makes a written request, the employee is entitled to receive a written statement of the employer’s record for the vacation entitlement year. The employer is only required to provide one statement per vacation entitlement year or stub period. Where vacation pay is paid on a pay-period-by-pay-period basis, the employer is not required to provide an annual vacation statement.</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Name and address of employer; name of employee; pay period; wage rate; hours worked; gross wages; amount and purpose of each deduction; any bonuses, gratuities, or living allowances; net wages</td>
</tr>
<tr>
<td>Quebec</td>
<td>Name of employer; name of employee; identification of occupation; date of payment and work period covered by payment; hours paid at the regular rate; hours paid at overtime rate or hours off in lieu of overtime; nature and amount of bonuses, indemnities, allowances, or commissions paid; wage rate; amount of wages before deductions; nature and amount of deductions; net wages paid to employee; information on gratuities where applicable</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>Name of employer and employee; the period for which payment is made; regular and overtime hours worked; wage rate; public and annual holiday pay as required; an itemized list of any deductions made from wages; total earnings; actual payment made. Saskatchewan also requires that the pay statement be easily separated from the cheque or bank deposit slip.</td>
</tr>
<tr>
<td>Yukon</td>
<td>Period for which payment is made; hours for which payment is made; rate of wages; details of deductions; actual sum received by employee.</td>
</tr>
</tbody>
</table>

### Q: How can the statement of wages be given to employees?

**Answer**

Most provinces/territories specify that the statement of wages must be in writing. In today’s electronic world, some employers have been wondering if the statement of
PAYMENT OF WAGES

Wages can be provided electronically, say via e-mail. An employer’s legal obligations are set out in legislation, and most legislation in Canada still reflects the paper-only world and has not yet been amended to include electronic forms of document delivery. Until legislation is amended, the statement of wages should be provided in writing on paper. Should an employer wish to get permission to deliver the statement of wages via e-mail, the employer should contact the provincial employment standards office and request a written authorization to do this.

Ontario, British Columbia, and the Northwest Territories are the only jurisdictions that specifically permit a statement of wages be given to an employee by e-mail rather than in writing, so long as the employee has access to a printer to make a paper copy of the statement.

Q: What can an employee do if an employer doesn’t pay wages owing?

Answer

Where an employee believes that a past or current employer has improperly failed to pay wages that are owing, he or she may file a complaint with Employment Standards. Generally speaking, there is a time limit on when such a complaint can be filed, although this time limit varies across the country. In most parts of the country, such a complaint must be filed within 6 months of when employment with the employer ceased, or the wages became due.

Employees may also have avenues of redress through their collective agreement if they are unionized, or by pursuing a civil action in the courts.

Q: How does the employment standards division enforce payment of wages?

Answer

In all jurisdictions except British Columbia, once a complaint has been filed, an Employment Standards Officer will investigate to determine whether wages are owing and if so, how much. The officer may attempt to settle the matter informally between the parties. If it is determined that there are wages owing, the Director of Employment Standards will issue an order-to-pay against the employer. If it is determined that the complaint is not valid, it will be dismissed. If either party is dissatisfied with the determination, it can be appealed.
Employment Standards generally has a variety of powers at its disposal to enforce the payment of wages owing. Although there is some variance across the country, some of the most common methods of enforcement are listed below:

- **File order with court:** In all parts of the country, an order for unpaid wages may be filed with the court, in which case it is enforceable in the same manner as a judgment of the court. These powers of enforcement include the power to garnish and to seize and sell property belonging to the debtor.

- **Attachment of debts:** Where an order for payment of wages has been issued against an employer, and the Director learns or suspects that a person is or is about to become indebted to the employer, the Director may demand that the money be paid to the Director in trust, rather than to the employer.

- **Registration in Land Titles Office:** In some parts of the country, the Director has the power to register the order for unpaid wages in the Land Titles Office, against property of the employer. Once an order is registered in this manner, it becomes a secured charge against the employer’s interests in the land, and has the same priority for payment as a mortgage.

- **Liability of associated firms:** Where it is found that a business, undertaking, or other activity is being carried on by two or more employers, the employers may be declared to be a single employer for the purposes of employment standards, and the associated firms will be jointly and severally liable for the unpaid earnings.

- **Seizure of assets:** As noted above, Directors have the power to file an order with the court, in which case the order may be enforced by the seizure and sale of assets. As well, some jurisdictions give Directors a direct power to seize assets belonging to the employer, in order to secure payment of the unpaid wages.

In British Columbia, the Employment Standards Branch no longer accepts complaints (except in highly unusual circumstances) alleging violations of the Employment Standards Act unless the employee has first attempted to resolve the issue through the use of a self-help kit. The self-help kit’s “Request for Payment form” is designed to deal with wage issues; the following wage issues are addressed by this form:

- employee was not paid money for hours worked;
- employee was not paid overtime;
PAYMENT OF WAGES

- employee was paid less than employee thought he or she should be;
- money was deducted from the pay cheque;
- employee did not receive minimum daily pay;
- employee was not paid or given time off with pay for statutory holidays;
- employee did not get annual vacation or vacation pay;
- employee had to pay for a uniform;
- employee was paid less than the minimum wage;
- employee was not paid for travel time;
- employee did not get severance pay (pay in lieu of notice) when employment terminated; and
- a talent agency took more than 15% commission from the employee’s pay.

The federal jurisdiction also provides employee wage protection in cases of employer bankruptcy. Where the employer is bankrupt or goes into receivership, employees who have been terminated and had been working for the employer for more than three months can pursue up to 6 months’ unpaid wages (including salaries, commissions, compensation for services rendered, and vacation pay, but not severance or termination pay) through the Wage Earner Protection Program (“WEPP”) under the Wage Earner Protection Program Act. An individual who had occupied a managerial position, was an officer or director of the employer, or had a controlling interest in the employer’s business is not eligible for the WEPP.

Wages recoverable are those earned in the last 6 months before the bankruptcy, less any applicable provincial or federal deductions, to a maximum of the greater of $3,000 and four times the maximum weekly insurable earnings under the Employment Insurance Act.

Wages for individuals who do not qualify for the WEPP, or claims for termination and severance pay, can be pursued through the less speedy process under the Bankruptcy and Insolvency Act.
Q: Can an organization’s directors be held liable for unpaid wages?

Answer

In a number of jurisdictions, directors of a corporation can be held personally liable for unpaid wages that accrued while they were directors. However, limitations are placed on this liability. In some parts of the country, employees who are owed wages must first pursue the corporation before seeking compensation from the directors. As well, limitations are placed on the amount of unpaid wages for which directors can be held liable.

In the Alberta, Manitoba, Ontario, Saskatchewan, and the federal jurisdiction, directors are liable for 6 months’ wages that became due while they were directors.

In British Columbia, Newfoundland and Labrador, Northwest Territories, Nunavut, and the Yukon, directors are liable for 2 months’ wages that became due while they were directors.

Directors are also liable for all outstanding vacation pay in Manitoba, and 12 months’ vacation pay in Ontario and the Yukon.

As well, some jurisdictions, such as New Brunswick and Quebec, do not indicate specific liability or amounts, but rather state that an offence (such as non-payment of wages) committed by a corporation is also held to be an offence by each officer and director of the corporation.

Q: Are there limits on how much in unpaid wages can be recovered?

Answer

Some provinces place a limit on the amount of wages that can be recovered through employment standards legislation.

In Alberta and Saskatchewan, recovery is limited to wages payable in the year preceding the complaint, or the last year of employment if employment has been terminated.

In British Columbia, the time limit is 6 months.

In Manitoba, the time limit is 6 months for wages and 22 months for vacation pay.
In Newfoundland and Labrador, the time limit is 24 months.

In Ontario, an employment standards officer may not make an order for wages greater than $10,000 for one employee.

**Q:** What priority does an employee’s claim for unpaid wages have as compared to other creditors?

**Answer**

In most jurisdictions, statutes set out both the priority that unpaid wages receive as compared to other creditors, as well as the amount an employee is entitled to recover. The chart below sets out the basic information. It is important to remember that the information provided is only a brief overview. All jurisdictions have detailed legislative provisions that govern the priority and recovery of wages and, as indicated in the chart below, there is considerable variation from jurisdiction to jurisdiction.

**Priority of Wage Claims in Relation to Other Claims**

<table>
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<th>Jurisdiction</th>
<th>Priority of Wage Claim</th>
<th>Amount Recoverable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal (Federal Wage Earner Protection Program)</td>
<td>Fourth</td>
<td>Wages for 3 months prior to bankruptcy to a maximum of $500; valid disbursements for travelling salespeople not exceeding $300</td>
</tr>
<tr>
<td>Alberta</td>
<td>Priority over every claim except for a purchase money security interest (subject to certain conditions; please see relevant legislation for complete details)</td>
<td>Up to a maximum of $7,500</td>
</tr>
<tr>
<td>British Columbia</td>
<td>First priority</td>
<td>Not addressed</td>
</tr>
<tr>
<td>Manitoba</td>
<td>First priority except for mortgages, a purchase money security interest, or a lien for taxes under The Tax Administration and Miscellaneous Taxes Act (subject to certain conditions; please see relevant legislation for complete details)</td>
<td>Up to a maximum of $2,500</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>First priority</td>
<td>3 months’ wages</td>
</tr>
<tr>
<td></td>
<td>Rank as general creditor</td>
<td>Remainder of claim</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Priority of Wage Claim</td>
<td>Amount Recoverable</td>
</tr>
<tr>
<td>------------------------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>First priority</td>
<td>Up to a maximum of $7,500</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>First priority</td>
<td>Up to a maximum of $7,500 for each employee</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>First priority (except for wages owed to other workers)</td>
<td>Not addressed</td>
</tr>
<tr>
<td>Nunavut</td>
<td>First priority</td>
<td>Not addressed</td>
</tr>
<tr>
<td>Ontario</td>
<td>First priority</td>
<td>3 months’ wages</td>
</tr>
<tr>
<td></td>
<td>Rank as general creditor</td>
<td>Remainder of claim, priority over all other unsecured</td>
</tr>
<tr>
<td></td>
<td></td>
<td>creditors to a maximum of $10,000</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>First priority</td>
<td>Up to a maximum of $5,000</td>
</tr>
<tr>
<td>Quebec</td>
<td>Not addressed</td>
<td>Not addressed</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>First priority, except for mortgages or a purchase money security interest</td>
<td>Not addressed</td>
</tr>
<tr>
<td></td>
<td>(subject to certain conditions; please see relevant legislation for complete</td>
<td></td>
</tr>
<tr>
<td></td>
<td>details)</td>
<td></td>
</tr>
<tr>
<td>Yukon</td>
<td>First priority</td>
<td>Up to a maximum of $7,500</td>
</tr>
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Q: What is the reason for vacations-with-pay requirements?

Answer

Even the most dedicated employee occasionally needs a break. Governments across the country have recognized that employee well-being and productivity are improved when vacations are provided. While the details of these laws regarding vacations vary — for instance, in the length of vacation that employees can take — the basic structure and philosophy of the laws regarding vacations are similar across the country.

Q: Do all employees have a right to take a vacation with pay?

Answer

While the federal government and every province and territory in Canada has laws requiring employers to provide periods of rest for their employees on a regular basis, not every employee is entitled to a vacation.

Not all employees are covered by employment standards laws. For example, professionals such as architects, lawyers, and dentists are often excluded from employment standards protections. Managers and salespeople are often excluded as well. If you have a concern about the coverage of employment standards laws in your jurisdiction, contact your nearest employment standards office for specific details.

Even if an employee is not covered by employment standards laws, he or she may still have a right to a paid vacation. For example, an employment contract or a collective agreement may provide certain vacation rights and benefits.

Q: Do part-time employees have a right to vacations with pay?

Answer

All employees who are covered by employment standards laws are entitled to vacations with pay. The fact that some employees work shorter hours than some of their co-workers does not affect their right to take a vacation. However, because vacation pay is calculated as a percentage of annual earnings, part-time workers may receive less vacation pay than their full-time colleagues.
Q: How much vacation time are employees entitled to?

Answer

All Canadian governments have provided for at least 2 weeks of vacation per year for each employee. In Saskatchewan, employees are entitled to a minimum of 3 weeks’ vacation each year.

In addition, Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec, Saskatchewan, the Northwest Territories, Nunavut, and the federal jurisdiction each provide longer vacations for employees who have worked for one employer for a specified length of time (e.g., in British Columbia, an employee who has worked for an employer for 5 consecutive years is allowed at least 3 weeks of vacation).

As well, in Quebec, employees who are not yet entitled to 3 weeks of vacation can apply to take the remaining number of days required to increase their annual vacation to 3 weeks as unpaid leave.

For details regarding the amount of vacation time to which an employee is entitled, please refer to the Minimum Vacation Entitlements chart.

Q: Do employees have to work for a certain length of time before being entitled to take a vacation with pay?

Answer

In all parts of Canada, employees are required to complete a year of employment before they become eligible for a vacation with pay.

Q: How is the length of employment for vacation entitlement calculated?

Answer

A year of employment is defined as 12 consecutive months of continuous employment with the same employer. In Newfoundland and Labrador, in order for an employee to be credited with a year’s service, he or she must have worked at least 90% of the normal working hours in that year.

The employment year usually commences on the day employment began or on any anniversary of that date. However, in Alberta, British Columbia, Ontario, Saskatchewan, the Northwest Territories, Nunavut, and the federal jurisdiction, an
employer can set up a common anniversary date for all employees for ease of administration. For example, an employer may decide to use January 1st of each year as its common anniversary date, so that the vacation entitlements of all employees will be calculated based on their service as of that date. If a common anniversary date is used, the employer must ensure that employees do not receive any less vacation time or vacation pay than they would by the regular method of calculation.

In two provinces, the employment year is defined by law: in New Brunswick, the law states that the vacation year runs from the first of July until the last day of June each year; in Quebec, the vacation year runs from the first of May until the last day of April.

**Q:** Can employees take vacation whenever they like?

**Answer**

No. Because vacations must be scheduled in an orderly manner to enable employers to operate their businesses effectively, employers have the final say regarding when vacations are to be taken. While employers will often consult with employees about the timing of vacations, they are not required to do so by employment standards law.

However, in Newfoundland and Labrador, if an employer cancels or changes an employee’s previously scheduled vacation, the employer must reimburse the employee for reasonable expenses incurred by the employee that are otherwise irrecoverable.

**Q:** When must employers grant vacations?

**Answer**

While employers have the final say on when vacations are granted, they must be granted within specific time limits.

In Prince Edward Island and New Brunswick, the annual vacation must be given within 4 months of the end of the employment year in which the vacation right was earned.

In Alberta, British Columbia, Quebec, and Saskatchewan, employees must be permitted to take their vacations within 12 months of the end of the employment year.
In the Northwest Territories, annual vacation must be given within 6 months of the end of the employment year in which the vacation right was earned.

In the rest of Canada, vacations must begin no later than 10 months following the completion of the employment year in which the right to a vacation was earned.

Q: **Can an employee take vacation prior to having earned it?**

Answer

Yes. Many companies permit employees to take paid vacation prior to an employee having earned it. In fact, in Quebec, labour standards legislation specifically states that annual vacation may also be taken during the vacation reference year if the employee so requests and the employer consents.

However, if the employee leaves the company before actually qualifying for the paid vacation, the employer cannot deduct any overpayment for vacation pay from the employee’s final pay cheque, unless the employee has signed a written authorization to permit this. Note also that in Quebec, any overpayment of vacation pay is considered a “gift” and not part of the vacation pay.

Q: **Must an employer provide notice of when the vacation is to begin?**

Answer

With the exception of British Columbia, Ontario, the Northwest Territories, Nunavut, and the Yukon, all jurisdictions specifically require employers to notify employees about the start date of their vacations.

In Alberta, Newfoundland and Labrador, and the federal jurisdiction, the employer must give notice at least 2 weeks before the planned beginning of the vacation.

In Quebec and Saskatchewan, 4 weeks’ notice must be given.

In Prince Edward Island, Nova Scotia and New Brunswick, 1 week’s advance notice must be given to the employee.

In Manitoba, 15 days’ notice must be given.

The notice from the employer to the employee setting out the vacation dates should be in writing.
Q: Can vacation be taken in more than one period?

Answer

Whether vacations can be taken in more than one period or not varies between the jurisdictions. The federal jurisdiction, New Brunswick, the Northwest Territories, Nunavut, and the Yukon have no provisions regarding how annual vacation is to be taken. In these jurisdictions, the way in which the vacation period is used is a matter to be worked out between the employee and the employer.

In other jurisdictions, governments have ensured that employees are not required by their employers to break up their vacations into overly small periods.

Alberta, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan permit employees to take their vacation in one unbroken period, if they choose. With the exception of Prince Edward Island, these jurisdictions also permit the vacation period to be broken down into smaller sections if the employee so requests and the employer agrees.

In British Columbia, Manitoba, and Ontario, employers are not permitted to require employees to take their annual vacations in periods of less than 1 week.

In Saskatchewan and Newfoundland and Labrador, employees who wish to divide their vacation into periods of 1 week must give the employer written notice of this by the date they become entitled to the vacation.

Q: Can an employer shut down operations and require vacation to be taken by all employees?

Answer

Yes. Some employers and industries actually close down their operations for a specific period of time to allow all employees to take vacation at the same time. In Quebec and Saskatchewan, such employers are not required to allow employees to break their vacation entitlements down into smaller periods.

Q: Are employees required to take an annual vacation?

Answer

Generally, employers are required to ensure that employees take the vacation time required under employment standards law.
EMPLOYMENT STANDARDS

However, some jurisdictions provide that employees may postpone their right to take a paid vacation or give it up altogether, if they choose:

In the federal jurisdiction, an employee may either postpone or give up his or her right to a vacation with pay for a particular year by entering into a written agreement with the employer. If the vacation with pay is given up altogether, the employer is still obliged to pay vacation pay.

In Nova Scotia, an employee who works for an employer for less than 90% of the regular working hours during a continuous 12-month period may give up the right to a paid vacation and receive vacation pay instead.

In Ontario, if the Director of Employment Standards approves and the employer agrees, an employee may be allowed to forgo taking the vacation that he or she is entitled to. However, the employer must still pay the correct amount of vacation pay to the employee.

In Saskatchewan, where there is a shortage of labour, an employee may agree to forgo taking the vacation and receive vacation payment instead.

In the Northwest Territories and Nunavut, an employee may postpone the right to take a vacation in a particular year by sending to the Labour Standards Officer either a written agreement between the employee and his or her employer, or a written application from the employee to the employer that sets out the exceptional circumstances that require the postponement of the vacation. The employee may also agree to give up his or her vacation altogether and receive payment instead.

In the Yukon, the employer and employee may agree that the employee will not take an annual vacation. Such an agreement must be in writing, and vacation pay must be paid to the employee within 10 months of the date on which the employee became entitled to vacation.

Q: What if a statutory holiday falls during vacation?

Answer

In all parts of Canada, the laws ensure that employees receive their full vacation period as well as all statutory holidays.
Q: Does an employee on short-term disability still accrue vacation days?

Answer

The vacation entitlement year that qualifies an employee for vacation time includes active and inactive employment. For example, the right to vacation time is earned even when an employee spends time away from work because of:

- layoff;
- sickness or injury; or
- approved leaves under an employment contract or collective agreement (i.e., pregnancy, parental, and emergency leaves).

When an employee is away on one of the leaves set out above, his or her employment is deemed to be continuous. Therefore, upon the employee’s return to work, the employee will not be treated like a new employee in terms of rights to paid vacation.

However, the right to vacation pay is usually affected, since vacation pay is usually calculated as a percentage of wages earned in the 12 months during which entitlement to the vacation accrued.

It should be noted that employees in Newfoundland and Labrador are required to have worked a certain percentage of the normal working hours in the year in order to be credited with a year’s service; thus, employees on leave may not accrue a year’s service for the year during which they take leave.

Q: If an employee takes maternity or parental leave, is vacation entitlement affected?

Answer

When an employee is away on maternity or parental leave, his or her employment is deemed to be continuous. Therefore, upon the employee’s return to work, he or she will not have to work a full year before qualifying for an annual vacation.

However, in many provinces, the actual amount of vacation that an employee is entitled to and when it is earned is affected if a maternity or parental leave is taken:

In Alberta, Manitoba, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, the Northwest Territories, and Nunavut, maternity or parental leave...
EMPLOYMENT STANDARDS

will not result in any loss of seniority accrued up to the time the leave began. Therefore, the period of leave is not counted towards service for entitlement to vacation. For example, in Alberta, an employee is entitled to 3 weeks of vacation after 5 years of service. If an employee, during her fifth year of service, took 52 weeks of maternity and parental leave, she would return to work with 4 years of seniority, and would have to work the sixth year to become entitled to 3 weeks of vacation.

In British Columbia, New Brunswick, Ontario, Saskatchewan, and the federal jurisdiction, seniority continues to accrue during maternity and parental leave, or employment is considered to be continuous for the purpose of calculating vacation entitlement, notice of termination, and benefits (all things tied directly to the continuation of seniority).

In Quebec and the Yukon, an employee returning from maternity or parental leave must be reinstated to his or her former position with the same benefits, wages, vacations, etc., that he or she would have been entitled to had the leave not been taken (i.e., had he or she remained at work).

Q: If an employee takes maternity or parental leave, is entitlement to vacation pay affected?

Answer

While the right to vacation pay is not affected by a leave, the amount of vacation pay may be lower, since vacation pay is usually calculated as a percentage of wages earned in the 12 months during which entitlement to the vacation accrued.

In Quebec, the right of employees who take maternity leave to collect vacation pay is specifically protected. As well, Quebec sets out a specific method of calculating vacation pay. An employee whose absence in the reference year due to illness, accident, or maternity or paternity leave results in a reduction of the annual leave is entitled to vacation pay calculated as follows:

- twice the weekly average of the wage earned during the work period if the employee has more than one and less than five years of service; and
- three times the weekly average of the wage earned during the work period if the employee has five years or more of service.
Q: What can an employer do to ensure that the rules for vacation entitlement are met?

Answer

The following checklist provides a list of questions that, when answered, should help employers meet the rules for vacation entitlement.

Vacation Entitlement Checklist

☐ Is the employee covered by employment standards laws?
☐ Has the employee worked continuously for the same employer for 12 months?
☐ If a common anniversary date is used for calculating vacation entitlement, has this date passed?
☐ Has the vacation been scheduled within the time limits imposed by the law that applies to you?
☐ Has the required notice been provided regarding the date when the employee’s vacation will start?
☐ If the employee has the right to break up annual vacation into weeks or days, have the employer and employee agreed to the smaller vacation periods?

Q: How is vacation pay calculated?

Answer

Vacation pay is calculated as a percentage of the wages the employee was paid during the year of employment in which he or she earned the right to a paid vacation. If an employee is entitled to 2 weeks’ paid vacation, he or she will receive 4% of his or her yearly wages. If the employee is entitled to 3 weeks’ paid vacation, she or he will receive 6% of her or his yearly wages. Two provinces do not use this method of calculating vacation pay: Alberta and Saskatchewan.

In Alberta, special provisions apply to workers who are paid monthly. In such cases, the normal monthly wage is divided by 4\(\frac{1}{2}\) to determine the vacation pay owing for each week of paid vacation taken. For other employees, vacation pay is calculated as a percentage of the yearly earnings.

In Saskatchewan, those who are entitled to 3 weeks’ annual vacation receive \(\frac{3}{52}\) of their annual wage as vacation pay, and those who are entitled to 4 weeks’ vacation
will receive \( \frac{4}{52} \) of their annual wage. Because of this difference in calculation methods, employees in Saskatchewan receive less vacation pay than their counterparts in other jurisdictions who are entitled to the same length of vacation.

**Q:** What vacation pay is included in an annual wage?

**Answer**

Employees receive payment for their services in many different ways, and it can be difficult and confusing to determine what is included when calculating an employee’s annual wage. Moreover, payments differ depending on which law applies to you.

For assistance in determining what is and what is not included in vacationable earnings, please refer to the Earnings Included in Vacation Pay Calculations chart.

**Q:** When must vacation pay be paid?

**Answer**

Generally, all jurisdictions require employers to pay to employees the vacation pay due them before the start of the vacation. However, there are a number of exceptions.

In the federal jurisdiction, payment need not be made before the vacation begins if it is the established practice in that workplace to pay vacation pay together with the regular pay during or immediately following the vacation and it is impracticable to do otherwise.

In Alberta, the employee must request payment of vacation pay prior to the vacation, otherwise the employer may pay it on the next scheduled payday.

In British Columbia, vacation pay is payable at least 7 days before the start of the annual vacation, or on regular paydays if agreed to in writing by the employer and the employee.

In Manitoba, employees may agree to receive their vacation pay at another time.

In Ontario, if the employee takes vacation in complete weeks, vacation pay must be paid in a lump sum prior to the start of the vacation. If the employee is paid his or her wages by direct deposit to a financial institution, or the employee does not take vacation in complete weeks, vacation pay may be paid on or before the payday for the pay period in which the vacation falls. If the employee agrees, vacation pay that an employee earns during the 12-month employment period may be paid on a
pay-period-by-pay-period basis throughout the year. Finally, the employer may also pay vacation pay at a time agreed to by the employee.

Q: Are normal salary deductions made from vacation pay?

Answer

Yes. Vacation pay is considered to be wages. The normal deductions for income tax, Employment Insurance, the Canada Pension Plan or Quebec Pension Plan will be made from vacation pay.

Q: What can an employer do to ensure that the rules for vacation pay are met?

Answer

The following checklist should help employers meet the rules for vacation pay.

Vacation Pay Checklist

- Ensure vacation pay is paid at the correct time.
- Calculate vacation pay from the correct annual wage using gross pay, not net pay. Include all of the appropriate payments and benefits when calculating the annual wage.
- Make the regular salary deductions (i.e., income tax, EI, and CPP or QPP).
- Ensure the vacation pay is appropriate for the number of years the employee has worked for the employer.

Q: What if an employee is dismissed before all vacation is taken or all vacation pay is received?

Answer

If an employee’s employment is terminated before receiving all of the vacation with pay that he or she is entitled to (for example, if the employee has worked for this employer for less than a year, and so has not worked long enough to take a paid vacation under the law, or if the employer has not scheduled the vacation the employee earned during a previous year of employment), the employee will not be deprived of vacation rights because of the termination of employment. Upon termination, an employer must pay an employee vacation pay for:
● any vacation entitlement the employee earned in a prior year of employment and has not yet used; and
● the portion of the current year of employment that the employee has worked.

**Q: How is vacation pay that is paid on termination calculated?**

**Answer**

Any vacation pay owing with respect to a previous year of employment is calculated in the normal manner — as if employment had not been terminated before the employee used his or her vacation time.

As well, for the current employment year, the employer must pay the employee a percentage of the wages earned so far in the year. The percentage will depend on how many weeks of vacation the employee would have been entitled to take in that year. For example, if the employee would have been entitled to 2 weeks’ vacation, she will be entitled to 4% of the wages earned to date in that year.

**Q: When must an employer pay any vacation pay owed at the time of termination?**

**Answer**

In some jurisdictions, vacation pay owing must be paid at the same time as all other wages owing on termination; in other jurisdictions, vacation pay must be paid at a different time.

### Due Date of Vacation Pay Owing at Termination

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Due Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>Payment must be made at the time of termination</td>
</tr>
<tr>
<td>Alberta</td>
<td>If proper termination notice is given or notice is required to be given by the employer, payment must be made within 3 days of termination; Where neither the employer nor employee is required to give termination notice, payment must be made within 10 days; If an employee quits without giving proper termination notice, payment must be made within 10 days after the date on which the notice would have expired if it had been given</td>
</tr>
<tr>
<td>British Columbia</td>
<td>If employer terminates the relationship, payment must be made within 48 hours from the effective date of termination; If employee terminates the relationship, payment must be made within 6 days from the effective date of termination</td>
</tr>
</tbody>
</table>
VACATIONS WITH PAY

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Due Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manitoba</td>
<td>Payment must be made within 10 working days from the date of termination</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Payment must be made at the time of final pay</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Payment must be made within 1 week from the date of termination</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Payment must be made at the time of termination</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Payment must be made within 10 days from the date of termination</td>
</tr>
<tr>
<td>Nunavut</td>
<td>Payment must be made at the time of termination</td>
</tr>
<tr>
<td>Ontario</td>
<td>Payment must be made by the later of 7 days after termination and the next payday</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Payment must be made by the next regular pay period after termination</td>
</tr>
<tr>
<td>Quebec</td>
<td>Time limit is not specified</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>Payment must be made within 14 days from the termination</td>
</tr>
<tr>
<td>Yukon</td>
<td>Payment must be made by 7 days from the termination</td>
</tr>
</tbody>
</table>

Q: Can an employee’s vacation be used as part of a notice of termination period?

Answer

In British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Ontario, Saskatchewan, the Northwest Territories, Nunavut, and the Yukon, the laws specify that vacation to which an employee is entitled cannot be used as part of the notice period, unless the employee agrees otherwise. If an employee’s employment is terminated, the employee must be fully compensated for any earned vacation time.

Q: What are the requirements for vacation entitlement across Canada?

Answer

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Length of Annual Vacation</th>
<th>Vacation Pay</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>2 weeks; 3 weeks after 6 years of employment</td>
<td>4% of annual earnings; 6% after 6 years</td>
</tr>
<tr>
<td>Alberta</td>
<td>2 weeks; 3 weeks after 5 years</td>
<td>4% of annual earnings; 6% after 5 years</td>
</tr>
</tbody>
</table>
### Employment Standards

<table>
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<tr>
<th>Jurisdiction</th>
<th>Length of Annual Vacation</th>
<th>Vacation Pay</th>
</tr>
</thead>
<tbody>
<tr>
<td>British Columbia</td>
<td>2 weeks; 3 weeks after 5 years</td>
<td>4% of annual earnings after 5 days of employment; 6% after 5 years</td>
</tr>
<tr>
<td>Manitoba</td>
<td>2 weeks; 3 weeks after 5 years</td>
<td>4% of annual earnings; 6% after 5 years</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>2 weeks; 3 weeks after 8 years</td>
<td>4% of annual earnings; 6% after 8 years</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>2 weeks; 3 weeks after 15 years</td>
<td>4% of annual earnings; 6% after 15 years</td>
</tr>
<tr>
<td>Manitoba</td>
<td>2 weeks; 3 weeks after 6 years</td>
<td>4% of annual earnings; 6% after 5 years</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>2 weeks; 3 weeks after 8 years</td>
<td>4% of annual earnings; 6% after 8 years</td>
</tr>
<tr>
<td>Nunavut</td>
<td>2 weeks; 3 weeks after 6 years</td>
<td>4% of annual earnings; 6% after 5 years</td>
</tr>
<tr>
<td>Ontario</td>
<td>2 weeks</td>
<td>4% of annual earnings</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>2 weeks</td>
<td>4% of annual earnings</td>
</tr>
<tr>
<td>Quebec</td>
<td>2 weeks; 3 weeks after 5 years</td>
<td>4% of annual earnings; 6% after 5 years</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>3 weeks; 4 weeks on the 10th anniversary of employment</td>
<td>7/12 of annual earnings after 1 year; 7/12 of annual earnings on the 10th anniversary</td>
</tr>
<tr>
<td>Yukon</td>
<td>2 weeks</td>
<td>4% of annual earnings</td>
</tr>
</tbody>
</table>

### Q: What are the requirements for vacations with pay across Canada?

**Answer**

#### Requirements for Vacations with Pay

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Qualifying Period</th>
<th>Time of Vacation</th>
<th>Required Notice</th>
<th>How Vacation is Taken</th>
<th>Waiver or Postpone-ment Allowed</th>
<th>Payment Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>12 months</td>
<td>Within 10 months of entitlement</td>
<td>2 weeks</td>
<td>Not specified</td>
<td>Yes</td>
<td>Within 14 days preceding vacation</td>
</tr>
<tr>
<td>Alberta</td>
<td>12 months</td>
<td>Within 12 months of entitlement</td>
<td>2 weeks</td>
<td>Unbroken or periods of at least 1 day</td>
<td>No</td>
<td>Next scheduled payday</td>
</tr>
</tbody>
</table>

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## Vacations with Pay

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Qualifying Period</th>
<th>Time of Vacation</th>
<th>Required Notice</th>
<th>How Vacation is Taken</th>
<th>Waiver or Postpone-ment Allowed</th>
<th>Payment Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>British Columbia</td>
<td>12 months</td>
<td>Within 12 months of entitlement</td>
<td>Not specified</td>
<td>Periods of at least 1 week</td>
<td>No</td>
<td>Within 7 days following vacation or, with written agreement, on employee’s scheduled payday</td>
</tr>
<tr>
<td>Manitoba</td>
<td>12 months</td>
<td>Within 10 months of entitlement</td>
<td>15 days</td>
<td>Periods of at least 1 week</td>
<td>No</td>
<td>By day preceding vacation</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>12 months</td>
<td>Within 4 months of entitlement</td>
<td>1 week</td>
<td>Not specified</td>
<td>No</td>
<td>By day preceding vacation</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>12 months</td>
<td>Within 10 months of entitlement</td>
<td>2 weeks</td>
<td>1 unbroken period, or 2 or 3 unbroken periods of 1 week</td>
<td>No</td>
<td>By day preceding vacation</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>12 months</td>
<td>Within 6 months of entitlement</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Yes</td>
<td>By day preceding vacation</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>12 months</td>
<td>Within 10 months of entitlement</td>
<td>1 week</td>
<td>1 unbroken period, or 2 or 3 unbroken periods of 1 week</td>
<td>Yes</td>
<td>By day preceding vacation</td>
</tr>
<tr>
<td>Nunavut</td>
<td>12 months</td>
<td>Within 10 months of entitlement</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Yes</td>
<td>By day preceding vacation</td>
</tr>
<tr>
<td>Ontario</td>
<td>12 months</td>
<td>Within 10 months of entitlement</td>
<td>Not specified</td>
<td>1 or 2 unbroken periods of 1 week, unless employer agrees to employee’s written request for shorter vacation periods</td>
<td>Yes</td>
<td>Before vacation commences, or, if employee agrees, accrued and paid on a pay-period basis</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>12 months</td>
<td>Within 4 months of entitlement</td>
<td>1 week</td>
<td>Unbroken</td>
<td>No</td>
<td>By day preceding vacation</td>
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</tbody>
</table>
**EMPLOYMENT STANDARDS**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Qualifying Period</th>
<th>Time of Vacation</th>
<th>Required Notice</th>
<th>How Vacation is Taken</th>
<th>Waiver or Postponement Allowed</th>
<th>Payment Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quebec</td>
<td>12 months</td>
<td>Within 12 months of entitlement, or during the entitlement year if requested and granted by the employer</td>
<td>4 weeks</td>
<td>1 or 2 unbroken periods</td>
<td>No</td>
<td>Before beginning of vacation</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>12 months</td>
<td>Within 12 months of entitlement</td>
<td>4 weeks</td>
<td>1 unbroken period or periods of at least 1 week</td>
<td>Yes</td>
<td>Within 14 days preceding vacation</td>
</tr>
<tr>
<td>Yukon</td>
<td>12 months</td>
<td>Within 10 months of entitlement</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Yes</td>
<td>By day preceding vacation</td>
</tr>
</tbody>
</table>

Q: When calculating vacation pay, what types of earnings and payments are included?

Answer

**Earnings Included in Vacation Pay Calculations**

<table>
<thead>
<tr>
<th>Type of Earnings</th>
<th>Fed.</th>
<th>BC</th>
<th>AB</th>
<th>SK</th>
<th>MB</th>
<th>ON</th>
<th>QC</th>
<th>NB</th>
<th>PEI</th>
<th>NS</th>
<th>NL</th>
<th>YT</th>
<th>NWT</th>
<th>NU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regular Earnings</td>
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<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
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<tr>
<td>Call-in pay</td>
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<td>Y</td>
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<td>Overtime</td>
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<td>Y</td>
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<td>Y</td>
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<td>Y</td>
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<td>Retroactive pay</td>
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<td>Standby pay</td>
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<td>Statutory holiday pay</td>
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<tr>
<td>Previously paid vacation pay</td>
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<td>N</td>
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<td>N</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>TBD</td>
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</table>

1 Included in unique circumstances.
### Vacations with Pay

<table>
<thead>
<tr>
<th>Type of Earnings</th>
<th>Fed.</th>
<th>AB</th>
<th>SK</th>
<th>MB</th>
<th>ON</th>
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<td>Earned at employer’s premises</td>
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<td>Y</td>
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<td>Tips &amp; gratuities (employer controlled)</td>
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</table>

1 Included in unique circumstances.

2 Housing and meal included if part of employment contract.

3 Included if tied to hours of work, production, or efficiency.

4 Majority earned must be salary.

5 Included where fee is a “wage” (condition of employment).

6 Included if tied to hours of work, production, or efficiency.

7 Excluded if part of a DPSP.

8 Included in unique circumstances.
<table>
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<tr>
<th>Type of Earnings</th>
<th>Fed.</th>
<th>BC</th>
<th>AB</th>
<th>SK</th>
<th>MB</th>
<th>ON</th>
<th>QC</th>
<th>NB</th>
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<th>NL</th>
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<td>Taxable Benefits</td>
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<td>Board &amp; lodging</td>
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</table>

TBD: To be determined

---

8 Included in unique circumstances.
9 If included in wages or remuneration for work.
10 Excluded in construction.
<table>
<thead>
<tr>
<th>Question</th>
<th>Page</th>
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<tbody>
<tr>
<td>What is the reason for statutory holidays?</td>
<td>78</td>
</tr>
<tr>
<td>What is a statutory holiday?</td>
<td>78</td>
</tr>
<tr>
<td>Is it against the law to work on a statutory holiday?</td>
<td>78</td>
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<tr>
<td>Which days are statutory holidays?</td>
<td>78</td>
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<tr>
<td>Which jurisdictions have legislated the third Monday in February as a</td>
<td>80</td>
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<td>statutory holiday?</td>
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<td>Which jurisdictions have legislated the first Monday in August as a</td>
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<td>statutory holiday?</td>
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<td>Are civic holidays statutory holidays?</td>
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<tr>
<td>Are all employees entitled to statutory holidays?</td>
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<td>Are part-time workers entitled to statutory holidays?</td>
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<tr>
<td>Can an employer require an employee to work on a statutory holiday?</td>
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<td>Can an employee be required to work on another day in the week of a</td>
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<td>statutory holiday to make up for the time taken off?</td>
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<td>Can a statutory holiday be substituted with another day?</td>
<td>82</td>
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<td>What if a statutory holiday falls on a non-working day?</td>
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<td>What if a statutory holiday falls during an employee’s vacation time?</td>
<td>85</td>
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<td>Is there a qualifying period before employees are entitled to statutory</td>
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<td>holiday pay?</td>
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<td>Are there other exceptions that would disentitle an employee to a</td>
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<td>statutory holiday with pay?</td>
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<tr>
<td>How is statutory holiday pay calculated?</td>
<td>87</td>
</tr>
<tr>
<td>How are employees who work on a statutory holiday paid?</td>
<td>88</td>
</tr>
<tr>
<td>How are employees who work in continuous operations or special</td>
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<tr>
<td>industries paid for work on statutory holidays?</td>
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<tr>
<td>Is the time worked on a statutory holiday included when calculating</td>
<td>92</td>
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<tr>
<td>overtime hours?</td>
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<tr>
<td>What if an employee’s employment ends before payment for a statutory</td>
<td>92</td>
</tr>
<tr>
<td>holiday or a substitute holiday is received?</td>
<td></td>
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</table>
Q: What is the reason for statutory holidays?

Answer

In every community there are days of special significance that the public celebrate together. All governments in Canada have recognized this by passing laws that allow employees time off from work to observe days of national or regional importance. These are called statutory holidays, public holidays, or general holidays, depending on the part of Canada in which you are located, but all of these terms mean the same thing.

Q: What is a statutory holiday?

Answer

A statutory holiday is a day set aside by the federal, provincial, or territorial government in order to celebrate days of national or regional significance. Examples of national days of significance include Thanksgiving Day, Canada Day, and Labour Day. Provincial and territorial governments also proclaim public holidays for days of importance particular to their own regions. Examples of this include St. John the Baptist Day in Quebec, St. George’s Day in Newfoundland and Labrador, and National Aboriginal Day in the Northwest Territories. On these days, employees are not required to work, but nonetheless receive pay from their employers.

Q: Is it against the law to work on a statutory holiday?

Answer

No. The legislation respecting statutory holidays does not prohibit work on these days but rather establishes rules for:

- when employees are entitled to the day off with pay; and
- how much employees are to be paid if they are required to work on these days.

Q: Which days are statutory holidays?

Answer

Some days are recognized as holidays all across Canada, such as New Year’s Day, Canada Day, Labour Day, and Christmas Day. Others, such as Remembrance Day, Victoria Day, and Thanksgiving, are recognized as statutory holidays in some
regions only. The statutory holidays recognized in the various parts of Canada are summarized in the chart below.

Statutory Holidays Across Canada

<table>
<thead>
<tr>
<th>Holiday</th>
<th>Fed.</th>
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<th>BC</th>
<th>MB</th>
<th>NB</th>
<th>NL</th>
<th>NS</th>
<th>ON</th>
<th>PEI</th>
<th>QC</th>
<th>SK</th>
<th>NWT</th>
<th>NU</th>
<th>YK</th>
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<tbody>
<tr>
<td>New Year’s Day</td>
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<td>X</td>
<td>X</td>
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<td>X</td>
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<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Third Monday in February</td>
<td></td>
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<td>X</td>
<td>X</td>
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<td>X</td>
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<td>Good Friday</td>
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<td>Victoria Day (Monday before May 25)</td>
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<td>National Aboriginal Day (June 21)</td>
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<tr>
<td>Saint-Jean Baptiste Day (June 24)</td>
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<td>Thanksgiving (Second Monday in October)</td>
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<td>Remembrance Day (November 11)</td>
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<td>Christmas (December 25)</td>
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</tbody>
</table>

1 This holiday is known as Family Day in Alberta, Ontario, and Saskatchewan; Louis Riel Day in Manitoba; and Islander Day in Prince Edward Island.
2 In Quebec, employers may choose either Good Friday or Easter Monday as the paid statutory holiday.
3 Known as National Patriots’ Day in Quebec.
4 In Manitoba, Remembrance Day is not a statutory holiday, but most businesses must be closed on that day. It is not provided that employees be paid for Remembrance Day if they are not required to work on that day.
5 In Nova Scotia, if an employee is required to work on Remembrance Day, he or she shall be given a holiday with pay on another agreed-upon day.
EMPLOYMENT STANDARDS

Q: Which jurisdictions have legislated the third Monday in February as a statutory holiday?

Answer

Alberta, Manitoba, Ontario, Prince Edward Island and Saskatchewan have designated the third Monday in February to be a statutory holiday. In Alberta, Ontario, and Saskatchewan, it is known as Family Day; in Manitoba, it is known as Louis Riel Day; and in Prince Edward Island, it is known as Islander Day.

Q: Which jurisdictions have legislated the first Monday in August as a statutory holiday?

Answer

Only British Columbia, New Brunswick, Saskatchewan, the Northwest Territories, and Nunavut consider the first Monday in August a statutory holiday.

This day is also customarily observed in Alberta, Manitoba, Ontario, Nova Scotia, and Prince Edward Island as a civic holiday, but is not a legislated statutory holiday in those provinces.

Q: Are civic holidays statutory holidays?

Answer

Civic holidays are not statutory holidays, so employers are not obliged to observe these holidays unless they have agreed to do so in an employment contract or collective agreement. For example, while many employers in Ontario give their employees a holiday on the first Monday in August, they are not required by law to do so.

Q: Are all employees entitled to statutory holidays?

Answer

No, not all employees have the right to take a statutory holiday, because not all employees are covered by employment standards laws. For example, professionals such as architects, lawyers, and dentists are often exempted from employment standards protections. As well, certain industries may be exempted from certain employment standards. For example, in British Columbia, high-tech professionals are...
exempt from the normal hours of work, overtime, and statutory holiday pay requirements.

However, even those employees who are not covered by employment standards laws may still have a right to statutory holidays. For example, an employment contract or collective agreement that applies to your workplace may grant certain statutory holiday rights and benefits.

Q: Are part-time workers entitled to statutory holidays?

Answer

Yes. Part-time employees are entitled to the same rights and benefits under employment standards laws as full-time employees, providing that they meet the qualifying requirements.

Q: Can an employer require an employee to work on a statutory holiday?

Answer

In most cases, employees cannot be required to work, but an employee can agree to work (usually in writing) on the statutory holiday. Where the employee agrees to work or the employer requires the employee to work, the employer must pay the employee the specified wage rate or provide an alternative day off. In Manitoba, Newfoundland and Labrador, New Brunswick, and Ontario, only employees in certain industries may be required to work.

In Manitoba, the industries in which employees may be required to work on statutory holidays include continuous operations (businesses that usually operate day and night without interruption until the completion of the regular operation of the business), seasonal businesses (businesses that suspend operations for one or more periods of not less than three weeks due to change in market demand or crop ripening; does not include the construction industry), a place of amusement, gasoline service stations, hospitals, hotels, restaurants, or domestic servants.

In New Brunswick, the industries in which employees may be required to work on statutory holidays include hotels, motels, tourist resorts, restaurants, taverns, or continuous operations (operations or parts of operations that do not stop or close more than once a week, such as oil refineries or alarm-monitoring companies).
In Newfoundland and Labrador, the exceptions include public utility services, services essential in the public interest, and continuous operations.

In Ontario, the excepted industries include hotels, motels, and tourist resorts; restaurants and taverns; hospitals and nursing homes; and continuous operations. However, the only time these employees can be required to work on a public holiday without their agreement is when the public holiday falls on a day they would normally work and when they are not on vacation.

Q: Can an employee be required to work on another day in the week of a statutory holiday to make up for the time taken off?

Answer

Only the Northwest Territories, Nunavut, and the Yukon deal with this issue in their employment standards laws. In these jurisdictions, in a week where a statutory holiday occurs, employers are specifically forbidden from requiring employees to work on another day of the week that would normally be a day off, unless the employees are paid extra wages.

In the Yukon, if, during the week that a statutory holiday occurs, an employee is required to work on another day that would normally be a day off, the employee must be paid 1.5 times the regular wages (overtime rate) for the hours worked on that day.

In the Northwest Territories and Nunavut, if, during the week that a statutory holiday occurs, an employee is required to work on another day that would normally be a day off, the employee must be paid 2 times the regular wages.

In other jurisdictions where this prohibition is not spelled out in the law, it is likely that the practice would also be unacceptable, since the requirement to work another day to make up for the holiday time undermines the intent of laws about statutory holidays.

Q: Can a statutory holiday be substituted with another day?

Answer

All parts of Canada make provision for the substitution of statutory holidays. It should be noted that the law provides for the substitution of holidays and in no way condones any reduction in holiday entitlements.
Where employees are represented by a bargaining agent (i.e., a union), in general, the employer and the bargaining agent must both agree in writing to substitute another day for the statutory holiday.

Where there is no bargaining agent and no collective agreement, the employer must obtain the agreement of a majority of employees (70% under federal law), generally with the supervision of an employment standards official.

In New Brunswick, if the employees are not represented by an agent, the employer must obtain the consent of each employee.

In Newfoundland and Labrador, no substitution can be made if there is no bargaining agent and collective agreement to protect the rights of the employees.

In Ontario, the day substituted for the public holiday must be granted no later than three months after the public holiday or, if the employee and employer agree, no later than 12 months after the public holiday. As well, the employer and the employee may agree that instead of the substituted day, the employee will receive public holiday pay for the day.

Q: **What if a statutory holiday falls on a non-working day?**

**Answer**

Generally speaking, if a statutory holiday falls on a day on which the employee does not usually work, the employee has the right to take a holiday with pay at some other time. This substitute day off is determined by the employer.

The exception to this is Alberta. Employers in Alberta are not required to compensate workers for statutory holidays that fall on their regular days off.

Saskatchewan provides that when Remembrance Day, New Year’s Day, or Christmas Day falls on a Sunday, the following Monday will be observed as a statutory holiday.

The following is a summary of the how the jurisdictions compensate for statutory holidays that fall on non-working days:

- a holiday with pay at the time of annual vacation is provided in the federal jurisdiction, Nova Scotia, and Prince Edward Island;
- a holiday with pay on a working day following the statutory holiday is provided in Newfoundland and Labrador, Nova Scotia, Prince Edward Island, and the Yukon;
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- a holiday with pay at another time (generally the holiday must be granted prior to the employee’s next annual vacation) is provided in the federal jurisdiction (except as noted below), British Columbia, Manitoba (except as noted below), New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, the Northwest Territories, and Nunavut;

- payment of regular wages is provided in New Brunswick; and

- payment of public holiday pay for the holiday is provided in the Northwest Territories, Nunavut, Ontario (where the employee and the employer agree), and Quebec.

As the above list indicates, in some parts of Canada there is more than one way of compensating for a statutory holiday that falls on a non-working day.

It should also be noted that the federal government, Manitoba, Quebec, and Saskatchewan make special provisions for certain holidays, requiring that when a holiday falls on a non-working day, a substitute holiday should be granted on a working day proximate to the holiday. These holidays are New Year’s Day, Christmas Day, and Canada Day in Manitoba; New Year’s Day, Christmas Day, Canada Day, and Remembrance Day in Saskatchewan; and New Year’s Day, Christmas Day, Canada Day, Remembrance Day, and Boxing Day in the federal jurisdiction. In Saskatchewan, if New Year’s Day, Christmas Day, or Remembrance Day falls on a Sunday, the following Monday is granted as a day off with pay. If the holiday falls on a Saturday, the employer must pay the required payment; the employer is not obliged to give another day off.

In Quebec, the National Holiday (Saint-Jean Baptiste Day) is celebrated on June 24. When June 24 falls on a Sunday, an employee who ordinarily works on Sunday is entitled to a paid leave on Sunday, June 24. An employee who does not ordinarily work on Sunday is entitled to a paid leave on Monday, June 25. If the National Holiday falls on a non-working day, employers must grant a compensatory holiday or pay the employee an indemnity equal to $\frac{1}{20}$ of the wages earned during the 4 complete weeks of pay preceding the week of June 24, excluding overtime. If an employee is paid wholly or partly by commission, the indemnity is calculated as $\frac{1}{60}$ of the wages earned during the 12 complete weeks of pay preceding the week of June 24. The compensatory holiday must be taken on the working day preceding or following June 24. However, if the employee is on annual leave on June 24, the holiday can be taken at a date agreed upon by the employer and the employee.
Q: What if a statutory holiday falls during an employee’s vacation time?

Answer

In all parts of Canada, the laws ensure that employees receive their full vacation period, as well as all statutory holidays. If a statutory holiday falls during an employee’s annual vacation period, another day of vacation will be given to her or him at a later time. In Alberta, Nova Scotia, Prince Edward Island, Saskatchewan, the Yukon, and under federal law, employees are entitled to extend their vacation for one day if a public holiday occurs during it. For example, if an employee’s annual vacation is scheduled for the first 2 weeks of September, the employee will return to work a day later than he or she would have done if Labour Day were not a public holiday.

As well, in all jurisdictions except Saskatchewan, the Yukon, and the federal jurisdiction, employees have the additional option of taking the substituted day of holiday on any day within the vacation year agreed upon by the employer and employee.

In the preceding situations, the employee will be paid for the statutory holiday, as well as all vacation days, including the compensatory vacation day.

In New Brunswick, Ontario, Quebec, the Northwest Territories, and Nunavut, the option exists of simply paying the employee for the statutory holiday.

Q: Is there a qualifying period before employees are entitled to statutory holiday pay?

Answer

There are no qualifying periods in Manitoba, Ontario, Quebec, or Saskatchewan. In the other jurisdictions, an employee must have been employed for a specified number of days before he or she qualifies for a paid statutory holiday.

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<tr>
<td>Alberta</td>
<td>Must have worked at least 30 days in the 12 months immediately prior to the holiday</td>
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Incorrect handling of statutory holiday pay is a common problem. To avoid overpayments, be sure to monitor whether the employee has completed the qualifying period, has worked the regularly scheduled shift on the day before and the day after the statutory holiday, and has met any other applicable exceptions.

Summer students are also entitled to statutory holiday pay after they have completed the qualifying period and met any other criteria.

**Q:** Are there other exceptions that would disentitle an employee to a statutory holiday with pay?

**Answer**

When a statutory holiday falls on a working day, employees are entitled to a day off with pay. However, there are exceptions:

- The employee does not work on the statutory holiday when required or scheduled to do so. This exception applies in Alberta, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, the Northwest Territories, Nunavut, the Yukon, and the federal jurisdiction.
The employee is absent without justification on the working day preceding or following the statutory holiday. This exception applies everywhere except in British Columbia, Saskatchewan, and the federal jurisdiction.

The employee has not earned wages for at least 15 of the 30 calendar days preceding the statutory holiday. This exception applies in British Columbia, Nova Scotia, Prince Edward Island, and the federal jurisdiction. In the Yukon, an employee is not eligible if he or she has been absent for 14 consecutive days immediately before the holiday due to a leave of absence without pay that is taken at his or her request.

The employee works under an arrangement in which he or she chooses whether or not to work when requested to do so. This exception applies only in New Brunswick and Prince Edward Island.

There are also a number of further special exceptions. For example, in British Columbia, workers employed to harvest fruit or berry crops on a piece-work basis are not eligible for statutory holiday pay, since vacation/statutory holiday pay is included in the minimum wage for such workers. In the Northwest Territories, persons on pregnancy leave, parental leave, compassionate care leave, or court leave exceeding 10 days are not eligible. In Nunavut, persons on pregnancy leave, parental leave, or compassionate care leave are not eligible.

Q: How is statutory holiday pay calculated?

Answer

The basic principle for calculating holiday pay is that employees receive pay for the hours they would normally work at the wage rate they would normally receive.

This means that if an employee is paid on a weekly or monthly basis, the amount of pay he or she receives is not reduced because of the statutory holiday. Where employees are paid on a daily or hourly basis, they must be paid the equivalent of the wages they would have earned at their regular rate for their normal hours of work. In cases where pay varies, the daily earnings of the employee should be averaged over a period of time to come up with an average daily rate. This averaging does not include overtime, but would normally include vacation pay. The amount of time over which pay should be averaged varies from jurisdiction to jurisdiction.
Manitoba, Ontario and Quebec have established that employees receive “public holiday pay”, and each of these provinces has established a formula for calculating statutory holiday pay.

In Manitoba, for most employees, holiday pay is equal to the employee’s wage for regular hours of work on a normal workday in the pay period in which the holiday occurs. However, if an employee’s wage for regular hours of work on a normal workday cannot be determined because the number of hours worked in a normal workday varies from day to day, or the employee’s wage for regular hours of work varies from pay period to pay period, the employee is entitled to holiday pay calculated as 5% of the employee’s total wages (excluding overtime wages) for the four-week period immediately preceding the holiday.

In Ontario, public holiday pay is $\frac{1}{20}$ of regular wages earned and vacation pay payable during the 4 weeks immediately before the holiday.

In Quebec, payment is calculated at $\frac{1}{20}$ of wages earned in the 4 work weeks prior to the holiday.

Some provinces also make special provisions for certain industries, such as construction.

**Q:** How are employees who work on a statutory holiday paid?

**Answer**

Employees who work on a statutory holiday are compensated differently throughout the country.

In the federal jurisdiction, employees are entitled to regular pay plus 1.5 times the regular pay. Employees in continuous operations or professional or managerial positions may be given a substitute day off with pay.

In Alberta, employees who work on a general holiday receive their average daily wage plus 1.5 times the employee’s wage rate for the hours worked. Average daily wage is calculated as either the daily wage of an employee averaged over his or her period of employment, or the daily wage of the employee over the 9-week period immediately before the holiday, whichever is shorter. Alternatively, an employee who works on a statutory holiday may be paid his or her regular wages for each hour worked, as well as receive a substitute day off with pay. The replacement holiday must be a day on which the employee is normally scheduled to work.
In British Columbia, employees who work on a statutory holiday receive 1.5 times their regular wage (2 times their regular wage for time worked over 12 hours in that day) plus an average day’s wages. An average day’s pay is calculated by dividing the total wages in the 30 calendar days before the statutory holiday by the number of days worked. The employer is not required to give an additional day off with pay.

In Manitoba, employees must be paid 1.5 times the regular rate for the hours worked, plus holiday pay.

In New Brunswick, Prince Edward Island, the Northwest Territories, Nunavut, and the Yukon, employees are entitled to either regular pay plus 1.5 times the regular pay, or a substitute paid holiday at a later date.

In Newfoundland and Labrador, employees may receive either another day off with pay in addition to their regular pay, or pay at twice the regular rate.

In Nova Scotia and Saskatchewan, employees are entitled to regular pay plus 1.5 times the regular pay for hours worked.

In Ontario, employees are entitled to either regular wages plus a substitute paid holiday at a later date, or (if the employee and employer agree) public holiday pay plus 1.5 times the regular pay. Public holiday pay is calculated as the total amount of regular wages and vacation pay payable to the employee during the four-week period right before the work week in which the public holiday falls, divided by 20.

In Quebec, employees receive either regular wages plus a compensatory holiday to be taken within 3 weeks of the statutory holiday, or an amount equal to an average day’s wages. If the employee is required to work on the National Holiday (June 24) (i.e., in an establishment, where, due to the nature of the activities, work is not interrupted on June 24), he or she must be paid regular wages and granted either a compensatory holiday on the working day before or after June 24, or paid an indemnity equal to \(\frac{1}{60}\) of the wages earned during the 12 complete weeks of pay preceding the week of June 24, excluding overtime. If an employee is paid wholly or partly by commission, the indemnity is calculated as \(\frac{1}{60}\) of the wages earned during the 12 complete weeks of pay preceding the week of June 24.
Q: How are employees who work in continuous operations or special industries paid for work on statutory holidays?

Answer

In some parts of Canada, there are special provisions for employees who work in the hotel/tourism industry, the agricultural industry, or in continuous operations. A continuous operation is an industry or service that, in each 7-day period, continues operations and stops only when the regularly scheduled operation for that period is completed (e.g., a restaurant that operates 7 days a week). There are special provisions in a number of jurisdictions for the payment of workers in continuous operations. The entitlements under these provisions are as follows.

In the federal jurisdiction, employees in a continuous operation receive either regular pay plus 1.5 times that amount, or a compensatory holiday with pay at some other time.

In British Columbia, there are special provisions for farm workers and silviculture workers:

- Farm workers are excluded from statutory holiday pay.

- Silviculture workers are paid primarily on a piece-rate basis and are involved in reforestation field work such as clearing bush, cone picking, creek clearing, seed harvesting, applying herbicide, reclamation work, sheep herding, site preparation, stand sanitation, trail building, fertilizing, girdling, planting, pruning, spacing or distributing trees, weeding, or supervising any of the above activities.

Silviculture workers are subject to different rules. Instead of paying holiday pay, an employer can pay silviculture workers an additional 3.6% of gross earnings on each pay cheque. Alternatively, if the silviculture worker does not work on the statutory holiday, and the employer chooses not to pay statutory holiday pay on each pay cheque, the employer must pay one day’s pay (the amount is calculated by dividing the earnings in the 4 weeks before the statutory holiday by the number of days worked in that period). If a silviculture worker works on a statutory holiday, the employer must pay double the piece rate or regular wage. However, if the employer has been paying 3.6% of gross earnings on each pay cheque (calculated as noted above), the employer only has to pay straight time (regular piece rate) for work done that day. An employer may substitute another day off for a statutory holiday if it is agreed to in writing by
the majority of affected employees (silviculture workers) or negotiated under a collective agreement.

In Manitoba, persons employed in continuously operating businesses (businesses that, within a 7-day period, usually operate day and night without interruption until completion of the regular operation of the business), seasonal businesses (businesses related to crop ripening, or ones that suspend operations for one or more periods of not less than 3 weeks due to change in market demand, but not including the construction industry), places of amusement, gasoline service stations, hospitals, hotels, restaurants, or domestic servants must receive either 1.5 times their regular wages for working on the holiday, or receive their regular pay plus a substituted day off with pay.

In New Brunswick, employees working in a hotel, motel, tourist resort, restaurant, tavern, or continuous operation are entitled to regular pay plus 1.5 times the regular pay. Alternatively, employees may receive regular pay as well as a holiday on their first working day immediately following their next vacation, or on a working day agreed upon, and be paid their regular wages for that day.

In Newfoundland and Labrador, employees working in a continuous operation or for a public utility receive twice their regular pay for that day, or regular pay for the day plus a substituted day off with pay.

In Nova Scotia, employees in a continuous operation who work on a statutory holiday receive either regular pay plus 1.5 times that amount, or a compensatory paid holiday at some other time.

In Ontario, there are special provisions for hospitality industry workers, employees of continuous operations, and farm workers:

- Persons employed in a hotel, motel, tourist resort, restaurant, tavern, hospital, or continuous operation receive either regular wages plus a substitute day off with pay, or public holiday pay plus 1.5 times the regular wages. However, for these employees, the option as to how to pay is at the employer’s choice, with no employee agreement required.

- Persons who are employed on a farm to harvest fruit, vegetables, or tobacco for marketing or storage are deemed to be employed in a continuous operation and are entitled to public holidays with pay after having been employed by an employer for 13 weeks or more.
Q: Is the time worked on a statutory holiday included when calculating overtime hours?

Answer

Generally, no. Time worked on statutory holidays is not usually included in overtime calculations. Employees are already compensated for the extra time worked by higher statutory holiday pay rates as well as by provisions for time off at a later date.

Q: What if an employee’s employment ends before payment for a statutory holiday or a substitute holiday is received?

Answer

When a worker’s employment is terminated, whether voluntarily or involuntarily, any monies owing for statutory holiday pay must be paid to the worker at the same time as other wages owing. This also includes pay owed for a substituted day off (for working on a holiday) that has not yet been taken, and pay owed for a day off that is in compensation for time worked on a statutory holiday that has not yet been taken.

Manitoba has a special requirement. If an eligible employee’s employment is terminated before he or she has taken the substitute day off (which is in compensation for working on a holiday), the employer must pay the holiday pay, along with any other wages payable, on termination. If an employee’s employment is terminated (other than by the employee) less than four weeks before a general holiday, the employee is entitled to holiday pay for that holiday equal to 5% of his or her total wages, excluding overtime wages, for the four-week period immediately preceding the holiday. The employee’s total wages for the four-week period includes the portion of the wage in lieu of notice that would have been payable as a wage if the employee had remained employed and worked his or her regular hours of work throughout the applicable notice period.
## Leaves of Absence

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Q: What types of leaves of absence are provided?

Answer

Leaves of absence are a relatively new phenomenon and are a response to the changing and competing interests of our society. For example, provisions for maternity or parental leave attempt to balance the competing interests of child rearing and workforce involvement, and are partially compensated through government funding. The federal government and all of the provinces and territories provide for unpaid maternity and parental leave in their employment standards legislation.

More recent forms of leave recognize that many other things can happen to an employee in the course of his or her working life. As such, in all of the provinces and territories, governments have either provided for or are looking at providing for miscellaneous leaves of absence to cover situations such as sickness, death, family responsibility, and armed forces reservist duties.

Finally, other forms of leave are the result of our democratic system of government and relate to voting at elections and jury duty.

Q: What is maternity leave?

Answer

Women who are pregnant may have a right to take maternity leave (also referred to as pregnancy leave). This means that they are entitled to take some time off from work during and immediately after pregnancy to ensure a healthy pregnancy and childbirth. The right to take maternity leave exists in all Canadian jurisdictions. However, employers are not required to pay salary to employees who are on maternity leave. Requirements with respect to the qualifying period, required notice, length of leave, and continuation of benefits vary from jurisdiction to jurisdiction.

Q: Are all pregnant employees eligible for maternity leave?

Answer

No. Employment standards legislation does not apply to all employees. For example, professionals such as architects, lawyers, dentists, and engineers are usually excluded from employment standards legislation. There are also other categories of employees who may not be protected by employment standards legislation, such as managers and some types of agricultural workers.
Q: Is there a qualifying period before an employee is entitled to maternity leave?

Answer

There is no qualifying period in British Columbia, New Brunswick, and Quebec. In the remaining jurisdictions, the provisions generally state that an employee who has worked for the same employer for a period ranging from 13 consecutive weeks to 12 consecutive months is entitled to an unpaid maternity or parental leave of up to 52 weeks. To determine the qualifying period for a particular jurisdiction, please refer to the Maternity and Parental Leave Requirements chart.

Q: Can part-time employees take maternity leave?

Answer

Yes. The legislation makes no distinction between part-time and full-time workers, so long as any required period of continuous employment has been completed.

Q: What must an employee do if she wants to take maternity leave?

Answer

An employee who wishes to take maternity leave must give her employer sufficient notice of her intent to take the leave before the leave begins. The required notice ranges from between 4 months and 2 weeks. This notice must be in writing.

The employer also has the right to request a medical certificate certifying the fact of the pregnancy and giving an estimated date for the birth. For the specific requirements for your jurisdiction, please refer to the Maternity and Parental Leave chart.

Q: Is an employee still entitled to maternity leave if she fails to give her employer sufficient notice?

Answer

In most jurisdictions, an employee who fails to give her employer the required notice is still entitled to maternity leave if, within 2 weeks after leaving work, she gives her employer notice and provides a medical certificate. The certificate must set out the
estimated date of delivery and state that she cannot work due to medical condition resulting from the pregnancy.

As well, in British Columbia and the Yukon, the right to take a limited period of time off after delivery of a child is protected, even if no notice is given.

In Nova Scotia, a pregnant employee is required to give her employer as much notice as possible if medical reasons oblige her to take her maternity leave early.

New Brunswick legislation does not deal with this issue.

**Q: How much time can an employee take off for maternity leave?**

**Answer**

Pregnant employees are entitled to 17 weeks of maternity leave in all jurisdictions except Alberta, Quebec, and Saskatchewan.

Employees in Alberta are entitled to 15 weeks’ maternity leave.

Employees in Quebec and Saskatchewan are entitled to 18 weeks’ maternity leave.

**Q: Can a leave of absence begin at any time during the pregnancy?**

**Answer**

No, each jurisdiction stipulates that a pregnant employee cannot begin her maternity leave before a certain stage in her pregnancy.

In British Columbia, New Brunswick, Prince Edward Island, and the federal jurisdiction, employees cannot start maternity leave until 11 weeks before the expected delivery date.

In Alberta and Saskatchewan, employees cannot start maternity leave until 12 weeks before the expected delivery date.

In Nova Scotia and Quebec, employees cannot start maternity leave until 16 weeks before the expected delivery date.

In Manitoba, Newfoundland and Labrador, the Northwest Territories, Nunavut, Ontario, and the Yukon, employees cannot start maternity leave until 17 weeks before the expected delivery date.
Q: Must at least part of maternity leave be taken after the birth?

Answer

Some jurisdictions structure maternity leave so that a certain portion of the leave must be taken after the birth of the child.

Alberta specifically provides that the period of maternity leave is to include at least 6 weeks immediately following the actual date of delivery, unless the employer and employee agree to shorten the period as a result of the employee providing a medical certificate indicating that returning to work will not endanger her health.

British Columbia, New Brunswick, Prince Edward Island, and the federal jurisdiction state that employees cannot start maternity leave until 11 weeks before the expected delivery date; therefore at least 6 weeks of the leave would generally be taken after the birth.

Saskatchewan maternity leaves cannot start until 12 weeks before the expected delivery date; therefore at least 6 weeks of the leave would generally be taken after the birth.

Nova Scotia and Quebec leaves cannot start until 16 weeks before the estimated delivery date; therefore at least 1 week in Nova Scotia or 2 weeks in Quebec would be taken after the birth.

British Columbia and Newfoundland and Labrador provide for a minimum of 6 weeks’ maternity leave following a birth or miscarriage.

Other jurisdictions require the presentation of medical documentation certifying the employee’s ability to return to work if the planned return is very soon after the delivery.

Q: Can an employee take a leave of absence following a miscarriage?

Answer

Yes. Most jurisdictions protect an employee’s right to have at least some period of time away from work if she has had a miscarriage or stillbirth. However, that period may be shorter than the full 17 or 18 weeks otherwise available.
Q: Can maternity leave be extended?

Answer

Some jurisdictions permit the extension of the maternity leave for a few weeks due to medical reasons. However, with parental leaves now being between 35 and 52 weeks, extensions are rather rare.

In British Columbia and Saskatchewan, a leave may be extended by 6 weeks if the employee provides the employer with medical documentation demonstrating why she is unable to return to work.

In Manitoba, Ontario, Prince Edward Island, Saskatchewan, the Northwest Territories, Nunavut, and the Yukon, in situations where the birth is later than expected, or if there has been a miscarriage, the maternity leave may be extended until the child is born, or up to 6 weeks following the miscarriage.

In Quebec, extensions for bona fide medical reasons are allowed for the time period set out in a medical certificate.

Q: Can an employee be required to take maternity leave?

Answer

Generally speaking, it is up to the employee to decide how long she will take for maternity leave and, with some qualifications, when she will take it. She is not required to take the full entitlement of maternity leave, although in some provinces she will be required to take a certain number of weeks of leave following the delivery of her child, unless she produces medical evidence of fitness to work (e.g., a medical certificate).

However, where pregnancy is affecting an employee’s ability to perform her job, some provinces and territories have provisions that permit the employer to require the employee to take maternity leave. This enforced maternity leave lasts only as long as the employee’s inability to effectively perform her job continues. The provinces that permit an employer to require the employee to take maternity leave are Alberta, New Brunswick, Nova Scotia, Prince Edward Island, Quebec, Saskatchewan, the Northwest Territories, Nunavut, and the Yukon.

On the other hand, Ontario states that it is against the law for an employer to make an employee start pregnancy leave, even if she is sick or if her pregnancy limits the type of work she can do. Instead, a pregnant woman with health issues is entitled
to access the health benefits and leave of absence provisions available through the employer’s disability plans.

In the federal jurisdiction, where an employee is unable to perform an essential function of her job and no appropriate alternative job is available, the employer may require the pregnant employee to take a leave of absence only for such time as she is unable to perform that essential function.

Q: Must maternity leave be taken all at once?

Answer

Yes. Once maternity leave has begun, all jurisdictions require maternity leave to be taken all at once; it cannot be split up.

Q: What must an employee do when she wishes to return to work following maternity leave?

Answer

When an employee on maternity leave wishes to return to work, all jurisdictions require that the employee provide some form of notice to the employer. The simplest notice of return to work is provided with the notice of intention to take maternity leave; the notice to take leave must specify a start date, therefore, based on the duration of the maternity leave, an end date or return-to-work date is calculated (e.g., 17 weeks later).

All jurisdictions except Alberta, Saskatchewan, and Quebec rely on this type of notice in that an employee is not required to provide notice of when she will return to work after her pregnancy leave. If the employee does not specify a return date, the employer may assume she will take the full 17 weeks (or any longer period that she may be entitled to). Alberta and Saskatchewan require 4 weeks’ notice of the date of return to work; Quebec requires 3 weeks’ notice.

Finally, British Columbia, Newfoundland and Labrador, Nova Scotia, Ontario, Quebec, the Northwest Territories, Nunavut, and the Yukon require notice in situations where the employee intends to return to work prior to the end of the full period of maternity leave.
Q: What is parental leave?

Answer

Parental leave (or child care leave, as it is called in some jurisdictions) permits new parents to take time off without pay to adjust to their new familial responsibilities and to care for the new child. It applies to natural and adopted children. The right to parental leave exists in all jurisdictions in Canada.

Q: Are all employees eligible for parental leave?

Answer

No. As with maternity leave, in most jurisdictions, in order to be eligible for parental leave, an employee must be covered by employment standards legislation and have worked for the employer for a specified period of time. In each of the jurisdictions where a qualifying period is specified, the period is the same as is required to become eligible for maternity leave. For details, please refer to the Maternity and Parental Leave chart.

Q: Can an employee take a leave if adopting a child?

Answer

Yes. In all jurisdictions, adoption leave is included under parental leave, and adoptive parents have the same rights as natural parents.

Q: How much time can an employee take off for parental leave?

Answer

The length of leave to which parents are entitled varies between jurisdictions; it ranges from 35 to 37 weeks throughout most of Canada, and reaches a high of 52 weeks in Nova Scotia, Prince Edward Island, and Quebec. Note also that the length of leave usually varies depending on whether or not maternity leave was taken previously and whether or not the parents are entitled to a combined or individual parental leave.
Q: Can either parent take parental leave?

Answer

In all jurisdictions, parental leave is available to both fathers and mothers; however, most provinces and territories limit the length of parental leave to 34 or 35 weeks when maternity leave has also been taken. Some permit each parent to take the maximum amount of leave, and others require the parental leave to be shared between the parents.

Nova Scotia, Prince Edward Island, and Quebec provide the greatest amount of parental leave, with each parent entitled to 52 weeks’ leave. However, in Nova Scotia and Prince Edward Island, if parental leave is combined with maternity leave, parental leave is limited to 35 weeks.

In Alberta, British Columbia, New Brunswick, the Yukon, and the federal jurisdiction, parental leave must be shared between the parents. Therefore, if the one parent took 17 weeks’ maternity leave and 10 weeks’ parental leave, the other parent would generally only be entitled to 15 or 17 weeks’ parental leave.

In all the other provinces and territories, parental leave is generally limited to a maximum of 35 or 37 weeks for each parent.

Finally, some jurisdictions place restrictions on both parents taking parental leave at the same time. In Alberta, if the parents are both employed by the same employer, the employer is not required to grant parental leave to more than one parent at a time. In the Yukon, if both parents take parental leave, they cannot take their leaves at the same time unless the employee who is first on parental leave cannot reasonably be expected to care for the child by him or herself because of injury, illness, death or other hardship in the family.

Q: Can an employee who took maternity leave take parental leave at any time?

Answer

No. Unless her employer agrees otherwise, parental leave must begin when maternity leave ends. She cannot take her maternity leave, return to work for a limited period, and then take parental leave.
Q: What if a child is hospitalized at the time maternity leave expires or after parental leave has begun?

Answer

Only New Brunswick, Newfoundland and Labrador, Nova Scotia, and Ontario make special provisions for such cases.

In New Brunswick and Newfoundland and Labrador, parental leave does not have to start until the child actually comes into the care and custody of his or her parents.

In Nova Scotia, if the parental leave has begun and the child is hospitalized for a period exceeding or likely to exceed 1 week, the employee is entitled to resume work and defer the unused portion of the parental leave until the child is discharged from the hospital. An employee is entitled to only one interruption and deferral of parental leave. An employee who intends to use the deferral option must give the employer as much notice as possible of the dates of resumption of work and resumption of leave and, where requested, provide the employer with whatever proof is reasonable to support the employee’s entitlement to the option.

In Ontario, the parental leave of a mother who has taken pregnancy leave must begin when the pregnancy leave ends, unless the child had not yet come into the custody and care of the parent for the first time. This exception recognizes situations where the child is hospitalized after birth. However, should the child first come home and then have to be hospitalized, the parental leave will continue to run. In all other cases, the parental leave must begin no later than 52 weeks after the child is born or first comes into the custody and care of the parent.

Q: When can an employee who did not take maternity leave begin parental leave?

Answer

In most jurisdictions, an employee can begin parental leave at any time after the child is born, adopted, or comes into the care and custody of the parent. Unless a parent is also taking maternity leave, most jurisdictions allow parents to take their parental leave at any time during the 52 weeks following the birth, adoption, or start of parental care and custody.

In Manitoba, Ontario, and Prince Edward Island, parents must start their parental leave within 52 weeks of the birth, adoption, or arrival of the child into
parental care and custody, but the leave itself can occur in the year after the child comes into the parents’ custody.

In Quebec, parental leave must end within 70 weeks of the child’s birth or the entrustment of an adopted child to the employee.

Q: Can parental leave ever be extended?

Answer

In British Columbia, where the child has a physical, psychological, or emotional condition requiring an additional period of parental leave, the employee is entitled to up to 5 additional weeks of unpaid leave beginning immediately after the end of the original leave.

Q: Can parental leave ever be taken in more than one period?

Answer

In most jurisdictions, unless the employer agrees otherwise, parental leave must be taken in one period and may not be broken into two or more periods.

However, in Nova Scotia, where parental leave has begun and the child is hospitalized for a period exceeding or likely to exceed 1 week, the employee is entitled to resume work and defer the unused portion of the parental leave until the child is discharged from hospital. An employee is entitled to only one interruption and deferral of parental leave. An employee who intends to use the deferral option must give the employer as much notice as possible of the dates of resumption of work and resumption of leave and, where requested, provide the employer with whatever proof is reasonable to support the employee’s entitlement to the option.

Q: What must an employee do if he or she wishes to take parental leave?

Answer

The employee must provide the employer with written notice of intent to take parental leave. The length of the required notice varies from province to province; the requirements are set out in the Maternity and Parental Leave chart.

In the notice, the employee must specify not only the intention to take child care leave, but also the proposed start and finish dates of the leave. In some jurisdictions,
the employee is required to provide a medical certificate confirming the pregnancy and the anticipated date of birth. If the employee is adopting a child, the employee must provide proof of the adoption to the employer. As with maternity leave, there are exceptions to the notice requirements if the child comes into parental care and custody earlier than was expected.

Q: What are the requirements for maternity or parental leave across Canada?

Answer

The right to take maternity or parental leave exists in all Canadian jurisdictions. However, employers are not required to pay salary to employees who are on such leaves. Requirements with respect to the qualifying period, required notice, length of leave, and continuation of benefits vary from jurisdiction to jurisdiction.

The chart below sets out the minimum requirements for each jurisdiction. Remember, again, that these are minimum requirements.

Maternity and Parental Leave Requirements

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<tr>
<th>Jurisdiction and Type of Leave</th>
<th>Qualifying Employment Period</th>
<th>Length of Leave Allowed</th>
<th>Extension of Leave Allowed</th>
<th>Required Notice</th>
<th>Effects on Position, Wages, Benefits, and Seniority</th>
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</thead>
<tbody>
<tr>
<td>Federal (Pregnancy)</td>
<td>6 months</td>
<td>17 weeks</td>
<td>Not specified</td>
<td>4 weeks</td>
<td>Employment deemed continuous; same/similar position with same wages &amp; benefits</td>
</tr>
<tr>
<td>(Parental)</td>
<td>6 months</td>
<td>37 weeks; 35 weeks if combined with pregnancy leave</td>
<td>Not specified</td>
<td>4 weeks</td>
<td></td>
</tr>
<tr>
<td>Alberta (Maternity)</td>
<td>52 weeks</td>
<td>15 weeks</td>
<td>None</td>
<td>6 weeks</td>
<td>Same/comparable position; same wages &amp; benefits that accrued to the date the leave started</td>
</tr>
<tr>
<td>(Parental)</td>
<td>52 weeks</td>
<td>37 weeks</td>
<td>None</td>
<td>6 weeks</td>
<td></td>
</tr>
<tr>
<td>British Columbia (Pregnancy)</td>
<td>Not specified</td>
<td>17 weeks</td>
<td>6 weeks</td>
<td>4 weeks</td>
<td>Employment deemed continuous; same/ comparable position with all increments &amp; benefits as if leave not taken; employer to continue making payments to benefit plans</td>
</tr>
<tr>
<td>(Parental)</td>
<td>Not specified</td>
<td>35 if maternity leave taken; 37 if only parental leave taken</td>
<td>5 weeks</td>
<td>4 weeks</td>
<td></td>
</tr>
<tr>
<td>Jurisdiction and Type of Leave</td>
<td>Qualifying Employment Period</td>
<td>Length of Leave Allowed</td>
<td>Extension of Leave Allowed</td>
<td>Required Notice</td>
<td>Effects on Position, Wages, Benefits, and Seniority</td>
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</tr>
<tr>
<td>Manitoba (Maternity)</td>
<td>7 months</td>
<td>17 weeks</td>
<td>Not specified</td>
<td>4 weeks</td>
<td>Employment deemed continuous; same/ comparable position; same wages &amp; benefits as before leave began</td>
</tr>
<tr>
<td></td>
<td>(Parental)</td>
<td>7 months</td>
<td>37 weeks</td>
<td>4 weeks</td>
<td></td>
</tr>
<tr>
<td>New Brunswick (Pregnancy)</td>
<td>Not specified</td>
<td>17 weeks</td>
<td>Not specified</td>
<td>4 months' notice of intent to take leave; 2 weeks' notice of commencement of leave</td>
<td>Same/equivalent position; benefits or wages accrued to date leave started; no loss of seniority</td>
</tr>
<tr>
<td></td>
<td>(Child care)</td>
<td>Not specified</td>
<td>37 weeks; max. 52 weeks if combined with pregnancy leave</td>
<td>4 weeks (natural child); 4 months (adoptive child)</td>
<td></td>
</tr>
<tr>
<td>Newfoundland and Labrador (Pregnancy)</td>
<td>20 weeks</td>
<td>17 weeks</td>
<td>Not specified</td>
<td>2 weeks</td>
<td>Employment deemed continuous; wages, duties, benefits, and position not less beneficial than before; benefits do not accrue unless agreed to</td>
</tr>
<tr>
<td></td>
<td>(Parental)</td>
<td>20 weeks</td>
<td>35 weeks</td>
<td>2 weeks</td>
<td></td>
</tr>
<tr>
<td>Northwest Territories (Pregnancy)</td>
<td>12 months</td>
<td>17 weeks</td>
<td>6 weeks</td>
<td>4 weeks</td>
<td>Same/comparable position; wages &amp; benefits increment as if leave not taken; no loss of the seniority accrued to date leave commenced</td>
</tr>
<tr>
<td></td>
<td>(Parental)</td>
<td>12 months</td>
<td>35 if maternity leave taken; 37 if only parental leave taken</td>
<td>4 weeks</td>
<td></td>
</tr>
<tr>
<td>Nova Scotia (Pregnancy)</td>
<td>1 year</td>
<td>17 weeks</td>
<td>Not specified</td>
<td>4 weeks</td>
<td>Same/comparable position; same wages &amp; benefits; no loss of the seniority &amp; benefits accrued to date leave commenced</td>
</tr>
<tr>
<td></td>
<td>(Parental)</td>
<td>1 year</td>
<td>52 weeks; 35 weeks if combined with pregnancy leave</td>
<td>4 weeks</td>
<td></td>
</tr>
<tr>
<td>Nunavut (Pregnancy)</td>
<td>12 months</td>
<td>17 weeks</td>
<td>6 weeks</td>
<td>4 weeks</td>
<td>Same/comparable position; wages &amp; benefits increment as if leave not taken; no loss of the seniority accrued to date leave started</td>
</tr>
<tr>
<td></td>
<td>(Parental)</td>
<td>12 months</td>
<td>35 if maternity leave taken; 37 if only parental leave taken</td>
<td>5 weeks</td>
<td></td>
</tr>
</tbody>
</table>

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## Employment Standards

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<th>Jurisdiction and Type of Leave</th>
<th>Qualifying Employment Period</th>
<th>Length of Leave Allowed</th>
<th>Extension of Leave Allowed</th>
<th>Required Notice</th>
<th>Effects on Position, Wages, Benefits, and Seniority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ontario (Pregnancy)</td>
<td>13 weeks prior to estimated delivery date</td>
<td>17 weeks</td>
<td>6 weeks</td>
<td>2 weeks</td>
<td>Same/comparable work; same wages &amp; benefits as if leave not taken; period of leave included in calculation of length of employment or seniority</td>
</tr>
<tr>
<td></td>
<td>13 weeks</td>
<td>35 weeks if pregnancy leave taken; 37 weeks if pregnancy leave not taken</td>
<td>Not specified</td>
<td>4 weeks</td>
<td></td>
</tr>
<tr>
<td>Ontario (Parental)</td>
<td>13 weeks</td>
<td>35 weeks if pregnancy leave taken; 37 weeks if pregnancy leave not taken</td>
<td>Not specified</td>
<td>4 weeks</td>
<td></td>
</tr>
<tr>
<td>Prince Edward Island (Maternity)</td>
<td>20 weeks</td>
<td>17 weeks</td>
<td>Not specified</td>
<td>4 weeks</td>
<td>Same/comparable work; same wages &amp; benefits as if leave not taken; no loss of the seniority &amp; benefits accrued to date leave taken; employer not obliged to pay pension benefits during leave</td>
</tr>
<tr>
<td></td>
<td>20 weeks</td>
<td>52 weeks; 35 if combined with maternity leave</td>
<td>Not specified</td>
<td>4 weeks</td>
<td></td>
</tr>
<tr>
<td>Prince Edward Island (Parental)</td>
<td>20 weeks</td>
<td>52 weeks; 35 if combined with maternity leave</td>
<td>Not specified</td>
<td>4 weeks</td>
<td></td>
</tr>
<tr>
<td>Quebec (Pregnancy)</td>
<td>None</td>
<td>18 weeks</td>
<td>Not specified</td>
<td>3 weeks</td>
<td>Same position; same wages &amp; benefits as if leave not taken; no loss of seniority; employer to continue making payments to benefit plans</td>
</tr>
<tr>
<td></td>
<td>None</td>
<td>52 weeks</td>
<td>Not specified</td>
<td>3 weeks</td>
<td></td>
</tr>
<tr>
<td>Saskatchewan (Pregnancy)</td>
<td>20 weeks</td>
<td>18 weeks</td>
<td>6 weeks</td>
<td>4 weeks</td>
<td>Same/comparable position; not less than same wages &amp; benefits; no loss of benefits accrued to date leave taken; seniority continues to accrue during leave</td>
</tr>
<tr>
<td></td>
<td>20 weeks</td>
<td>34 if maternity leave taken; 37 if only parental leave taken</td>
<td>Not specified</td>
<td>4 weeks</td>
<td></td>
</tr>
<tr>
<td>Yukon (Maternity)</td>
<td>12 months</td>
<td>17 weeks</td>
<td>Not specified</td>
<td>4 weeks</td>
<td>Employment deemed continuous; same/ comparable position; same wages &amp; benefits as if leave not taken</td>
</tr>
<tr>
<td></td>
<td>12 months</td>
<td>37 weeks</td>
<td>Not specified</td>
<td>4 weeks</td>
<td></td>
</tr>
</tbody>
</table>

### Q: Will an employee’s job be jeopardized as a result of taking a leave?

**Answer**

No. The legislation in all jurisdictions protects a parent’s right to return to his or her job upon the expiry of the maternity or parental leave. If the employer cannot return
the parent to his or her old job, the employee must be placed in a comparable job with at least the same or equivalent wages and benefits.

**Q: What happens to an employee’s employment status and seniority status while on leave?**

**Answer**

All jurisdictions consider employment before and after a leave of absence to be continuous (i.e., as if there is no break or interruption in employment). An employee returning from a leave of absence cannot be treated like a new employee with respect to his or her years of service and entitlement to employee rights, such as vacation entitlement.

However, the effect of a leave of absence on an employee’s seniority status varies from jurisdiction to jurisdiction.

In Alberta, Manitoba, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, the Northwest Territories, and Nunavut, a leave will not result in any loss of the seniority accrued to the time the leave began.

In British Columbia, New Brunswick, Ontario, Saskatchewan, and the federal jurisdiction, seniority continues to accrue during maternity and parental leave; or employment is deemed continuous for the purpose of calculating vacation entitlement, notice of termination, and benefits (all things tied directly to the continuation of seniority).

In Quebec and the Yukon, a returning employee must be reinstated to his or her former position with the same benefits, including the wage he or she would have been entitled to had the leave not been taken (i.e., had he or she remained at work).

**Q: Do benefits continue to accrue during a leave of absence?**

**Answer**

This varies between jurisdictions.

In Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, and Saskatchewan, an employee’s benefits are protected at the level reached before he or she went on leave.

In the federal jurisdiction, British Columbia, Ontario, Quebec, the Northwest Territories, Nunavut, and the Yukon, an employee’s benefits continue to accrue
during the period of leave as if there has been no loss of continuity in the employment. Depending on the jurisdiction, if benefits are to continue to accrue, the employee may be obliged to pay contributions to the benefit scheme during his or her absence from work.

Q: What is the effect of a leave of absence on vacations with pay?

Answer

Employment is deemed to be continuous during a leave of absence. As a result, an employee is not obliged to work an entire year after returning from leave before being entitled to a vacation with pay (as he or she would if the employment was considered to have been interrupted). (However, not all jurisdictions consider length of service/seniority to continue to accrue while on leave, and therefore length of vacation entitlement may be affected.

In Ontario, an employee on leave may defer taking vacation until the leave expires, or even to a later date if the employee and employer agree on a later date. This ensures that the employee does not forfeit vacation time to which he or she is entitled as a result of employer practices that require employees to take vacations by the end of the year after it is earned and that do not permit employees to carry vacation into another year. However, an employee may agree to forgo a vacation, and the employer will then be required to pay the employee the correct amount of vacation pay.

In Quebec, if the employee is on leave of absence (sickness, accident, parental, or family responsibility) at the end of the 12 months after the reference year (the period during which annual vacation must normally be taken), the employer may, at the request of the employee, permit the employee to defer the annual vacation to the following year. If the annual leave is not deferred, the employer must pay the employee the indemnity that he or she is entitled to. Similarly, if the employee is on Canadian Forces reservist leave at the end of the 12 months after the reference year, the employer may either defer the annual leave until the following year or pay the employee the indemnity for that leave.
Q: What happens if the employer discontinues the business while an employee is on leave?

Answer

An employee’s right to reinstatement does not disappear upon the suspension of the employer’s operations. If the employer resumes operations, the employee will be entitled to recall, in accordance with the employer’s regular seniority system or practice.

Q: What if the employer is unhappy about an employee taking a leave of absence? Can some form of reprisal be taken against the employee?

Answer

No. Employment standards legislation in all jurisdictions explicitly prohibits employers from dismissing, suspending, laying off, or otherwise discriminating against employees because they are or may become pregnant, or because they exercise their right to take maternity or parental leave. As well, human rights legislation in all jurisdictions prohibits discrimination in employment because of pregnancy or family status.

Q: What can an employee do if an employer refuses to grant maternity or parental leave?

Answer

An employee who believes that his or her rights with respect to maternity or parental leave have been violated should contact the nearest employment standards or labour standards office. They can help an employee to enforce his or her rights.

Q: What can an employer do in order to comply with maternity or parental leave requirements?

Answer

The following checklist sets out things an employer should know or do in order to comply with maternity or parental leave requirements.
Maternity or Parental Leave Requirements Checklist

- Is the employee covered by employment standards laws?
- Has the employee worked continuously for the same employer for the required period of time?
- Has the employee obtained and submitted a medical certificate certifying the pregnancy and the expected date of delivery, or a proof of adoption in those jurisdictions where it is required?
- Has the employee given the employer the required notice of his or her intent to take leave? (The required notice should be in writing, include the date on which the employee intends to begin leave, and include the date on which the employee intends to return to work.)
- If benefits are to continue to accrue during the absence from work, have arrangements been made to continue any employee contributions to benefit plans during the leave?
- Has the employer issued the Record of Employment necessary for the employee to apply for Employment Insurance (maternity/parental) benefits?

Remember that an application for Employment Insurance benefits should be filed as soon as maternity or parental leave begins.

Q: Can an employee take time off for medical examinations?

Answer

In Nova Scotia, an employee is entitled to receive up to 3 days of unpaid sick leave per year. The leave can also be used to care for a sick child, parent, or family member; or for medical, dental, or other similar appointments during working hours. On such occasions, the employee must advise the employer of his or her absence as soon as possible.

In Quebec, women who because of their pregnancy require a medical examination or an examination by a midwife are entitled to time off without pay to do so. The employee must inform her employer as soon as possible of her intended absence.

Other jurisdictions do not specifically state that employees can take time off for medical examinations, but often such circumstances would fall under family emergency/illness leave.
Q: What if a pregnant employee’s health or the health of the unborn or newborn child is jeopardized by the employee’s work?

Answer
Federally regulated employees who are pregnant or nursing are entitled, from the beginning of the pregnancy until 24 weeks after birth, to be reassigned or have their job duties modified if the work is posing a risk to the health of the mother, the fetus, or the child.

While the employer is examining the request, the mother is entitled to continue at her job if she chooses or, if the risk requires, to take a leave of absence with pay at her usual rate until the employer has come to a decision.

If it is not reasonably practicable to modify the job functions or reassign the worker, the worker is entitled to a leave of absence without pay for the duration of the risk.

In Quebec, a pregnant employee whose working conditions may endanger her, her fetus, or her nursing child may request reassignment. The employee retains all the benefits of her regular position and must be reinstated to that position when the danger has passed. Medical documentation must be presented to the employer.

Q: Are employees entitled to other leaves of absence (not maternity or parental)?

Answer
Yes, a number of the jurisdictions have provisions for other forms of leave, such as:

- bereavement leave;
- compassionate care leave;
- sick leave;
- family responsibility/emergency leave; and
- Canadian Forces reservist leave.
Q: What are the requirements for personal, family responsibility, democratic, and similar leaves across Canada?

Answer

The right to take some form of personal or family responsibility or democratic leave exists in all Canadian jurisdictions. However, employers are not usually required to pay salary to employees who are on such leaves.

Note that Alberta currently only provides for jury leave and reservist leave and no other leave.

The chart below sets out the length of sick leave, family responsibility leave, compassionate care leave, bereavement leave, reservist leave, and jury duty allowed in each jurisdiction. Remember, again, that these are minimum requirements.

### Length of Personal and Democratic Leaves

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Sick Leave</th>
<th>Family Responsibility Leave</th>
<th>Compassionate Care Leave</th>
<th>Bereavement Leave</th>
<th>Reservist Leave</th>
<th>Jury Duty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>Up to 12 weeks</td>
<td>N/A</td>
<td>8 weeks</td>
<td>3 days</td>
<td>Time to complete duty</td>
<td>Aligned with province of employment</td>
</tr>
<tr>
<td>Alberta</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>Time to complete duty</td>
<td>Time to complete jury duty</td>
</tr>
<tr>
<td>British Columbia</td>
<td>N/A</td>
<td>5 days</td>
<td>8 weeks</td>
<td>3 days</td>
<td>Time to complete duty</td>
<td>Time to complete jury duty</td>
</tr>
<tr>
<td>Manitoba</td>
<td>3 days</td>
<td>3 days</td>
<td>8 weeks</td>
<td>3 days</td>
<td>Time to complete duty</td>
<td>Time to complete jury duty</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>5 days</td>
<td>3 days</td>
<td>8 weeks</td>
<td>5 days</td>
<td>Up to 18 months</td>
<td>Time to complete jury duty</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>7 days</td>
<td>7 days</td>
<td>8 weeks</td>
<td>Up to 3 days</td>
<td>Time to complete duty</td>
<td>Time to complete jury duty</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Up to 7 days</td>
<td>N/A</td>
<td>8 weeks</td>
<td>Up to 7 days</td>
<td>N/A</td>
<td>Time to complete jury duty</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>3 days</td>
<td>3 days</td>
<td>8 weeks</td>
<td>Up to 4 days</td>
<td>Up to 18 months</td>
<td>Time to complete jury duty</td>
</tr>
<tr>
<td>Nunavut</td>
<td>N/A</td>
<td>N/A</td>
<td>8 weeks</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Ontario</td>
<td>Up to 10 days</td>
<td>Up to 10 days</td>
<td>8 weeks</td>
<td>Up to 10 days</td>
<td>Time to complete duty</td>
<td>Time to complete jury duty</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>3 days</td>
<td>3 days</td>
<td>8 weeks</td>
<td>Up to 3 days</td>
<td>Time to complete duty</td>
<td>Time to complete jury duty</td>
</tr>
<tr>
<td>Quebec</td>
<td>Up to 26 weeks</td>
<td>10 days</td>
<td>12 weeks</td>
<td>Up to 5 days</td>
<td>N/A</td>
<td>Time to complete jury duty</td>
</tr>
</tbody>
</table>
Q: Are employees entitled to time off in the event of a death in the family?

Answer

All jurisdictions except Alberta and Nunavut require employers to grant employees bereavement leave on the death of a family member.

Q: Are employees entitled to pay while on bereavement leave?

Answer

In most jurisdictions, bereavement leave is an unpaid leave of absence. However, in Newfoundland and Labrador, Prince Edward Island, Quebec, and the federal jurisdiction, bereavement leave is a mix of paid and unpaid leave.

Q: How long may an employee be absent following a death in the family?

Answer

All jurisdictions except Alberta and Nunavut require employers to grant employees bereavement leave on the death of a family member. The period of bereavement leave in each jurisdiction is set out below.

In the federal jurisdiction, in the event of a death of an immediate family member of an employee, the employee is entitled to bereavement leave on any of his or her normal working days that occur during the 3 days immediately following the day of the death. If the employee has completed 3 consecutive months of continuous employment with the employer, he or she is entitled to bereavement leave with pay at his or her regular rate of wages for the normal hours of work, and such pay is deemed to be wages.

In British Columbia, an employee is entitled to up to 3 days of unpaid leave on the death of an immediate family member.
In Manitoba, an employee who has been employed for at least 30 days may take up to 3 days of unpaid leave on the death of a family member. Before taking bereavement leave, an employee must give the employer notice of the amount and timing of the leave to be taken and of the death to which it relates. If requested by the employer, the employee must also provide evidence of his or her entitlement to the leave.

In New Brunswick, employees are entitled to an unpaid leave of up to 5 consecutive days on the death of a person in a close family relationship with the employee. The leave is to be taken during the period of the bereavement and is to begin no later than the day of the funeral. The employee is to inform the employer of the date(s) and length of the leave.

In Newfoundland and Labrador, all employees are entitled to a period of bereavement leave consisting of 2 days’ unpaid leave in the event of the death of a family member. As well, upon completion of 1 month’s continuous service with the same employer, an employee is also entitled to 1 paid day in addition to the 2 unpaid days. Where an entitlement to the 1 paid day of bereavement leave occurs during vacation leave, the vacation leave is extended by 1 day.

In the Northwest Territories, all employees are entitled to unpaid bereavement leave to attend the funeral or memorial service for a family member. The period of bereavement leave is 3 days if the funeral or memorial service will take place in the community where the employee lives, or 7 days if the funeral or memorial service will take place outside the community where the employee lives.

In Nova Scotia, an employee may be absent from work, without pay, for up to 3 consecutive working days upon the death of an immediate family member. The employee may also take unpaid bereavement leave of 1 working day on the death of an extended family member. On such occasions, the employee must advise the employer of his or her absence as soon as possible.

In Ontario, an employer who regularly employs 50 or more employees must grant employees up to 10 unpaid days per year of emergency leave. The leave applies to an employee’s (or the employee’s family member’s) illness, injury, or medical emergency; the death of a family member; and to an urgent family matter.

In Prince Edward Island, an employee may be absent from work, without pay, for up to 3 consecutive calendar days upon the death of an immediate family member of the employee, and 1 day, without pay, upon the death of an extended family member. Leave is to be taken during the period of bereavement and to begin no later
than the day of the funeral. An employee must advise the employer of his or her intention to take the leave, as well as the anticipated commencement date and duration of the leave.

In Quebec, an employee may be absent from work for 1 day with pay and for 4 more days without pay upon the death of an immediate family member. An employee may also take bereavement leave of 1 day without pay upon the death or funeral of an extended family member. On such occasions, the employee must advise the employer of his or her absence as soon as possible.

In Saskatchewan, an employee who has completed 3 continuous months of employment with an employer is entitled to a leave of up to 5 working days without pay upon the death of an immediate family member. The leave must be taken within 1 week before the funeral, and end within 1 week after. The employer may not dismiss or discipline an employee who takes bereavement leave.

In the Yukon, in the event of the death of an immediate family member, an employee is entitled to bereavement leave without pay for up to 1 week, provided that the funeral of the deceased falls within that week. As well, if an employee is designated by the family of a deceased member of a First Nation as the person responsible for organizing the funeral potlatch for the deceased, the employee is entitled to bereavement leave.

Q: How is “family member” defined for the purpose of bereavement leave?

Answer

All jurisdictions except Alberta and Nunavut require employers to grant employees bereavement leave on the death of a family member. The definition of family member varies in each jurisdiction and is set out below.

In the federal jurisdiction, the definition of immediate family includes the employee’s spouse or common-law partner, parents, spouse or common-law partner of a parent, children or children of a spouse or common-law partner, sisters, brothers, father-in-law and mother-in-law and their spouses or common-law partners, grandparents, grandchildren, and any relative permanently residing in the employee’s household or with whom the employee resides.
In British Columbia, an employee’s immediate family includes his or her spouse, child, parent, guardian, sibling, grandchild, or grandparent, as well as any person who lives with the employee as a member of the employee’s family.

In Manitoba, a family member is a spouse, common-law partner, child, stepchild, parent, grandparent, grandchild, brother, sister, aunt, uncle, niece, nephew, foster parent, foster child, guardian, and ward of an employee or of the employee’s spouse or common-law partner. The definition also includes any other person whom the employee considers to be like a close relative.

In New Brunswick, a close family relationship means the relationship between persons who are married to one another, between parents and their children, between siblings, between grandparents and their grandchildren, and includes a relationship between persons who, though not married to one another and whether or not a blood relationship exists, demonstrate an intention to extend to one another the mutual affection and support normally associated with those relationships first mentioned.

In Newfoundland and Labrador, family member includes a spouse, child, grandchild, mother, father, brother, sister, grandparent, mother- or father-in-law, brother- or sister-in-law, and daughter- or son-in-law.

In the Northwest Territories, family member means a spouse or common-law partner (includes same-sex partner), parent, child, grandchild or grandparent of the employee or of the employee’s spouse or common-law partner, parent of the employee’s spouse or common-law partner, current or former foster parent of the employee or of the employee’s spouse or common-law partner; current or former foster child, ward, or guardian of the employee or of the employee’s spouse or common-law partner; spouse or common-law partner of any of the above; any relative who lives with the employee and any other person whom the employee considers to be like a close relative (i.e., a friend or neighbour), whether or not they are related by blood, adoption, marriage, or common-law relationship.

In Nova Scotia, immediate family member means a spouse, parent, guardian, child or ward. Extended family member means grandparent, grandchild, sister, brother, mother- or father-in-law, son- or daughter-in-law, and sister- or brother-in-law.

In Ontario, family member means a spouse; parent, step-parent, or foster parent of the employee or the employee’s spouse; child, stepchild, or foster child of the
employee or the employee’s spouse; grandparent, step-grandparent, grandchild, or step-grandchild of the employee or the employee’s spouse; the employee’s child’s spouse; a brother or sister; and any relative dependent on the employee for care or assistance.

In Prince Edward Island, immediate family member means a spouse, common-law spouse, child, parent, brother, or sister. Extended family member means a grandparent, grandchild, brother- or sister-in-law, mother- or father-in-law, and son- or daughter-in-law.

In Quebec, immediate family member means a consort, child, child of the consort, father, mother, brother, or sister. Extended family member means son-in-law; daughter-in-law; grandparent; grandchildren; and father, mother, brother, or sister of the employee’s consort.

In Saskatchewan, immediate family is defined as the spouse, parent, grandparent, child, sister, or brother of an employee or the employee’s spouse. Spouse includes common-law spouse and is defined as the wife or husband of an employee, or a person with whom the employee cohabits as a spouse continuously for a period of at least 2 years, or in a relationship of some permanence if they are the parents of a child.

In the Yukon, family member is defined as the employee’s spouse or common-law partner, child, child of the employee’s spouse or common-law partner, parent, parent’s spouse or common-law partner, sibling or step-sibling, grandparent, grandparent of the employee’s spouse or common-law partner, grandparent’s spouse or common-law partner, grandchild, grandchild of the employee’s spouse or common-law partner, grandchild’s spouse or common-law partner, in-laws, aunt, uncle, niece, nephew; aunt, uncle, niece, nephew of the employee’s spouse or common-law partner; current or former foster parent, foster child, ward, guardian; current or former foster parent, foster child, ward, guardian of the employee’s spouse or common-law partner; and a person whom the employee considers to be like a close relative (i.e., a friend or neighbour), whether or not they are related by blood, adoption, marriage or common-law relationship. Spouse means the person who, at the date in question, cohabited with the employee and (a) is legally married to the employee, or (b) has cohabited as a couple with the employee for at least 12 months immediately before the date in question.
Q: Are employees entitled to time off to care for a terminally or seriously ill family member?

Answer

All jurisdictions except Alberta require employers to grant employees compassionate care leave in order to care for a seriously ill or terminally ill family member.

Q: Are employees entitled to pay while on compassionate care leave?

Answer

Compassionate care leave is an unpaid leave of absence. However, the employee may qualify for federal Employment Insurance compassionate care benefits.

Q: How long may an employee be absent to care for a seriously ill family member?

Answer

In New Brunswick, Nova Scotia, Prince Edward Island, the Northwest Territories, Nunavut, the Yukon, and the federal jurisdiction, the length of and rules surrounding compassionate care leave are generally the same:

- Where a qualified medical practitioner issues a certificate stating that a family member has a serious medical condition with a significant risk of death within 26 weeks (6 months) from the date the certificate was issued or the leave began, every employee is entitled to unpaid compassionate care leave for up to 8 weeks to provide care or support to a family member.

- The leave of absence must be taken from the first day of the week in which the certificate is issued or, if the leave had begun before the certificate was issued, the first day of the week in which the leave started if the certificate is valid from any day in that week. Compassionate care leave ends on the last day of the week in which either the family member dies or the 26-week (6-month) period following the issuing of the certificate ends.

- Compassionate care leave must be taken in periods of at least 1 week. In other words, leave for a day here and a day there is not permitted.

- The compassionate care leave may be shared by two or more employees of the same family, but the total amount of leave that may be taken by two or more
employees (to care for the same family member) is 8 weeks (i.e., 6 weeks of EI compassionate care benefits plus a 2-week waiting period).

- If the employer makes a written request for a copy of the medical certificate, the employee must give the employer a copy within 15 days after the employee’s return to work.

- The requirement regarding reinstatement and continuation of accrual of benefits, and the prohibition against dismissal because of the leave are generally the same as is set out under maternity leave.

British Columbia’s legislation is similar to the first group’s; however, there are some differences:

- The employee must give the employer a copy of the medical certificate as soon as practicable.

- If an employee takes a leave and the family member does not die within a 26-week period (or a shorter period as referred to in the medical certificate), the employee is entitled to take another period of leave subject to the same conditions.

Manitoba’s legislation is similar to the first group’s; however, there are some differences:

- In order to qualify for compassionate care leave, the individual must be employed for at least 30 days.

- The required medical certificate must state that the family member requires the care or support of one or more family members.

- An employee may take no more than two periods of leave totalling no more than 8 weeks. However, a period of leave must be at least 1 week. In other words, leave for a day here and a day there is not permitted.

Newfoundland and Labrador’s legislation is similar to the first group’s; however, there are some differences:

- In order to qualify for compassionate care leave, the individual must be employed for at least 30 days.

- In exceptional circumstances, the Director of Labour Standards may decide that an employee is to be given up to 3 additional days of unpaid leave immediately
following the end of the week in which the death of the family member occurred, and an employer is to provide that leave.

- An employee must give an employer 2 weeks’ written notice of his or her intention to take compassionate care leave, unless there is a valid reason why notice cannot be given. The notice of intention to take leave must include the length of leave the employee intends to take.

Ontario’s legislation is similar to the first group’s; however, there are some differences:

- If the employer so requests (the request does not have to be in writing), the employee must give the employer a copy of the medical certificate.

- If an employee takes a leave and the family member does not die within a 26-week period (or a shorter period referred to in the medical certificate), the employee is entitled to take another period of leave subject to the same conditions.

- An employee’s entitlement to family medical leave is in addition to any entitlement to emergency leave, sick leave, or family emergency or illness leave.

Quebec’s family care leave is quite different from the above:

- An employee who has 3 months of uninterrupted service may be absent without pay for a period of not more than 12 weeks over a period of 12 months. The situation should be such that the employee must stay with his or her child, spouse, the child of the spouse, father, mother, brother, sister, or grandparent because of a serious illness or a serious accident. The employee must advise the employer of his or her absence as soon as possible and state the reasons for the absence.

- An employee on a leave of absence due to family care continues to be a member of any employer group insurance or pension plan, so long as any required payments (usually made by the employer) are made to the plans.

- At the end of a family care leave, the employee must be reinstated to his or her former position with the same benefits, including the wages the employee would have been entitled to had he or she remained at work. If the job no longer exists when the employee returns, the employee must be extended whatever rights and privileges the employee would have been entitled to if he or she had been at work when the job was eliminated (i.e., termination pay). If the employer makes dismissals or layoffs that would have included the employee,
had the employee remained at work, the employee retains the same rights with respect to a return to work as the other employees who were dismissed or laid off.

In Saskatchewan, unpaid time off to care for seriously ill family members is indirectly provided for through the termination provisions in the province’s Labour Standards Act:

- Absence due to illness/injury of immediate family: An employer cannot dismiss, suspend, layoff, demote, or discipline an employee who has 13 weeks of uninterrupted service because of absence due to the illness or injury of a member of the employee’s immediate family who is dependent on the employee. For the employee to be protected by this provision, the period of absence due to the illness or injury of the family member must not be more than 12 weeks in any 52-week period. Immediate family is defined as the spouse, parent, grandparent, child, and sibling of an employee or the employee’s spouse. A spouse is the wife or husband of an employee, or a person with whom the employee cohabits as a spouse continuously for a period of at least 2 years, or in a relationship of some permanence if they are the parents of a child.

- Absence while receiving EI compassionate care benefits: Where the employee is absent and either serving the waiting period for or is receiving EI compassionate care benefits, the period of absence due to the illness or injury of the family member must not be more than 16 weeks in any 52-week period. As long as the employee qualifies for the federal compassionate care benefit, the employee is entitled to job protection for the period he or she is absent from work while receiving benefits or is in the waiting period for benefits even if that employee has not been employed for 13 consecutive weeks prior to the leave. Family member for purpose of this leave is defined as a spouse or common-law partner (includes same-sex partner), parent, child or child of the spouse or common-law partner, brother, sister, step-brother, step-sister, uncle, aunt, nephew, niece, grandchild, or grandparent of the employee or of the employee’s spouse or common-law partner, parent of the employee’s spouse or common-law partner, current or former foster parent of the employee or of the employee’s spouse or common-law partner, current or former foster child, ward or guardian of the employee or of the employee’s spouse or common-law partner, spouse or common-law partner of any of the above, and any other person whom the employee considers to be like a close relative (i.e., a friend or neighbour),
whether or not they are related by blood, adoption, marriage, or common-law relationship.

- If the employer makes a written request, the employee must provide the employer with a certificate of a duly qualified medical practitioner certifying the illness or injury of the family member.

**Q:** How is “family member” defined for the purpose of compassionate care leave?

**Answer**

In the federal jurisdiction, family member is defined as:

- an employee’s spouse, common-law partner, child, child of the spouse or common-law partner, parent, parent of the spouse or common-law partner;
- a child of the employee’s parent, or a child of the spouse or common-law partner of the employee’s parent;
- a grandparent of the employee or of the employee’s spouse or common-law partner, or the spouse or common-law partner of the employee’s grandparent;
- a grandchild of the employee or of the employee’s spouse or common-law partner, or the spouse or common-law partner of the employee’s grandchild;
- the spouse or common-law partner of the employee’s child or of the child of the employee’s spouse or common-law partner;
- the spouse or common-law partner of a parent of the employee’s spouse or common-law partner;
- the spouse or common-law partner of a child of the employee’s parent or of a child of the spouse or common-law partner of the employee’s parent;
- a child of a parent of the employee’s spouse or common-law partner, or a child of the spouse or common-law partner of the parent of the employee’s spouse or common-law partner;
- an uncle or aunt of the employee or of the employee’s spouse or common-law partner, or the spouse or common-law partner of the employee’s uncle or aunt;
- a nephew or niece of the employee or of the employee’s spouse or common-law partner, or the spouse or common-law partner of the employee’s nephew or niece;
LEAVES OF ABSENCE

- a current or former foster parent of the employee or of the employee’s spouse or common-law partner;
- a current or former foster child of the employee, or the spouse or common-law partner of a current or former foster child of the employee;
- a current or former ward of the employee or of the employee’s spouse or common-law partner;
- a current or former guardian or tutor of the employee, or the spouse or common-law partner of the employee’s current or former guardian or tutor; and
- an individual considered to be like a close relative, whether or not related to the employee by blood, adoption, marriage, or common-law partnership.

In British Columbia, family member is defined as an employee’s spouse (includes same-sex and common-law), child, parent, guardian, sibling, grandchild, grandparent, step-sibling, aunt, uncle, niece, nephew, current or former foster parent or foster child, current or former ward or guardian, and any person who lives with the employee as a member of the employee’s family; the spouse of the employee’s sibling, step-sibling, child, stepchild, grandparent, grandchild, aunt, uncle, niece, nephew, current or former foster child, and current or former guardian; the employee’s spouse’s parent, step-parent, sibling, step-sibling, child, grandparent, grandchild, aunt, uncle, niece, nephew, current or former foster parent, current or former ward; and an individual considered to be like a close relative, whether or not related to the employee by blood, adoption, marriage, or common-law partnership.

In Manitoba, family member is defined as the employee’s spouse or common-law partner, child, child of the employee’s spouse or common-law partner, parent, parent’s spouse or common-law partner, or parent of the employee’s spouse or common-law partner; brother, sister, step-brother, step-sister, uncle, aunt, nephew, niece, grandchild, or grandparent of the employee or of the employee’s spouse or common-law partner; current or former foster parent, ward, or guardian of the employee or of the employee’s spouse or common-law partner; spouse or common-law partner of any of the previously listed individuals; and any person whom the employee considers to be like a close relative (i.e., a friend or neighbour), whether or not they are related by blood, adoption, marriage, or common-law relationship.

In New Brunswick, a close family relationship means the relationship between persons who are married to one another, between parents and their children, between siblings, and between grandparents and their grandchildren. It includes a relationship
between persons who, though not married to one another and whether or not a blood relationship exists, demonstrate an intention to extend to one another the mutual affection and support normally associated with those relationships first mentioned.

In Newfoundland and Labrador, a family member is defined as:

- a spouse or cohabiting partner of the employee, a child of the employee or of the employee’s spouse or cohabiting partner, a parent of the employee or a spouse or common-law partner of the parent;
- a child of the employee’s parent or a child of the spouse or common-law partner of the employee’s parent;
- a grandparent or grandchild of the employee or of the employee’s spouse or common-law partner or the spouse or common-law partner of a grandparent or grandchild of the employee;
- the spouse or common-law partner of the employee’s child or of the child of the employee’s spouse or common-law partner;
- a parent, or the spouse or common-law partner or a parent, of the employee’s spouse or common-law partner;
- the spouse or common-law partner of a child of the employee’s parent or of a child of the spouse or common-law partner of the employee’s parent;
- a child of a parent of the employee’s spouse or common-law partner or a child of the spouse or common-law partner of the parent of the employee’s spouse or common-law partner;
- an uncle, aunt, niece, or nephew of the employee or of the employee’s spouse or common-law partner or the spouse or common-law partner of the employee’s uncle, aunt, niece, or nephew;
- a current or former foster parent or foster child of the employee or of the employee’s spouse or common-law partner;
- a current or former ward or guardian of the employee or of the employee’s spouse or common-law partner; and
- a person who considers the employee to be like a close relative, whether or not the person is related to the employee by blood, adoption, marriage, or common-law partnership (note: the employee can either be designated by the
person with the serious medical condition, or the EI claimant can view the seriously ill person as such).

In the Northwest Territories, family member means a spouse or common-law partner (includes same-sex partner), parent, child, child of the spouse or common-law partner, brother, sister, step-brother, step-sister, uncle, aunt, nephew, niece, grandchild or grandparent of the employee or of the employee’s spouse or common-law partner, parent of the employee’s spouse or common-law partner, current or former foster parent of the employee or of the employee’s spouse or common-law partner; current or former foster child, ward, or guardian of the employee or of the employee’s spouse or common-law partner; spouse or common-law partner of any of the above; any relative who resides with the employee and any other person whom the employee considers to be like a close relative (i.e., a friend or neighbour), whether or not they are related by blood, adoption, marriage, or common-law relationship.

In Nova Scotia, a family member is a spouse or common-law partner, child, child of the employee’s spouse or common-law partner, parent, parent’s spouse or common-law partner, sibling or step-sibling, grandparent, grandparent of the employee’s spouse or common-law partner, grandchild, grandchild of the employee’s spouse or common-law partner, grandchild’s spouse or common-law partner, in-laws, aunt, uncle, niece, nephew; aunt, uncle, niece, nephew of the employee’s spouse or common-law partner; current or former foster parent, foster child, ward, guardian; current or former foster parent, foster child, ward, guardian of the employee’s spouse or common-law partner; and a person whom the employee considers to be like a close relative (i.e., a friend or neighbour), whether or not they are related by blood, adoption, marriage or common-law relationship.

In Nunavut, a family member is an employee’s spouse or common-law partner, child, child of the employee’s spouse or common-law partner, parent, parent’s spouse or common-law partner, sibling or step-sibling, grandparent, grandparent of the employee’s spouse or common-law partner, grandchild, grandchild of the employee’s spouse or common-law partner, grandchild’s spouse or common-law partner, in-laws, aunt, uncle, niece, nephew; aunt, uncle, niece, nephew of the employee’s spouse or common-law partner; current or former foster parent, foster child, ward, guardian; current or former foster parent, foster child, ward, guardian of the employee’s spouse or common-law partner; and a person whom the employee considers to be like a close relative (i.e., a friend or neighbour), whether or not they are related by blood, adoption, marriage or common-law relationship.
neighbour), whether or not they are related by blood, adoption, marriage or common-law relationship.

Ontario provides for family medical leave and personal emergency leave. Family medical leave applies to the following individuals: an employee’s spouse, parent, step-parent, brother, sister, father-in-law, mother-in-law, brother-in-law, sister-in-law; a child, stepchild, foster child, foster parent, grandparent, grandchild, son-in-law, daughter-in-law, uncle, aunt, nephew, niece; the spouse of a grandchild, uncle, aunt, nephew, or niece; the employee’s spouse’s child, stepchild, foster child, foster parent, grandparent, grandchild, son-in-law, daughter-in-law, uncle, aunt, nephew, niece; and a person who considers the employee to be like a family member. With respect to a person who considers the employee to be like a family member, family medical leave applies only if the employee, on the employer’s request, provides the employer with a copy of the document provided to an agency or department of the Government of Canada for the purpose of claiming compassionate care benefits under the Employment Insurance Act, in which it is stated that the employee is considered to be like a family member.

Ontario’s personal emergency medical leave applies to the following individuals: an employee’s spouse, spouse of a child, brother, sister, parent, step-parent, foster parent, child, stepchild, foster child, grandparent, step-grandparent, grandchild, step-grandchild, a relative who is dependent on the employee for care or assistance; the employee’s spouse’s parent, step-parent, foster parent, child, stepchild, foster child, grandparent, step-grandparent, grandchild, and step-grandchild.

In Prince Edward Island, immediate family is defined as an employee’s spouse, common-law spouse, child, parent, brother, and sister.

Quebec provides for absences due to family responsibilities. Such absences apply to the following individuals, in relation to an employee: a child, child of the spouse, spouse, father, mother, brother, sister, and grandparent.

In Saskatchewan, immediate family is defined as the spouse, parent, grandparent, child, sister, or brother of an employee or of the employee’s spouse. A spouse is defined as the wife or husband of an employee, or a person with whom the employee cohabits as a spouse continuously for a period of at least 2 years, or in a relationship of some permanence if they are the parents of a child. Additional persons defined as “family member” in the Employment Insurance Regulations include an employee’s step-brother or step-sister; uncle, aunt, nephew, niece, son or daughter-in-law, grandchild of the employee or of the employee’s spouse or common-law partner; a current or former foster parent, foster child, ward, or
guardian of the employee or of the employee’s spouse or common-law partner; the spouse or common-law partner of any of the above; and any other person whom the employee considers to be like a close relative (i.e., a friend or neighbour), whether or not they are related by blood, adoption, marriage or common-law relationship.

In the Yukon, a family member is the employee’s spouse or common-law partner, child of the employee’s spouse or common-law partner, parent, parent’s spouse or common-law partner, sibling or step-sibling, grandparent, grandparent of the employee’s spouse or common-law partner, grandparent’s spouse or common-law partner, grandchild, grandchild of the employee’s spouse or common-law partner, grandchild’s spouse or common-law partner, in-laws, aunt, uncle, niece, nephew; aunt, uncle, niece, nephew of the employee’s spouse or common-law partner; current or former foster parent, foster child, ward, guardian; current or former foster parent, foster child, ward, guardian of the employee’s spouse or common-law partner; and a person whom the employee considers to be like a close relative (i.e., a friend or neighbour), whether or not they are related by blood, adoption, marriage or common-law relationship. Spouse means the person who, at the date in question, cohabited with the employee and (a) is legally married to the employee, or (b) has cohabited as a couple with the employee for at least 12 months immediately before the date in question.

Q: Are employees entitled to time off when they are sick?

Answer

All jurisdictions except Alberta, British Columbia, and Nunavut require employers to provide time off for illness. The provisions for sick leave in these jurisdictions are set out below.

In the federal jurisdiction an employer shall not dismiss or lay off an employee solely because of absence due to illness or injury if (a) the employee has completed 3 consecutive months of continuous employment with the employer, (b) the period of absence does not exceed 12 weeks or the period of treatment and rehabilitation at the expense of a workers’ compensation authority, and (c) the employee, if requested in writing by the employer within 15 days after returning to work, furnishes a doctor’s certificate confirming that the absence was legitimate.

All employers are required to have a wage replacement plan that provides wage replacement at a rate equivalent to the workers’ compensation payable in the employee’s province of residence. The employer must, where reasonably practicable,
return an employee to work after an absence due to a work-related illness or injury and may, where the employee is unable to perform all of the previous job functions, reassign the employee to a different position.

The employment of a person who has taken sick leave or is absent due to a work-related illness or injury is deemed to be continuous for the purpose of calculating pension and other employee benefits.

In Manitoba, an employee who has been employed for at least 30 days may take up to 3 days of unpaid leave each year in order to deal with his or her health or meet his or her family responsibilities in relation to a family member. An employee who wishes to take family responsibility leave must give the employer as much notice as is reasonable and practicable in the circumstances. The employer may require the employee to provide reasonable verification of the necessity of the leave. If an employee takes a part of a day as leave, the employer may count that day as a day of leave.

Manitoba also provides unpaid job-protected leave for employees who make living organ or tissue donations. An employee donates an organ when he or she undergoes a surgical procedure that involves the removal of an organ or tissue for the purpose of it being transplanted into another individual. In order for an employee to be eligible for organ donor leave, he or she must have been employed by the same employer for at least 30 days. The employee must provide his or her employer with written notice, as soon as is practicable, of the intention to take the leave, and he or she must provide a medical certificate stating the start and end dates of the period necessary to donate the organ and recover from the procedure. The leave may be extended beyond 13 weeks if the employee provides a medical certificate stating that he or she requires an additional specified period to recover from the organ donation. A leave may be extended more than once, but the total extension period must not exceed 13 weeks. An employee who wishes to extend a leave or end it early must provide written notice of his or her intention to do so at least one pay period in advance. The provisions regarding reinstatement on expiration of leave, continuous employment, vacation entitlement, and the prohibition against dismissal in relation to the leave are the same as those under maternity leave.

In New Brunswick, on completion of more than 90 days’ employment, an employee is entitled to a period of 5 days’ unpaid sick leave in 1 year. Where the employee requests a leave of 4 or more days, the employer can require the employee to provide a certificate from a medical practitioner.
In Newfoundland and Labrador, on completion of 30 days of continuous service with the same employer, an employee is entitled to a period of 7 days’ unpaid sick leave or family responsibility leave in 1 year. Where the employee requests a sick leave of 3 or more days, the employee must provide the employer with a certificate from a qualified medical practitioner. Where the employee requests family responsibility leave of 3 or more days, the employee must provide the employer with a written statement of the nature of the family responsibility. Any unused leave expires at the end of the year in which it was granted.

An employer is prohibited from dismissing an employee or giving notice of dismissal to an employee because of an absence by reason of bereavement leave or sick leave. Where an employee is dismissed contrary to this prohibition, the onus of proving that the reason for dismissal is unrelated to the employee’s absence from work on bereavement or sick leave rests with the employer.

In the Northwest Territories, every employee who has been employed by an employer for at least 30 days is entitled to up to 7 days unpaid sick leave during each 12 month period. The employee must be incapable of working due to illness or injury, and at the earliest reasonable opportunity must request the sick leave and advise the employer of the length or expected length of the leave. If the sick leave exceeds 3 consecutive days, the employer can require the employee to provide the employer with a medical certificate stating that the employee is incapable of working because of an illness or injury.

In Nova Scotia, the Labour Standards Code provides that an employee is entitled to a maximum of 3 days of unpaid sick leave per year. The leave can also be used to care for a sick child, parent, or family member, or for medical, dental, or other similar appointments during working hours.

In Ontario, an employer who regularly employs 50 or more workers must grant employees up to 10 days of unpaid emergency leave per year. The leave applies to an employee’s personal illness, injury, or medical emergency.

Ontario also provides unpaid job-protected leave for employees who donate certain organs to another individual. Organ donor leave is available to employees who are donating all or part of the following organs: kidney, liver, lung, pancreas and small bowel. Other organ and tissue donations may be added by regulation. In order to qualify for the leave, an employee must be employed by his or her employer for at least 13 weeks. All employees covered by the Employment Standards Act, 2000 are eligible for the leave, regardless of the size of their employer. An employee’s
entitlement to organ donor leave is in addition to any entitlement to personal emergency leave. Employees must give their employer at least 2 weeks’ written notice before starting the leave or, if such notice is not possible in the circumstances, provide notice as soon as possible. Where an employer so requests, an employee must provide a medical certificate confirming that the employee has undergone or will undergo surgery for the purpose of organ donation. An employee is entitled to organ donor leave for up to 13 weeks. Organ donor leave begins on the day that the surgery to donate the organ takes place. If needed, a donor may begin the leave at an earlier time as specified in a medical certificate. (The length of the leave to which a donor would be entitled would remain the same regardless of when it began.) The employee would be entitled to extend the leave for an additional period of up to 13 weeks (i.e., the total length of leave could be up to 26 weeks) if a medical certificate confirmed that the employee is not yet able to perform their duties. Organ donor leave ends 13 weeks after the leave began. If the employee extends the leave, the leave ends on the earlier of, the day specified in the most recent medical certificate or the day that is 26 weeks after the leave began. The employee may end his or her organ donor leave early by giving the employer at least 2 weeks’ written notice. The provisions regarding continuation of seniority and benefits, vacation entitlement, reinstatement on the expiration of the leave and the prohibitions against discipline or dismissal because of leave are the same as those covering pregnancy leave.

In Prince Edward Island, where an employee has been employed for 6 months or more, the employee is entitled to up to 3 days of unpaid sick leave in any 12-month period. Where the employee requests 3 consecutive days of sick leave, the employer may ask the employee to provide a medical certificate from a qualified medical practitioner, certifying that the employee is or was unable to work due to illness or injury. An employee must advise the employer of the anticipated duration of the leave.

Effective October 1, 2010, where an employee has been employed by the same employer for a continuous period of at least 5 years, the employee is also entitled to 1 day of paid sick leave during a 12-calendar-month period in addition to any unpaid leave that the employee is also entitled to. The employer shall pay the employee for the day of the leave at the employee’s regular rate of pay for a day of work.

In Quebec, an employee who has 3 months of uninterrupted service may be absent from work, without pay, for a period of not more than 26 weeks over a period of 12 months, due to sickness or accident. An employment injury covered under the Act respecting industrial accidents and occupational diseases does not qualify for
this leave as there are different provisions under occupational health and safety. The employee must advise the employer of his or her absence as soon as possible and state the reasons for the absence.

An employee with at least 3 months’ service may be absent from work without pay for up to 104 weeks if the employee suffers a serious bodily injury following a criminal offence. However, the employee is not entitled to take the leave if it may be inferred from the circumstances that the employee was probably a party to the criminal offence or probably contributed to the injury. In order to take the leave, the employee must advise the employer as soon as possible of the intended leave and the reasons for the leave. The employee must furnish documentation justifying the absence, if so requested by the employer. The employee may return to work intermittently or on a part-time basis if the employer so consents.

At the end of a sickness or accident leave, the employee must be reinstated to his or her former position with the same benefits, including the wages the employee would have been entitled to had he or she remained at work. If the job no longer exists when the employee returns, the employee must be extended whatever rights and privileges the employee would have been entitled to if he or she had been at work when the job was eliminated (i.e., termination pay). However an employer’s right to discipline or dismiss for cause is protected. An employer may dismiss, suspend, or transfer an employee if, in the circumstances, the consequences of the sickness or accident or the repetitive nature of the absences constitute good and sufficient cause.

In Saskatchewan, unpaid time off for illness or injury is indirectly provided for through the termination provisions in the province’s Labour Standards Act. An employer is prohibited from dismissing, suspending, laying-off, demoting, or disciplining an employee who has 13 weeks of uninterrupted service because of absence due to an illness or injury. However, an employer’s right to discipline or dismiss an employee for cause unrelated to injury or illness is protected. As well, the employer may dismiss, suspend, etc., an employee where it can be demonstrated that the employee has a record of chronic absenteeism and there is no reasonable expectation of improved attendance.

For the employee to be protected by this provision in Saskatchewan, the period of absence due to the illness or injury must not be more than 12 days in a calendar year.
If the employer makes a written request, the employee must provide the employer with a certificate of a duly qualified medical practitioner certifying that the employee was incapable of working due to the illness or injury.

In the Yukon, an employee is entitled to 1 day without pay for every month employed by that employer minus the number of days on which the employee has previously been absent due to illness or injury. However, an employee’s maximum net entitlement at any time shall not exceed 12 days. An employer may require the certificate of a qualified medical practitioner to confirm the entitlement.

Q: Can an employee take time off for events such as a paternity leave or family responsibility/emergency leave?

Answer

Only British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Quebec, and Saskatchewan require that employers provide time off for things such as caring for a sick family member or marriage. The definition of “family member” that applies in each jurisdiction is the same as the definition that applies for bereavement leave.

In British Columbia, an employee is entitled to up to 5 days of unpaid leave during each employment year to meet responsibilities related to the care, health, or education of a child in the employee’s care, or the care or health of any other member of the employee’s immediate family.

In Manitoba, an employee who has been employed for at least 30 days may take up to 3 days of unpaid leave each year in order to deal with his or her health or meet his or her family responsibilities in relation to a family member. An employee who wishes to take family responsibility leave must give the employer as much notice as is reasonable and practicable in the circumstances. The employer may require the employee to provide reasonable verification of the necessity of the leave. If an employee takes a part of a day as leave, the employer may count that day as a day of leave.

In New Brunswick, an employee is entitled to up to 3 days of unpaid leave during each employment year to meet responsibilities related to the care, health, or education of a person in a close family relationship with the employee.

In Newfoundland and Labrador, on completion of 30 days of continuous service with the same employer, an employee is entitled to a period of 7 days’ unpaid sick
leave or family responsibility leave in 1 year. Where the employee requests a sick leave of 3 or more days, the employee must provide the employer with a certificate from a qualified medical practitioner. Where the employee requests family responsibility leave of 3 or more days, the employee must provide the employer with a written statement of the nature of the family responsibility. Any unused leave expires at the end of the year in which it was granted.

In Nova Scotia, the Labour Standards Code provides that an employee is entitled to receive 3 days of unpaid sick leave per year. The leave can also be used to care for a sick child, parent, or family member, or for medical, dental, or other similar appointments during working hours. On such occasions, the employee must advise the employer of his or her absence as soon as possible.

In Ontario, an employer who regularly employs 50 or more employees must grant employees up to 10 days of unpaid emergency leave per year. The leave applies to an employee’s personal or family illness, injury, or medical emergency; the death of a family member; and to an urgent family matter or crisis.

In Quebec, the Act respecting labour standards provides for a number of other leaves of absence that are collectively referred to as “family or parental leave and absences”. In order to clarify who is entitled to these various leaves, a definition of “spouse” is provided. A spouse means either of two persons who (a) are married or in a civil union and cohabiting; (b) being of opposite sex or the same sex, are living together in a de facto union and are the father and mother of the same child; or (c) are of opposite sex or the same sex and have been living together in a de facto union for 1 year or more. De facto is translated as “in fact”, so this would mean “in an actual” or “in a real” union. Spouses are considered to be cohabiting despite the temporary absence of one of them — this is the case of spouses who are permanently hospitalized or incarcerated, and spouses who are temporarily absent for their work in another region or abroad. These employees are entitled to the same leaves as spouses who live together. The four leaves are discussed below:

- Family care leave: Employees may be absent, without pay, for 10 days per year to fulfill obligations relating to the care, health, or education of the employee’s child or the child of the employee’s spouse, or because of the state of health of the employee’s spouse, parent, sibling, or grandparent. The leave may be divided into days and, if the employer consents, into part days. The employee must advise the employer of his or her absence as soon as possible and take whatever reasonable steps he or she can to limit the leave itself and the length of the leave.
An employee who has 3 months of uninterrupted service may be absent, without pay, for a period of not more than 12 weeks over a period of 12 months where the employee must stay with his or her child, spouse, the child of the spouse, father, mother, brother, sister, or grandparent because of a serious illness or a serious accident.

An employee may also be absent from work without pay for up to 52 weeks if the employee’s child or spouse commits suicide or if the employee’s child disappears; or up to 104 weeks where the employee’s child suffers a serious bodily injury following a criminal offence, or the employee’s child or spouse dies as a result of a criminal offence. However, as above, the employee is not entitled to take the leave if it may be inferred that the employee or the victim was in some way responsible for the outcome.

An employee on leave of absence due to family care continues to be a member of any employer group insurance or pension plan, so long as any required payments (usually made by the employer) are made to the plans. At the end of a family care leave, the employee must be reinstated to his or her former position with the same benefits, including the wages the employee would have been entitled to had he or she remained at work. If the job no longer exists when the employee returns, the employee must be extended whatever rights and privileges the employee would have been entitled to if he or she had been at work when the job was eliminated (i.e., termination pay). If the employer makes dismissals or layoffs that would have included the employee had the employee remained at work, the employee retains the same rights with respect to a return to work as the other employees who were dismissed or laid off.

- Parental or adoption leave: An employee may be absent from work for 5 days at the birth or adoption of a child or where a pregnancy is terminated in or after the 20th week of pregnancy. Where the employee has 60 days of uninterrupted service, the first 2 days of the leave are to be with pay. The leave may be broken into separate days at the request of the employee, but it may not be taken more than 15 days after the child arrives at the employee’s residence. The employee must advise the employer of his or her absence as soon as possible.

- Paternity leave: Beginning January 1, 2006, an employee is entitled to a paternity leave of not more than 5 uninterrupted weeks without pay at the time of the birth of his child. The leave can be taken at any time, but cannot begin before the week in which the child is born, and must end not later than 52 weeks after the child’s birth. This paternity leave of 5 uninterrupted weeks is in addition to
the other leaves stipulated in the Act, notably the 5-day leave for the birth or adoption of a child, and the parental leave of 52 uninterrupted weeks. This leave cannot be transferred to the mother and cannot be shared between the father and the mother. An employee who intends to take paternity leave must provide his employer with not less than three weeks written notice. The notice must state the expected date of the leave and that of the return to work. However, the notice may be shorter if the birth of the child occurs before the expected date.

- Special occasion leave: An employee may be absent from work for 1 day with pay on his or her wedding day. An employee may also be absent from work, without pay, on the wedding day of his or her child, father, mother, brother, or sister, or of a child of his or her consort. The employee must advise the employer of his or her absence at least 1 week in advance.

In Saskatchewan, unpaid time off to care for seriously ill family members is indirectly provided for through the termination provisions in the province’s Labour Standards Act. An employer cannot dismiss, suspend, layoff, demote, or discipline an employee who has 13 weeks of uninterrupted service because of absence due to the illness or injury of a member of the employee’s immediate family who is dependent on the employee. For the employee to be protected by this provision, the period of absence due to the illness or injury of the family member must not be more than 12 weeks in any 52-week period. Immediate family is defined as the spouse, parent, grandparent, child, sister, or brother of an employee or the employee’s spouse. Spouse includes common-law spouse, and is defined as the wife or husband of an employee, or a person with whom the employee cohabits as a spouse continuously for a period of at least 2 years, or in a relationship of some permanence if they are the parents of a child.

Q: **How much time off is allowed for voting in federal elections?**

**Answer**

The Canada Elections Act provides that employees who qualify as electors in a federal election are entitled to 3 consecutive hours (during which the polls are open) to vote. If the hours of work do not allow for this, an employee must be granted enough time off with no deductions in wages to make up the 3 consecutive hours.

It is the employer’s obligation to ensure that an employee has 3 consecutive hours in which to vote. The additional time necessary for voting may be granted at the employer’s convenience and need be extended only to eligible voters.
Q: How much time off is allowed for voting in provincial or territorial elections?

Answer

All provinces and territories require that employees be given time off to vote in provincial or territorial elections.

Prince Edward Island requires that employees be granted 1 hour to vote. British Columbia, Quebec, and the Yukon require that employees be granted 4 hours to vote. All the other provinces and territories grant employees 3 hours to vote.

In all of these jurisdictions, if the hours of employment do not allow time off during the hours the polls are open, the employer must grant sufficient time off work to provide the required consecutive hours. Employers may not make any deduction from wages or impose any penalty on employees due to an absence from work during the time allowed to vote. Employers who violate these requirements are subject to penalties.

Q: Are employees entitled to time off to vote in municipal elections?

Answer

Only Alberta, New Brunswick, Ontario, Quebec, and the Yukon have enacted legislation allowing time off for voting in municipal elections. In Alberta, New Brunswick, and Ontario, employees are entitled to 3 consecutive hours for the purpose of voting. In Quebec and the Yukon, employees are entitled to 4 consecutive hours for the purpose of voting.

In these five jurisdictions, if the hours of employment do not allow time off during the hours the polls are open, the employer must grant sufficient time off work to provide the required consecutive hours. Employers may not make any deduction from wages or impose any penalty on employees due to an absence from work during the time allowed to vote. Employers who violate these requirements are subject to penalties.
Q: If an employee is called for jury duty, must the employer grant time off?

Answer

All jurisdictions except Nunavut and the Yukon have enacted legislation requiring employers to grant employees time off if they are summoned for jury duty.

In New Brunswick, Nova Scotia, and the Northwest Territories, an employee is entitled to the same unpaid leave of absence as when an employee is required by subpoena or summons to appear as a witness in court. In these three jurisdictions, this is known as “court leave”.

Only Newfoundland and Labrador requires that the time off be paid at the employee’s regular wage. All the other jurisdictions either make no statement regarding pay or state that the leave may be either paid or unpaid.

Q: What legislation covers maternity, parental, and compassionate care leaves?

Answer

Employers providing information to their employees should be aware that there are two separate pieces of legislation that need to be considered when dealing with maternity, parental, and compassionate care leaves. These are the federal Employment Insurance Act, which governs the payment of EI benefits for the leave, and the provincial or territorial legislation for employment or labour standards. This is where confusion can arise, since most employees are unaware two pieces of legislation exist.

Provincial or territorial legislation (e.g., Alberta’s Employment Standards Code) dictates how much unpaid time a qualifying employee can take off from work for maternity, parental, and compassionate care leave.

Federal legislation — the Employment Insurance Act — dictates the amount of EI benefits that are available and how long maternity, parental, and compassionate care EI benefits will be paid.
Q: Can an employee receive EI benefits while on unpaid maternity, parental, or compassionate care leave?

Answer

In addition to providing benefits for persons who lose their jobs, Employment Insurance provides special benefits for persons who are unable to work because of sickness, pregnancy, new child care responsibilities, or compassionate care duties. Because eligibility requirements and benefit levels for Employment Insurance change frequently, it is advisable to check entitlement qualifications with the federal Human Resources and Skills Development office.

Q: Can any employee claim maternity, parental, or compassionate care benefits from the Employment Insurance Commission?

Answer

No. In order to be eligible for any of these special programs (i.e., maternity, parental, or compassionate care benefits), an employee must be a “major attachment claimant”. This means that the employee needs to have had a “major attachment” to the workforce and not just have been working a few weeks.

A major attachment claimant is an employee who has worked in insurable employment for at least 600 hours over the last qualifying period. In most cases, the qualifying period is 52 weeks.

Q: What kinds of Employment Insurance benefits will an employee get while on maternity leave?

Answer

Employment Insurance provides benefits to women who cease working because of pregnancy. Mothers are eligible for benefits beginning 8 weeks before the week in which delivery is expected or the week it occurs, whichever is earlier. Eligibility for benefits ends 17 weeks after the week delivery is expected or the week in which it occurs, whichever is earlier. Where the child is hospitalized after birth, the benefit period is extended during the hospitalization for a period of up to 52 weeks.

The maximum number of weeks for which benefits may be paid is 15 (17 weeks minus the 2-week waiting period).
Q: How are Employment Insurance benefits affected if a new child is hospitalized after birth?

Answer

If a child is hospitalized after birth, the benefit period in which maternity benefits may be paid may be extended by the period of time the child is hospitalized. However, the benefit period will only be extended to a maximum of 52 weeks.

Parental benefits do not commence until the child arrives in the home.

Q: What kinds of Employment Insurance benefits will an employee get while on parental leave?

Answer

Parents can receive Employment Insurance benefits to remain at home to care for a new child or children.

Parental benefits for natural parents are payable during the benefit period, which begins with the child’s birth date and ends 52 weeks following the child’s birth.

Parental benefits for adoptive parents are payable during the benefit period, which starts with the arrival of the adopted child into the claimant’s home and ends 52 weeks after the date the child arrives home.

The maximum number of weeks for which a benefit may be paid in the benefit period is 35.

Q: Can an employee claim both maternity and parental leave benefits?

Answer

An employee can receive both maternity and parental benefits within one benefit period. The maximum allowable combined claim is 50 weeks. An employee can also receive maternity and parental benefits in combination with regular benefits (if, for example, the company closed and the employee was laid off during the maternity leave), so long as the total benefits do not exceed 50 weeks or the maximum regular benefit entitlement, whichever is greater. For example, the employee could receive 10 weeks of regular benefits, 15 weeks of maternity benefits, and 25 weeks of parental benefits.
Q: Can either parent obtain Employment Insurance benefits during parental leave?

Answer

Employment Insurance parental benefits are available to either parent. As well, parents can share the benefits between them if they wish. If the benefits are split, only one 2-week waiting period must be served by one of the claimants. A mother who has served the 2-week waiting period before receiving maternity benefits would not have to serve another waiting period for parental benefits.

Q: What kinds of Employment Insurance benefits will an employee get while on compassionate care leave?

Answer

Benefits are paid to persons who have to be away from work temporarily to provide care or support to a family member who is gravely ill with a significant risk of death within 26 weeks. Providing care or support to a family member means providing psychological or emotional support, arranging for care by a third party, or directly providing or participating in the care.

When requesting compassionate care benefits, a medical certificate must be provided as proof that the ill family member needs care or support and is at risk of dying within 26 weeks. A maximum of 6 weeks of compassionate care benefits is payable within the 26-week period.

A family member is defined as your child or the child of your spouse or common-law partner; your spouse or common-law partner; your parent or step-parent; the common-law partner of your father or mother; your brother or sister; your grandparent or grandchild; your in-law; your aunt, uncle, niece, or nephew; your foster parent or ward; and a person who considers you to be like family.

The 26-week benefit period starts with the earlier of:

- the week the doctor signs the medical certificate;
- the week the doctor examines the gravely ill family member; or
- the week the family member became gravely ill, if the doctor can determine that date (e.g., the date of the test results).
LEAVES OF ABSENCE

The benefits end when:

- 6 weeks of compassionate care benefits have been paid;
- the gravely ill family member dies or no longer requires care or support (benefits are paid to the end of the week); or
- the 26-week period has expired.

Q: Can more than one member of the family claim compassionate care Employment Insurance benefits?

Answer

The 6 weeks of compassionate care benefits may be shared by more than one member of the family. Each family member must apply and qualify for these benefits. Where the benefits are shared, only one 2-week waiting period has to be served by one family member.

Q: What is the EI benefit payment during maternity, parental, or compassionate care leave?

Answer

While an employee is unemployed due to pregnancy, parenthood, or compassionate care duties, the employee is entitled to receive 55% of his or her average weekly insurable earnings, up to a maximum of $457 per week (2010 rate).

Q: Can an employee work while collecting maternity, parental, or compassionate care EI benefits?

Answer

While a claimant is receiving maternity benefits, any work earnings are deducted from the benefit paid.

However, persons claiming parental or compassionate care benefits can work and collect benefits (as is the case with regular EI benefits). Claimants are permitted to earn either $50 per week or 25% of their weekly benefit rate, whichever is higher. Any earnings above these allowable amounts are deducted from that week’s parental or compassionate care benefit.
Q: What happens if an employee gets sick while collecting maternity or parental benefits?

Answer

Employment Insurance also provides sick benefits for “major attachment claimants” for a period of up to 15 weeks. Sick benefits can be combined with maternity or parental benefits up to a maximum of 50 weeks (i.e., an employee might claim for 7 weeks of sick benefits, 15 weeks of maternity benefits, and 28 weeks of parental benefits).

Q: What happens if a member of the employee’s family gets seriously ill while the employee is collecting maternity or parental benefits?

Answer

Employment Insurance also provides compassionate care benefits for “major attachment claimants” for a period of up to 6 weeks. Compassionate care benefits can be combined with maternity or parental benefits up to a maximum of 56 weeks (i.e., 6 weeks compassionate care benefits, 15 weeks of maternity benefits, and 35 weeks of parental benefits).

Q: How does an employee apply for maternity, parental, or compassionate care EI benefits?

Answer

A claim can be made at the local Human Resources and Skills Development office. The claimant must obtain a Record of Employment from the employer in order for the claim to be processed. Once the claimant has applied for benefits, there is a 2-week waiting period while the claim is processed.

It is therefore important for an employee to make the claim as soon as the leave begins.
Q: What rights do employees on disability leave have when returning to work?

Answer

The right to return to work for an employee on disability leave only exists if the employee can fulfill the essential duties of the job (after the employer has provided accommodation short of undue hardship). If the employee cannot fulfill the essential duties of the job despite the employer’s effort to accommodate, there is no right to return to work.

Accommodating a person who has been absent from work may raise unique issues. People who return to work after an absence related to a prohibited ground of discrimination are protected by human rights legislation. Returning employees generally have the right to return to the jobs they held before their absences. Both employers and unions must co-operate in accommodating employees who are returning to work; the workplace health and safety committee may be a good place to turn for solutions on how to accommodate a returning employee.

On a return to work, efforts should first be made to accommodate the employee in the job he or she held prior to the absence. In Ontario, if an employer cannot place an employee back in his or her previously held position (due to undue hardship), the Ontario Human Rights Commission has stated that a returning employee can be assigned to “alternate work”. Alternate work can mean different work that does not involve the same skills, responsibilities, or compensation. Alternate work can be temporary (pending the returning employee’s full recovery) or it can be permanent. Employers should be careful in attempts to place employees in alternate work as too much difference between the previously held job and the alternate work could lead to claims of constructive dismissal.

Q: How long is an employer required to accommodate a disability-related absence?

Answer

Federal and provincial legislation do not set out a fixed rule or period of time that an employee with a disability may be absent before the employer has met the duty to accommodate. However, the duty to accommodate does not necessarily guarantee the employee a limitless right to return to work. On the other hand, a return-to-work program that relies on arbitrarily selected cut-offs or that requires an inflexible date of return may be challenged as a violation of human rights legislation. Ultimately,
the test of undue hardship is the relevant standard for assessing return-to-work programs.

The right to return to work depends on the employee’s ability to perform the essential duties of the job, the unique circumstances of every absence, the nature of the employee’s condition, and the circumstances in the workplace. Also important is the predictability of the absence with regard to when it will end, if it may recur, and how frequent it is. The employee’s prognosis and length of absence are also important considerations. It is more likely that the duty to accommodate will continue if the employee has a better prognosis, regardless of the length of absence.

The following are examples of when an employee’s extended absence may be considered undue hardship for the employer:

- The employer is unable to attract or retain a qualified person for the position because the position is temporary (due to the pending return of the absent employee).
- The cost of paying an employee’s benefits while he or she is absent may become too high, and/or group insurance costs increase due to the absence.
- The employee’s skills may become outdated and he or she may no longer be able to perform the essential duties of the job.
- A new business focus or approach may result in the elimination of the employee’s job, and therefore the employee’s skills are no longer needed.

Q: Can an employee take time off for emergencies declared by a government body?

Answer

Only Alberta, Nova Scotia, and Ontario provide for time off for a government-declared emergency.

In Alberta, people who are complying with an order or certificate issued under the Public Health Act during a public health emergency cannot be terminated from their employment just because of their compliance. During a pandemic, this protection could also be extended to people who are ill with influenza as well as persons caring for sick family members.
Under the Alberta *Public Health Act*, where, on the advice of the Chief Medical Officer, the Lieutenant Governor in Council is satisfied that a public health emergency exists or may exist, or there is a significant likelihood of pandemic influenza, the Lieutenant Governor in Council may make an order declaring a state of public health emergency relating to all or any part of Alberta. As well, where the public emergency relates to communicable disease in epidemic form, the chief medical officer can issue isolation orders or certificates requiring individuals to submit to examination and treatment.

An Alberta public health emergency order lapses, unless continued by a resolution of the Legislative Assembly, at the earlier of the following: after 30 days for a general public health emergency, after 90 days in the case of pandemic influenza, and when the order is terminated by the Lieutenant Governor in Council.

During the state of public health emergency in Alberta, the Minister of Health or the regional health authority may do any or all of the following for the purpose of preventing, combating or alleviating the effects of the public health emergency and protecting the public health:

(a) acquire or use any real or personal property;

(b) authorize or require any qualified person to render aid of a type the person is qualified to provide;

(c) authorize the conscription of persons needed to meet an emergency;

(d) authorize the entry into any building or on any land, without warrant, by any person; and

(e) provide for the distribution of essential health and medical supplies and provide, maintain, and co-ordinate the delivery of health services.

As well, where the order is in regard to pandemic influenza in Alberta, the Chief Medical Officer may, during the state of public health emergency and subject to any terms and conditions, authorize the absence from employment of any persons who are ill with pandemic influenza, or who are caring for a family member ill with pandemic influenza.

In Alberta, no employer shall terminate, restrict, or in any way discriminate against an employee for an absence from employment that is in respect of and occurs during a declared public health emergency where:
the employee is the subject of a certificate requiring attendance for examination/treatment;

the employee is the subject of an isolation order;

the employee has been conscripted to perform duties needed to meet the emergency; or

in the case of a pandemic, the employee’s absence has been authorized due to his or her personal illness or because the employee is caring for family members who are ill.

In Nova Scotia, effective November 5, 2009, an employee is entitled to an unpaid leave of absence from work if the employee will not be performing his or her employment duties as a result of public emergencies declared under Nova Scotia’s Emergency Management Act, Canada’s Emergencies Act, under an order or directive of a medical officer of health pursuant to the Health Protection Act, or by government regulation. Under the Emergency Management Act, a municipality may declare a state of local emergency, which would qualify as a public emergency.

This leave only applies when a government agency declares an emergency related to situations such as a weather emergency, a natural disaster, a public health emergency, or other event. The leave does not apply to personal emergencies or illnesses that are not part of a declared emergency.

Emergency leave in Nova Scotia allows employees to take an unpaid leave during a natural disaster or public health risk in order to attend to their own needs or those of a family member where the employee is the only person reasonably able under the circumstances to provide the family member with the required care or assistance. An employee is entitled to an unpaid leave of absence for as long as the employee cannot perform the duties of the employee’s position because of the emergency.

An employee shall give the employer as much notice as is reasonably practicable of the employee’s intention to take an emergency leave or, where required to leave before notice can be provided, the employee shall advise the employer of the emergency leave as soon as possible after the leave begins. Where the employer requests, an employee must provide the employer with evidence (that is reasonable in the circumstances) that the employee is entitled to the leave; such evidence must be provided within a reasonable time subject to the circumstances.
Emergency leave in Nova Scotia continues for as long as the emergency continues and the emergency prevents the employee from performing the employee’s work duties. The entitlement ends on the day the emergency is terminated or the emergency no longer prevents the employee from performing his or her work duties. Where an emergency is made retroactive under a declaration, an employee who does not perform the duties of his or her position because of the declared emergency is deemed to have been on leave beginning on the first day that the employee did not perform the duties of the position on or after the date to which the declared emergency was made retroactive.

The emergency leave rights and responsibilities of employees and employers are similar to those with respect to parental or maternity leaves. At the end of an unpaid emergency leave, an employer must permit an employee to resume employment in his or her former position or, where that position is not available, to a comparable position at not less than the same wage and benefits and with no loss of seniority or benefits accrued up to the commencement of the leave. If the employer’s operations were suspended or discontinued while the employee was on emergency leave and have not resumed when the leave ends, the employer must comply with the notice of termination provisions and, when the operations resume, must reinstate the employee in accordance with the established seniority system, if any.

Also, as with parental and maternity leaves, where an employee is denied his or her right to an emergency leave of absence or where any of the provisions with respect to return to work, seniority, or benefits are violated, the employee may make a complaint to the Director of Employment Standards. If a violation is found, the Director may require that the employer do any act to comply with the Act, or compensate or rectify any injury. The Director’s powers include the power to reinstate the employee and order financial compensation.

In Nova Scotia, the definition of “family member” for the purposes of emergency leave is the same as that with respect to compassionate care leave, which, in relation to the employee, is as follows: spouse or common-law partner, parent, spouse or common-law partner of a parent, child, child of the spouse or common-law partner, sibling, grandparent, grandchild, in-law, aunt, uncle, niece, nephew, foster parent, ward, guardian, or a gravely ill person who considers the employee to be like a family member.

In Ontario, an employee is entitled to an unpaid leave of absence from work if he or she will not be performing his or her employment duties as a result of an emergency declared under the new *Emergency Management and Civil Protection*
EMPLOYMENT STANDARDS

Act, where the employee is the subject of an order under that Act or under the Health Protection and Promotion Act, or where the employee is needed to provide assistance to a family member.

The powers under the new Act and the new employment standards provisions are in response to previous Ontario situations such as SARS and the 2003 Ontario power blackout.

The Emergency Management and Civil Protection Act gives the Ontario Premier and/or the provincial cabinet the power to do the following:

- order the evacuation of an area, control travel into an area, and requisition property;
- stop price gouging;
- authorize those who would not otherwise be eligible to do so, to perform certain duties (e.g., allow doctors from other jurisdictions to work in Ontario for the duration of the declared provincial emergency);
- establish facilities for the care, welfare, safety, and shelter of individuals, including emergency shelters and hospitals;
- close any place, whether public or private, including any business, office, school, hospital, or other establishment or institution; and
- authorize facilities, such as electrical generating facilities, to operate as necessary to address the emergency.

The Act can be used only during defined provincial emergencies and does not relate to everyday occurrences in the province. The Act includes strict guidelines for determining whether or not a provincial emergency should be declared.

In Ontario, there is also a maximum 14-day limit for the initial declaration, and the Premier must file a report on the emergency in the legislature within 120 days of the declaration being lifted. The lieutenant governor in council may by order extend an emergency before it is terminated for one further period of no more than 14 days, and the legislative assembly, on the recommendation of the Premier, may by resolution extend the period of an emergency for additional periods of no more than 28 days. As well, even though an emergency may be terminated, the lieutenant governor in council may by order extend the effective period of an order for periods of no more than 14 days if the extension of the order is necessary to deal with the effects of
the emergency. The Act also provides that the legislative assembly may disallow a cabinet declaration of emergency.

In Ontario, the employee must advise the employer that he or she is taking the leave and, if the employee begins the leave before advising the employer, the employee must advise the employer of the leave as soon as possible after beginning it. If required by the employer, the employee must provide evidence of entitlement to the leave. The leave would continue so long as the emergency conditions (described above) apply. Should the emergency be extended for a further period, the employee’s entitlement to unpaid declared emergency leave would also continue.

The definition of family member in Ontario is the same as for other forms of leave.

Entitlement to the unpaid emergency leave during a declared emergency in Ontario would be in addition to the regular 10 days’ unpaid personal emergency leave provided under the Employment Standards Act, 2000 in relation to personal illness, injury, or medical emergency; or the death, illness, injury, medical emergency, or urgent matter concerning a family member set out in family emergency/illness leave and compassionate care leave.

Q: Are employees entitled to time off for Canadian Forces reservist duties?

Answer

Every jurisdiction but the Northwest Territories and Nunavut requires employers to grant leave to employees who are reservists with the Canadian Forces so that they may fulfill their obligations with the army. The provisions in these jurisdictions are set out below.

In the federal jurisdiction, reservists who have been employed with the same employer in civilian employment for at least 6 consecutive months have the right to an unpaid leave to take part in training; active duty in the reserves; or treatment, recovery, or rehabilitation in respect of a physical or mental health problem that results from service in such an operation or activity. An employee is not entitled to a leave of absence if it would adversely affect public health or safety or would cause undue hardship to the employer if the employee were to take leave (decided by the Minister).
The employee must provide the employer with at least 4 weeks’ written notice before the day on which the leave is to begin and inform the employer of the length of the leave. If there is a valid reason for not providing the required notice, the employee must notify the employer as soon as practicable. If the employee does not notify the employer at least 4 weeks before the day on which the leave is to end, the employer may postpone the employee’s return to work for a period of up to 4 weeks after the day on which the employee informs the employer of the end date of the leave.

At the end of the leave, the employee is to be reinstated to the position held before the leave or, where this is not possible, to a comparable position with the same wages and benefits and in the same location. If an employee is not able to perform the functions of the position that he or she held before the leave (or those of a comparable position) with the same wages and benefits and in the same location, the employer may assign the employee to a position with different terms or conditions of employment.

The employment of a person on reservist leave is considered continuous while on leave. Therefore, not only does seniority continue to accumulate during the leave, but the seniority benefits of an employee who takes reservist leave accumulate during the entire period of the leave. As a result, the period of reservist leave counts as part of seniority for determining eligibility and calculating entitlements to a number of leave and benefit provisions, including maternity leave, bereavement leave, sick leave, severance pay and vacation amongst others.

No employer may dismiss, suspend, lay off, demote, or discipline an employee because he or she is a member of the reserve force or intends to take or has taken a reservist leave. In a decision to promote or train the employee, the employer cannot take into account that the employee is a member of the reserve force or intends to take or has taken a leave of absence. No person may refuse to employ a person because he or she is a member of the reserve force.

In Alberta, an employee who has at least 26 consecutive weeks of employment with his or her employer is entitled to unpaid reservist leave. The employee must provide the employer with at least 4 weeks’ written notice of the date the leave is to begin. The notice must also give the anticipated date of return, if with respect to an operation, and the actual date of return, if with respect to training. In circumstances of urgent deployment, where it is not possible to provide 4 weeks’ notice, the employee must advise the employer, in writing, of the reservist leave as soon as is reasonable and practicable. Unless there is a valid reason for not doing so, an
employee who takes reservist leave must advise the employer, in writing, of any change in the length of the leave as soon as is reasonable and practicable in the circumstances. In addition, where the employer requests proof that an employee is entitled to reservist leave, the employee must provide the employer with a document from the employee’s commanding officer specifying that the employee is taking or has taken part in an operation or training activity, the day on which the leave is to start or started, and the estimated or actual length of the leave.

The length of the reservist leave is as long as the operation or training applies to the employee. However, a specific length of leave may be set set later by regulation.

If a reservist is on leave for Canadian Forces training and has provided a return to work date in his or her notice, the employee is not required to give any additional written notice of his or her return.

If a reservist who is on leave for a Canadian Forces operation is on reservist leave for more than 4 weeks, the employee must give at least 4 weeks’ written notice of the day he or she intends to resume work. However, if a reservist on leave for an operation is on leave for 4 weeks or less, he or she must give the employer written notice of the date of his or her return to work as soon as possible before resuming work.

If an employee fails to comply with these resumption of employment provisions, the employer may postpone the employee’s return to work up to 4 weeks after the day the employee has indicated that he or she intended to resume work. During the period of postponement, the employee is deemed to continue to be on reservist leave.

Where an employee resumes work, the employer must reinstate the employee in the position occupied when the reservist leave started, or provide the employee with alternative work of a comparable nature at not less than the earnings and other benefits that had accrued to the employee when the reservist leave started.

If an employee is on reservist leave on the day by which his or her vacation must be used, any unused part of the vacation must be used immediately after the leave expires unless the employer and employee agree to a later date.

An employee who does not wish to resume employment after reservist leave must give the employer at least 4 weeks’ written notice of his or her intention to terminate employment.
An employer can not terminate or lay off an employee who has started reservist leave.

Where an employer suspends or discontinues the business, or part of the business, while the employee is on reservist leave and the employer has not resumed operations when the leave ends, the employer must, if the operation is subsequently resumed within 52 weeks following the end of the leave, reinstate the employee in the position occupied at the time the leave started, at not less than the earnings and other benefits that had accrued to the employee, or provide the employee with alternative work in accordance with an established seniority system or practice of the employer in force at the time the employee’s leave started, with no loss of seniority or other benefits accrued to the employee.

In British Columbia, an employee who is a member of the Canadian Forces reserves and who is required to be absent from his or her employment, would be entitled, upon providing notice, to an unpaid leave of absence for the relevant period of service. Notice of intent to take reservist leave must be given to the employer at least 4 weeks before the date that the leave will begin, or if the employee receives notice of the deployment less than 4 weeks before it will begin, as soon as practicable after the employee receives the notice. Subject to the regulations, the period of leave for the purpose of service is the period necessary to accommodate the period of service.

The notice requesting leave must be in writing and include the date the employee proposes to begin leave and the date the employee proposes to return to work.

If circumstances require leave to be extended beyond the original date specified for return to work, the employee must notify the employer of the need for the extended leave at least 4 weeks before the original date specified by the employee, or if the employee receives notice of the extended deployment less than 4 weeks before it will begin, as soon as practicable after the employee receives the notice. The notice must include the new date the employee proposes to return to work.

If an employee who is a reservist proposes to return to work earlier than specified in the request for leave, the employee must notify the employer at least 1 week before the date the employee proposes to return to work.

An employer may require an employee who takes leave under this section to provide further information respecting the leave.
In **Manitoba**, a reservist who has been employed with the same employer in civilian employment for at least 7 consecutive months have the right, upon providing reasonable written notice to his or her employer, to an unpaid leave to participate in either training or active duty in the reserves. Subject to the regulations, the period of leave for the purpose of service is the period necessary to accommodate the period of service. The employer may require the employee to provide reasonable verification of the necessity of the leave, including a certificate from an official with the reserves stating that the employee is a member of the reserves and is required for service; and if possible, the expected start and end dates for the period of service. An employee on leave under these provisions would also be required to provide his or her employer with written notice of the expected date of return to work. The employer would have the ability to defer the employee’s return to work by up to 2 weeks or one pay period, whichever is longer, after receiving the notice.

In **New Brunswick**, the civilian jobs that reservists leave behind when they are serving their country either at home or overseas are protected. A reservist may be away on unpaid leave for up to 18 months and return to his or her previous position or to a position at a similar level. In order to meet eligibility requirements, the applicant must have at least 6 months of employment with his or her employer and provide the employer with the notice of the length of the leave. In addition, documentation from the Canadian Forces and from the employee requiring leave must be provided upon the request of the employer.

In **Newfoundland and Labrador**, the jobs of military reservists who volunteer and are deployed, or are training for deployment for foreign or domestic operations are protected. Reservists are also eligible for leave to receive any necessary treatment or rehabilitation resulting from deployment.

The employee must have at least 6 months of employment with the employer and provide the employer written notice of the leave 60 days prior to deployment. The required notice shall give the start and anticipated end date for the leave. Where, due to circumstances beyond the control of the employee, he or she cannot comply with the required notice period, the employee shall provide as much notice as is reasonable in the circumstances. An employer may require the employee to provide a certificate from an official with the reserves stating that the employee is a member of the reserves and is required for service.

The period of leave is the period necessary to accommodate the period of service and includes an extension of the service beyond the date given in the written request for leave. An employee is not entitled to a second or additional period of
unpaid reservist leave unless at least 1 year has elapsed since the date the employee returned to work from the most recent reservist leave.

Where the date on which his or her service is anticipated to end changes, the employee shall notify the employer as soon as practicable and shall, within at least 2 weeks or one pay period, whichever is longer, provide written notice to the employer of the new end date. Where an employee fails to give the written notice of the change in return to work date, his or her employer may defer the date of re-employment for up to 2 weeks or one pay period, whichever is longer, after the day on which the employee informs the employer of the new end date.

In recognition of the needs of employers, provision is made for a right to refuse the leave request in those circumstances where the employer can demonstrate that the leave will result in undue hardship that jeopardizes the employer’s ability to continue to function. An employer who has received from an employee a request for reservist leave may apply to the director for an exemption from the requirement to grant the leave. Where the director determines that the reservist leave would cause undue hardship to the employer if his or her employee were to take leave, the employee is not entitled to the leave. The decision of the director is final and binding on the employer and employee to whom it applies.

When the leave ends, the employee must be permitted to his or her employment on terms and conditions that are not less beneficial than those that existed before the leave began. Unless the employer and the employee otherwise agree, a period of leave does not count towards the application of the rights, benefits, and privileges (e.g., vacation accrual, entitlement to notice of termination). However, employment is deemed continuous and therefore there is no loss of seniority, benefits, wages, etc., accrued up to the date the leave began and going forward from the date of return to work.

In Nova Scotia, an employee who has been employed by an employer for at least 1 year and is required to be absent from employment for the purpose of service, is entitled, upon providing notice, to an unpaid leave of absence for a period of service not longer than 18 months in a 3-year period. An employee who intends to take such a leave must provide the employer with reasonable notice of his or her intention before taking the leave and, before the employee returns to work after the unpaid leave, he or she must give reasonable notice to the employer of his or her intention to return to work. The employer may request that notice be in writing. “Reasonable notice” means at least 90 days’ notice, except in an emergency situation, in which case reasonable notice is as much notice as is reasonably practical. The
employee’s notice of intention to take an unpaid leave of absence must include the date that the leave will begin and the anticipated date of return to work. The employer is entitled to request a certificate from an official with the reserves that states that the employee is a member of the reserves and is required for service, and, if possible, specifies the anticipated dates for the period of service. The start date for a period of service must be at least 1 year after the date the employee returned to work from a leave for a previous period of service, and an employee must return to work no later than 4 weeks after the date his or her period of service expires.

In Ontario, to qualify for the leave, a reservist must have worked for his or her employer for at least 6 consecutive months. All employers covered by the Employment Standards Act, 2000, regardless of size, are required to provide the leave to eligible employees. Reservists are entitled to a leave period necessary to engage in the operation they are deployed to. In the case of international operations, this includes any pre-deployment or post-deployment activities required by the Canadian Forces. The reservist is required to provide reasonable notice, in writing, before beginning and ending the leave, and may be required to provide proof of service if requested by the employer. An employer may postpone a reservist’s reinstatement for 2 weeks or one pay period. The employer does not have to pay the reservist while he or she is on leave and is not required to continue any pension or benefit plan contributions for the duration of the leave. However, if the employer chooses to postpone the reservist’s return date, the employer is required to make benefit contributions during this additional period of time. Seniority and length of service credits continue to accumulate during the leave. Upon the reservist’s return from leave, the employer is required to reinstate the reservist to the same position if it still exists, or to a comparable position if it does not.

In Prince Edward Island, an employee who has been employed by an employer for at least 6 consecutive months and is required to be absent from employment for the purpose of service, is entitled, upon providing notice, to an unpaid leave of absence equal to the required period of service with the reserves. An employee who intends to take a leave of absence for service must provide the employer with written notice of his or her intention before taking the unpaid leave. The employee must provide this notice as soon as is reasonable and practical in the circumstances, and the notice of intention to take leave must include the anticipated dates the leave will begin and end. The employer is entitled to request a certificate from an official with the reserves that states that the employee is a member of the reserves and is required for service, and, if possible, specifies the anticipated dates for the period of service. An employee on leave under these provisions is also
required to provide his or her employer with written notice of the expected date of return to work. The employer may defer the employee’s return to work by up to 2 weeks or one pay period, whichever is longer, after receiving the notice.

In Quebec, employees who are members of the Canadian Forces reserves are entitled to take unpaid leave for service in the reserves. An employee who has been employed by an employer for at least 12 consecutive months and is required to be absent from employment for the purpose of service is entitled, upon providing notice, to an unpaid leave of absence of up to 18 months. An employee who is a reservist may also take leave to intervene in Canada in a major disaster or in an emergency situation.

An employee is not entitled to leave if his or her absence could endanger the life, health, or security of other employees or the population, or cause the destruction or serious deterioration of certain property or in a case of superior force, or if the absence is inconsistent with the employee’s professional code of ethics.

An employee who intends to take a leave of absence for service must provide the employer written notice of his or her intention before taking the unpaid leave. The employee must provide this notice at least 4 weeks prior to the date of the leave. The notice must also include the reason for the leave and its duration. In the case of serious cause, the notice may be shorter and the employee must notify the employer as soon as possible. On request, an employee must provide the employer with any document justifying the employee’s absence.

An employee who is absent for a period greater than 12 weeks may not be absent again for one of those reasons before the expiry of a period of 12 months from the date of the return to work.

An employee on leave may return to work before the expected date after giving the employer written notice of not less than 3 weeks. At the end of the leave, the employee must be reinstated to his or her former position with the same benefits, including the wages the employee would have been entitled to had he or she remained at work.

In Saskatchewan, an employee who has volunteered for service and is required to be absent from his or her employment would be entitled, upon providing notice, to an unpaid leave of absence. Notice of intent to take reservist leave must be given to the employer at least 6 weeks before the date the leave will begin, or at any reasonable time before the leave begins if an official with the reserves informs the employee that he or she is required for service because of an emergency and the
employee advises his or her employer of this. On completion of the leave and receipt of the proper notice, the employer must allow the employee to continue employment without loss of any privilege connected with seniority (seniority being determined at the date the unpaid leave began). Employers convicted of contravening these provisions could be compelled to either reinstate the employee under his or her former terms and conditions of employment, or pay the employee the wages he or she would have earned had his or her employment continued after the expiration of the leave of absence. An employee must give notice of intent to return to work at the following times:

- in the case of training, on a date that is before the unpaid leave of absence begins;
- in the case of regular deployment, on a date that is not less than 6 weeks before the date that the employee intends to return to work; or
- in the case of service that is required because of an emergency, any period before the employee returns to work that is reasonable in the circumstances.

In the Yukon, an employee who is a member of the reserve force of the Canadian Forces with an entitlement to an unpaid leave of absence to participate in military training, operations, or activities in Canada or abroad. With respect to training, the length of leave is either for the prescribed period or for a period of up to 15 days. As well, treatment, recovery or rehabilitation in respect of a physical or mental health problem that results from service in an operation or activity qualifies for the leave.

In order to qualify for the leave, the reservist must have completed 6 months of continuous employment with his or her employer, or a shorter period if it is prescribed for the class of employees to which the reservist belongs. Unless there is a valid reason for not doing so, the reservist must give his or her employer at least 4 weeks’ written notice before the day on which the leave is to begin and inform the employer of the length of the leave. If there is a valid reason for not providing the 4 weeks’ written notice, the employee shall notify the employer as soon as practicable. Similarly, unless there is a valid reason not to do so, the reservist must give the employer written notice of any change in the length of the leave at least 4 weeks’ before the new day on which the leave is to end, if the employee is taking a shorter leave; or the day that was most recently indicated for the leave to end.

The employer may request proof of the leave, and the employee shall provide it within three weeks after the day on which the leave begins. The employee shall
EMPLOYMENT STANDARDS

provide the employer with a document from the employee’s commanding officer specifying that the employee is taking part in an operation or activity that entitles the employee to the leave of absence.

A reservist is not entitled to reservist leave if, in the opinion of the Minister, it would adversely affect public health or safety or would cause undue hardship to the employer if the reservist, as an individual or as a member of a class of employees, were to take the leave.

If the employee does not give the employer at least 4 weeks’ notice of the day the leave is to end, the employer may postpone the employee’s return to work for a period of up to 4 weeks after the day on which the employee informs the employer of the end date of the leave. If the employer informs the employee that their return to work is postponed, the employee is not entitled to return to work until the day that is indicated by the employer. During the period of postponement, the employee is deemed to continue to be on reservist leave. Where the employee has given the employer notice of the leave before it began and the length of the leave has not changed, that qualifies as notice here and the employer is not permitted to postpone the employee’s return to work at the end of the leave. The reservist may postpone his or her annual vacation until after the day on which the reservist leave ends.

Seniority continues to accumulate during the period of leave, while employment is deemed continuous for the purpose of calculating benefit entitlement. If during a leave of absence the wages or benefits of the group of employees of which an employee is a member are changed as part of a plan to reorganize the industrial establishment, the employee is entitled to receive the wages and benefits that the employee would have been entitled to receive had that employee been working when the reorganization took place.

At the end of a leave of absence, the employer is required to reinstate the employee in the position that the employee occupied on the day before the leave begins. Where that is not possible the employer must reinstate the employee in a comparable position with the same wages and benefits and in the same location. Where the returning employee is not able to perform the duties of his or her former position, the employer may assign him or her to a position with different terms or conditions of employment. An employer cannot terminate, suspend, lay off, demote or discipline, an employee who has started reservist leave.
# Termination of Employment

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Q: What are the issues around termination and why are they important?

Answer

The termination of the employment contract is one of the most important and difficult areas of employment law. The action of terminating the employment of a worker carries with it specific legal rights and obligations for both the employee and the employer. A misunderstanding as to the respective rights and duties of employers and employees on the termination of the relationship can be costly for both parties.

All jurisdictions have enacted laws that require an employer to provide minimum notice of termination or payment in lieu of notice of termination. Some jurisdictions also require minimum notice from the employee terminating his or her own employment, and two jurisdictions require that an employee receive severance pay.

The discussion in this section of questions and answers will cover issues only as they arise under employment standards legislation across the country. While the parties also have rights and obligations under the common law upon termination of employment, these are discussed separately in the series of questions and answers on “wrongful dismissal”. While the two occasionally overlap, an attempt has been made to keep them separate here for purposes of discussion.

This series of questions and answers does not deal with termination of employment for cause. If an employee has been fired as a result of some sort of wilful misconduct or disobedience, or because of a failure to fulfil his or her duties, an employee’s rights are fairly limited. All the employee is entitled to is his or her record of employment and any monies owed at the time of the dismissal.

Q: Are there circumstances in which an employer can’t dismiss an employee?

Answer

Generally speaking, so long as an employer complies with its obligations under employment standards and the common law, an employer can terminate employees at will. However, the federal government, Nova Scotia, and Quebec have created special protections for employees, restricting the right of employers to dismiss them.

In the federal jurisdiction, employers are prohibited from laying off employees who have been employed for more than 12 months and who are not covered by a
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collective agreement, unless employees are being laid off for lack of work or because of the discontinuance of a function. Where a complaint of unjust dismissal is upheld, employees may be entitled not only to compensation, but also to reinstatement to their former position.

In Nova Scotia, the law provides that employees with 10 or more years of service with their employer may not be discharged or suspended without just cause unless the situation is beyond the control of the employer, the employee has been offered reasonable alternative employment, the employee is retiring, or the employee is employed in the construction industry or another industry exempted by regulation.

In Quebec, an employee credited with 2 years of uninterrupted service in the same enterprise who believes that he or she has not been dismissed for a good and sufficient cause may present a complaint in writing to the Commission des normes du travail (the Labour Standards Commission) or mail it to the address of the Commission within 45 days of the dismissal. Upon receiving the complaint, the Commission may, with the agreement of the parties, appoint a person who shall endeavour to settle the complaint to the satisfaction of the interested parties. If no settlement is reached following receipt of the complaint by the Commission, the Commission shall refer the complaint to the Commission des relation du travail (the Labour Relations Commission).

Where the Labour Relations Commission considers that the employee has not been dismissed for good and sufficient cause, the Commission may order the employer to reinstate the employee; order the employer to pay to the employee an indemnity up to a maximum equivalent to the wage he would normally have earned had he not been dismissed; or make any other decision believed fair and reasonable in the circumstances. However, in the case of a domestic or a caregiver to the sick, handicapped, or aged, the Commission can only order the employer to pay an indemnity equal to the wages and benefits the domestic lost up to a maximum period of 3 months.

Q: **How much notice is an employer required to give a worker upon termination of employment?**

**Answer**

When the employment of a worker is terminated, the employer is required to provide reasonable notice of the termination. Each jurisdiction sets out minimum notice requirements based upon the employee’s length of service.
Manitoba contains some rather unique provisions that allow employers to establish their own practices in the termination of employment. Basically, if an employer notifies each person in the establishment, in writing, of the terms of the termination practice that the employer wishes to implement, and the employer keeps a notice of the practice posted in a prominent place, within a month of complying with these two provisions, the employer’s practice is considered to be established in the workplace. As well, the notification period does not apply in an industry where there is already a general practice regarding termination that provides for less than in the legislation.

The chart below sets out the minimum requirements for each jurisdiction. Remember, again, that these are minimum requirements.

### Notice Requirements for Individual Terminations

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Employee’s Length of Service</th>
<th>Notice Period Required by Employer</th>
<th>Notice Period Required by Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>3 months or more</td>
<td>2 weeks</td>
<td>None</td>
</tr>
<tr>
<td>Alberta</td>
<td>– 3 months or more but less than 2 yrs</td>
<td>– 1 week</td>
<td>– 1 week</td>
</tr>
<tr>
<td></td>
<td>– 2 yrs or more but less than 4 yrs</td>
<td>– 2 weeks</td>
<td>– 2 weeks if employed</td>
</tr>
<tr>
<td></td>
<td>– 4 yrs or more but less than 6 yrs</td>
<td>– 4 weeks</td>
<td>2 yrs or more</td>
</tr>
<tr>
<td></td>
<td>– 6 yrs or more but less than 8 yrs</td>
<td>– 5 weeks</td>
<td></td>
</tr>
<tr>
<td></td>
<td>– 8 yrs or more but less than 10 yrs</td>
<td>– 6 weeks</td>
<td></td>
</tr>
<tr>
<td></td>
<td>– 10 yrs or more</td>
<td>– 8 weeks</td>
<td></td>
</tr>
<tr>
<td>British Columbia</td>
<td>– 3 months to less than 12 months</td>
<td>– 1 week</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>– 12 months to less than 3 yrs</td>
<td>– 2 weeks</td>
<td></td>
</tr>
<tr>
<td></td>
<td>– 3 yrs to less than 4 yrs</td>
<td>– 3 weeks</td>
<td></td>
</tr>
<tr>
<td></td>
<td>– 4 yrs or more</td>
<td>– 3 weeks + 1 additional week for each subsequent yr, to max. of 8 weeks</td>
<td></td>
</tr>
<tr>
<td>Manitoba</td>
<td>– 30 days or more but less than 1 yr</td>
<td>– 1 week</td>
<td>– 1 week</td>
</tr>
<tr>
<td></td>
<td>– 1 yr to less than 3 yrs</td>
<td>– 2 weeks</td>
<td>– 2 weeks if employed</td>
</tr>
<tr>
<td></td>
<td>– 3 yrs to less than 5 yrs</td>
<td>– 4 weeks</td>
<td>1 yr or more</td>
</tr>
<tr>
<td></td>
<td>– 5 yrs to less than 10 yrs</td>
<td>– 6 weeks</td>
<td></td>
</tr>
<tr>
<td></td>
<td>– 10 yrs or more</td>
<td>– 8 weeks</td>
<td></td>
</tr>
<tr>
<td>New Brunswick</td>
<td>– 6 months to 5 yrs</td>
<td>– 2 weeks</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>– 5 yrs or more</td>
<td>– 4 weeks</td>
<td></td>
</tr>
<tr>
<td>Newfoundland</td>
<td>– 3 months or more but less than 2 yrs</td>
<td>– 1 week</td>
<td>Same as notice by employer</td>
</tr>
<tr>
<td>and Labrador</td>
<td>– 2 yrs or more but less than 5 yrs</td>
<td>– 2 weeks</td>
<td></td>
</tr>
<tr>
<td></td>
<td>– 5 yrs or more but less than 10 yrs</td>
<td>– 3 weeks</td>
<td></td>
</tr>
<tr>
<td></td>
<td>– 10 yrs or more but less than 15 yrs</td>
<td>– 4 weeks</td>
<td></td>
</tr>
<tr>
<td></td>
<td>– 15 yrs or more</td>
<td>– 6 weeks</td>
<td></td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Employee’s Length of Service</td>
<td>Notice Period Required by Employer</td>
<td>Notice Period Required by Employee</td>
</tr>
<tr>
<td>-------------------</td>
<td>-------------------------------</td>
<td>------------------------------------</td>
<td>-----------------------------------</td>
</tr>
</tbody>
</table>
| Northwest Territories | – 90 days or more but less than 3 yrs  
– 3 yrs or more but less than 4 yrs  
– 4 yrs or more but less than 5 yrs  
– 5 yrs or more but less than 6 yrs  
– 6 yrs or more but less than 7 yrs  
– 7 yrs or more but less than 8 yrs  
– 8 yrs or more | – 2 weeks  
– 3 weeks  
– 4 weeks  
– 5 weeks  
– 6 weeks  
– 7 weeks  
– 8 weeks | None |
| Nova Scotia       | – 3 months or more but less than 2 yrs  
– 2 yrs or more but less than 3 yrs  
– 3 yrs or more but less than 5 yrs  
– 5 yrs or more but less than 10 yrs  
– 10 yrs or more | – 1 week  
– 2 weeks  
– 4 weeks  
– 8 weeks | – 1 week  
– 2 weeks if employed  
– 2 yrs or more |
| Nunavut          | – 90 days or more but less than 3 yrs  
– 3 yrs or more but less than 4 yrs  
– 4 yrs or more but less than 5 yrs  
– 5 yrs or more but less than 6 yrs  
– 6 yrs or more but less than 7 yrs  
– 7 yrs or more but less than 8 yrs  
– 8 yrs or more | – 2 weeks  
– 3 weeks  
– 4 weeks  
– 5 weeks  
– 6 weeks  
– 7 weeks  
– 8 weeks | None |
| Ontario          | – 3 months or more but less than 1 yr  
– 1 yr or more but less than 3 yrs  
– 3 yrs or more but less than 4 yrs  
– 4 yrs or more but less than 5 yrs  
– 5 yrs or more but less than 6 yrs  
– 6 yrs or more but less than 7 yrs  
– 7 yrs or more but less than 8 yrs  
– 8 yrs or more | – 1 week  
– 2 weeks  
– 3 weeks  
– 4 weeks  
– 5 weeks  
– 6 weeks  
– 7 weeks  
– 8 weeks | None |
| Prince Edward Island | – 6 months or more but less than 5 yrs  
– 5 yrs or more but less than 10 yrs  
– 10 yrs or more but less than 15 yrs  
– 15 yrs or more | – 2 weeks  
– 4 weeks  
– 6 weeks  
– 8 weeks | – 1 week  
– 2 weeks if employed  
– 5 yrs or more |
| Quebec           | – 3 months or more but less than 1 yr  
– 1 yr or more but less than 5 yrs  
– 5 yrs or more but less than 10 yrs  
– 10 yrs or more | – 1 week  
– 2 weeks  
– 4 weeks  
– 8 weeks | Reasonable notice  
taking into account the nature of the work |
| Saskatchewan     | – 3 months or more but less than 1 yr  
– 1 yr or more but less than 3 yrs  
– 3 yrs or more but less than 5 yrs  
– 5 yrs or more but less than 10 yrs  
– 10 yrs or more | – 1 week  
– 2 weeks  
– 4 weeks  
– 6 weeks  
– 8 weeks | None |
| Yukon            | – 6 months or more but less than 1 yr  
– 1 yr or more but less than 3 yrs  
– 3 yrs or more but less than 4 yrs  
– 4 yrs or more but less than 5 yrs  
– 5 yrs or more but less than 6 yrs  
– 6 yrs or more but less than 7 yrs  
– 7 yrs or more but less than 8 yrs  
– 8 yrs or more | – 1 week  
– 2 weeks  
– 3 weeks  
– 4 weeks  
– 5 weeks  
– 6 weeks  
– 7 weeks  
– 8 weeks | – 1 week if employed  
less than 2 yrs  
– 2 weeks if employed  
≥ 2 yrs and < 4 yrs  
– 3 weeks if employed  
≥ 4 yrs and < 6 yrs  
– 4 weeks if employed  
6 yrs or more |
Q: Must employment have been continuous for termination notice requirements to apply?

Answer

Not necessarily. In eight jurisdictions — namely the federal jurisdiction, Alberta, Manitoba, Newfoundland and Labrador, Nova Scotia, Ontario, the Northwest Territories, and Nunavut — interruptions in employment history are ignored for the purposes of termination provisions if these interruptions fit certain criteria. These criteria are significantly different from jurisdiction to jurisdiction.

In the federal jurisdiction, employment is considered to be continuous if an employee’s absence from employment is due to a layoff that is not a termination or for a reason that was permitted or condoned by the employer (e.g., a leave of absence).

In Alberta, if an employee has been employed by the same employer more than once, and if not more than 3 months has elapsed between periods of employment, the employee’s employment is considered to be continuous.

In Manitoba, length of service is the length of time from when an employee starts with an employer, to the day the employment ends. The period of employment also includes periods of temporary interruption in employment such as a layoff, an unpaid leave (e.g., pregnancy, parental, family, bereavement, or compassionate care leave, other employer-approved leave, jury duty), seasonal employment, and when an employee returns to work for the same employer after a break of less than 2 months.

In Newfoundland and Labrador, seasonal workers engaged under a contract of service for two or more consecutive seasons of at least 5 months in each season are considered to have been continuously employed.

In the Northwest Territories, an employee who has been employed by the same employer more than once is understood to have had continuous employment, as long as not more than 90 days has elapsed between each period of employment.

In Nova Scotia, successive periods of employment constitute one period of employment, unless the periods are more than 13 weeks apart, in which case the last period of employment constitutes the period of employment for purposes of termination.

In Nunavut, an employee who has been employed by the same employer more than once is understood to have had continuous employment, as long as not more than 90 days has elapsed between each period of employment.
In Ontario, successive periods of employment with the same employer are considered to constitute one period of employment, unless the successive periods are more than 13 weeks apart.

**Q:** What if an employer does not provide an employee with the required notice period upon termination?

**Answer**

If an employer does not provide the employee with the required notice, he or she must provide the employee with “pay in lieu of notice”, also known as “termination pay”. Basically, the employer must give the employee the money he or she would have earned if he or she had worked during the required notice period.

**Q:** Can the amount of notice be limited by an employment contract?

**Answer**

If there is an agreement between the parties on the terms of the employment relationship, including the conditions for severing that relationship, this will override the common law, so long as the contract is valid. There are a number of circumstances in which a contract may not be valid, such as if it is signed under duress, if it violates employment standards laws, or if it is improperly executed.

**Q:** Is everyone entitled to notice of termination?

**Answer**

No, not everyone is entitled to notice of termination. Some workers are generally excluded from protection under employment standards laws, while others are specifically excluded from the right to required notice.

Professionals, for example, are often excluded from employment standards protection. As such, people employed as architects, lawyers, doctors, and dentists may not have protection under employment standards law.

In many jurisdictions, certain employees are not entitled to notice of termination. Workers who have been hired for a definite term of employment; who have been offered and have refused reasonable alternative work; whose contract has
become impossible to fulfil; who are hired on a seasonal basis; or who work in the construction industry may not be entitled to notice of termination.

In every jurisdiction, a worker who has not completed the minimum length of service is not entitled to notice of termination.

Certain layoffs are not considered to be terminations.

Even if an employee is not entitled to notice of termination under employment standards law, he or she may well still have a right to notice under an employment contract or collective agreement, if one applies.

**Q:** Are employees who are on fixed-term contracts entitled to reasonable notice?

**Answer**

Employees who are employed under a contract for a fixed and definite period of time have been given notice of termination from the beginning of the contract, so to speak. Therefore, these employees are not entitled to notice of termination or pay-in-lieu when their contract draws to an end.

However, if the employment of the employee is terminated prior to the date fixed in the contract, the employee may be entitled to reasonable notice or pay in lieu of notice.

On the other hand, if the period of employment is extended beyond the termination date of the contract without a new termination date being first communicated, the employee may be entitled to notice of termination when employment is actually terminated.

**Q:** Are employees who are on probation entitled to reasonable notice?

**Answer**

Sometimes employment is offered on the basis that the first few months will be a trial period, during which the performance of the new employee will be closely monitored. If the new employee is determined not to be suitable for the position, he or she may be dismissed without just cause or notice beyond the minimal requirements of employment standards legislation.
In order for a probation period to be enforceable, its terms should be clearly communicated to the new employee at the outset, including the length of the period, the basis on which the assessment will be made, the standards that the employee will be expected to meet, the extendability of the probation period, and the assistance available to the employee during the probation period.

As well, the employer should ensure that the probationary employee is given a fair chance to succeed. Information about potential performance issues should be passed along regularly and documented, so that the employee cannot claim surprise if the probation period is not passed. If performance problems are noted, employees should be given a reasonable opportunity to improve and offered assistance in doing so. Extension of a probation period should only be used in exceptional circumstances; courts tend to look unfavourably upon extensions of probation periods.

**Q:** How must a notice of termination be given?

**Answer**

Notice of termination must be in writing.

**Q:** What if an employer does not want to continue employing the employee during the notice period?

**Answer**

An employer has the option, where it concludes that it is not convenient or appropriate to have an employee working during the period of notice of termination, to substitute pay in lieu of notice (sometimes called “termination pay”).

For example, an employer may have determined that 3 months’ notice of termination is appropriate for a particular employee, but does not want the employee to work for another 3 months because his or her services are no longer required (i.e., there is no work for the employee). Instead of allowing the employee to work for 3 months, the employer may provide the employee with 3 months’ pay in lieu of the notice period, and terminate the employment relationship immediately.
Q: Can an employer offer an employee a combination of notice and pay in lieu?

Answer

Alberta, British Columbia, Manitoba, Ontario, and Quebec are the only jurisdictions that deal specifically with this issue, and their answer is yes.

Although the issue is not dealt with specifically in other jurisdictions, there would appear to be no reason why an employer could not offer an employee a combination of notice and pay in lieu of the remainder of the notice.

Q: Does overtime count towards calculating pay in lieu of notice?

Answer

No. Pay in lieu of notice is defined in most jurisdictions as the amount of pay an employee would have earned had he or she worked his or her normal hours during the notice period. Generally, overtime is not considered part of an employee’s normal hours. Some jurisdictions actually state that overtime pay is not to be taken into account when calculating normal hours of work. In others it is simply implied.

The exception is Newfoundland and Labrador’s law, which states that normal wages include the amount of overtime pay that might have been earned by the employee, calculated on the basis of the overtime hours in the month preceding the termination.

Q: When calculating an employee’s normal hours, what if the hours are not the same from week to week?

Answer

If an employee’s weekly hours of work are not standard, some form of averaging will need to take place in order to figure out what the employee’s normal hours of work are to compensate the employee properly at termination. This issue is only addressed in six jurisdictions: the federal jurisdiction, Alberta, British Columbia, Ontario, Quebec, and Saskatchewan.

In the federal jurisdiction, the actual number of hours, excluding overtime, worked over the 4 weeks prior to the termination are calculated and divided by four.
In Alberta, the sum to be paid is determined by calculating the average of the wages made by the employee over the 3 months prior to the termination.

In British Columbia, the amount owed to an employee is based upon the average weekly wage earned in the last 8 weeks in which the employee worked normal or average hours of work.

In Ontario, where the employee does not have a regular work week or is paid on a basis other than time, the employer must pay the employee a weekly wage equal to the average regular weekly wage earned by the employee in the 12 weeks immediately prior to the date the notice of termination was given.

In Quebec, where an employee is paid mainly by commission, the payment in lieu of notice is based on the average weekly wage during the 3 months preceding the termination of layoff.

In Saskatchewan, an employee’s regular weekly rate is determined by averaging the wage he or she made in the 4 weeks prior to the termination.

Q: Do employee benefits continue once an employee has received notice of termination or pay in lieu?

Answer

If an employee has received notice of termination and remains actively employed until the notice period runs out, then yes, any benefit programs that are in place in the workplace still apply to the employee.

If, on the other hand, the employee has received pay in lieu of notice, he or she is generally not entitled to benefits since he or she is technically no longer employed.

There are, however, exceptions. In Ontario, the Northwest Territories, and Nunavut, employees are entitled to take advantage of benefit programs during the period that they would have continued working for their employer had they received notice of termination, rather than pay in lieu of notice.

Q: What if the conditions of employment are changed once notice of termination is given?

Answer

To a certain extent, it is inevitable that the conditions of employment will change once notice of termination has been issued. The simple fact that the employee will
Termination of Employment

soon no longer be employed is bound to change the workplace environment somewhat. However, all jurisdictions, with the exception of New Brunswick, Newfoundland and Labrador, and Quebec, provide that an employer cannot alter a worker’s conditions of employment once notice of termination has been given.

Basically, what this comes down to is that an employer cannot try to cheat an employee out of earnings to which he or she is entitled just because the employee has been given notice of termination. An employer is stepping over a line if he or she cuts an employee’s hours back from 35 to 10 per week during the notice of termination period, without paying the employee what he or she would normally have earned. Even in those jurisdictions where there is no specific prohibition against changing conditions of employment, the very fact that pay in lieu of notice requirements are in effect protects the employee, at least in terms of the minimum payment required.

Q: Can an employee’s vacation be used as part of the notice period?

Answer

In British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Ontario, Saskatchewan, the Northwest Territories, Nunavut, and the Yukon, the laws specify that vacation to which an employee is entitled cannot be used as part of the notice period, unless the employee agrees otherwise. If an employee’s employment is terminated, the employee must be fully compensated for any earned vacation time.

Q: When must employers pay former employees their wages owing?

Answer

Each jurisdiction sets out a different time frame within which an employer must give the monies owed to a terminated employee after termination. These monies include pay in lieu of notice and overtime pay. The time frames are set out below.
Due Date of Pay Owing at Termination

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Due Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>Payment must be made within 30 days of termination</td>
</tr>
<tr>
<td>Alberta</td>
<td>Payment must be made within 3 days of termination where notice was given, or 10 days where no notice was given</td>
</tr>
<tr>
<td>British Columbia</td>
<td>Payment must be made within 48 hours of termination, or within 6 days where the employee terminates</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Payment must be made within 10 working days of termination</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Payment must be made within 1 week of the date of termination</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Payment must be made within 10 days after termination</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Payment must be made within 10 days after termination</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Payment must be made by the expiry of the termination notice</td>
</tr>
<tr>
<td>Nunavut</td>
<td>Payment must be made within 10 days after termination</td>
</tr>
<tr>
<td>Ontario</td>
<td>Payment must be made on the later of 7 days after termination or the next payday</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Payment must not be later than the last day of the next pay period after termination</td>
</tr>
<tr>
<td>Quebec</td>
<td>Regular wages are owed by the next scheduled payday after termination; payment in lieu of notice of termination is owed at the time of termination</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>Payment must be made within 14 days after the date of termination</td>
</tr>
<tr>
<td>Yukon</td>
<td>Payment must be made within 7 days of termination</td>
</tr>
</tbody>
</table>

Q: When must an employer pay any vacation pay owed at the time of termination?

Answer

In some jurisdictions, vacation pay owing must be paid at the same time as all other wages owing on termination; in other jurisdictions, vacation pay must be paid at a different time.
TERMINATION OF EMPLOYMENT

Due Date of Vacation Pay Owing at Termination

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Due Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>Payment must be made at the time of termination</td>
</tr>
<tr>
<td>Alberta</td>
<td>If proper termination notice is given or notice is required to be given by the employer, payment must be made within 3 days of termination; Where neither the employer nor employee is required to give termination notice, payment must be made within 10 days; If an employee quits without giving proper termination notice, payment must be made within 10 days after the date on which the notice would have expired if it had been given</td>
</tr>
<tr>
<td>British Columbia</td>
<td>If employer terminates the relationship, payment must be made within 48 hours from the effective date of termination; If employee terminates the relationship, payment must be made within 6 days from the effective date of termination</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Payment must be made within 10 working days from the date of termination</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Payment must be made at the time of final pay</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Payment must be made within 1 week from the date of termination</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Payment must be made at the time of termination</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Payment must be made within 10 days from the date of termination</td>
</tr>
<tr>
<td>Nunavut</td>
<td>Payment must be made at the time of termination</td>
</tr>
<tr>
<td>Ontario</td>
<td>Payment must be made by the later of 7 days after termination and the next payday</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Payment must be made by the next regular pay period after termination</td>
</tr>
<tr>
<td>Quebec</td>
<td>Time limit is not specified</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>Payment must be made within 14 days from the termination</td>
</tr>
<tr>
<td>Yukon</td>
<td>Payment must be made by 7 days from the termination</td>
</tr>
</tbody>
</table>

Q: What is severance pay?

Answer

Severance pay is payment that is required in addition to pay in lieu of notice. In terms of individual termination, the only jurisdictions in which an employee is entitled to severance pay are the federal jurisdiction and Ontario. No other jurisdictions require employers to pay anything above and beyond the minimum pay-in-lieu-of-notice requirements.
Q: When are employees entitled to severance pay?

Answer

In terms of individual termination, only employees in the federal jurisdiction and Ontario are entitled to severance pay.

In the federal jurisdiction, an employee is entitled to severance pay if his or her employment is terminated after the completion of 12 consecutive months of employment with the same employer. The amount of severance pay is the greater of (a) 2 days’ wages at the employee’s regular rate of pay for each year of employment, or (b) 5 days’ wages.

In Ontario, the Employment Standards Act, 2000 provides that where (a) 50 or more employees are terminated in a period of 6 months or less as a result of the discontinuance of all or part of the employer’s business; or (b) one or more employees are terminated by an employer with a payroll of $2.5 million, the employer is required to pay severance pay to each employee who has been employed for 5 years or more.

Severance of employment is defined as follows: a dismissal or a refusal to continue an employee’s employment; a constructive dismissal following which the employee resigns; a layoff resulting from the permanent discontinuance of all of the employer’s business at an establishment; a layoff that equals or exceeds 35 weeks in any period of 52 consecutive weeks; or an employee resignation following an employer’s notice of termination where the employee provides 2 weeks’ written notice of the resignation and resigns during the statutory notice period.

A layoff in Ontario is defined as a period of at least 1 week in which an employee receives less than one-quarter of the wages he or she would earn at his or her regular rate in a regular non-overtime work week, unless the employee was not able to work or unavailable to work, was suspended, or was unable to work due to a strike or lockout at the place of employment or elsewhere.

Where the employer operates at two or more locations and 50 or more employees have their employment terminated due to a permanent discontinuance of all or part of the employer’s business at one location, that one location shall be deemed to be an establishment for the purpose of determining rights to severance pay.

Persons entitled to receive severance pay would include the following: regular and part-time employees; all employees terminated as a result of a strike or lockout,
except where the discontinuance of the business results from economic hardship caused by the strike or lockout; an employee absent because of illness or injury, provided the contract of employment has not become impossible to perform due to the illness or injury; an employee who received or who was entitled to receive notice of termination but who died before employment was terminated or would have terminated if notice had been given; an employee terminated due to another employee exercising a seniority right; and an employee who, being terminated, retires and is entitled to a reduced pension.

An employee in Ontario is not entitled to severance pay where:

- the employment is severed as a result of the permanent discontinuance of all or part of the business that the employer establishes was caused by the economic consequences of a strike;
- the employee’s contract has become impossible to perform;
- the employee retires (following severance of employment) and receives an actuarially unreduced pension that reflects service credits he or she would have earned but for the severance;
- the employee is in receipt of an actuarially unreduced pension benefit when employment is severed (in such a case, the time spent in the employer’s employ for which the employee received service credits used for the calculation of that pension is not be included in calculating years of service for entitlement to severance pay or in the actual severance pay amount);
- the employee refuses an offer of reasonable alternative employment or refuses to exercise a seniority right;
- the employee has been guilty of wilful misconduct, disobedience, or neglect of duty not condoned by the employer;
- the employee may elect to work or not when requested to do so; or
- the employee is engaged in aspects of the construction industry.

Where an employee entitled to severance pay has a right to recall, the employee may elect to be paid the severance pay immediately or may elect to maintain the right to recall. If the employee elects to be paid severance pay, the employee is deemed to have abandoned the right to be recalled. Where the employee elects to maintain the right to recall or fails to make an election, the employer is required to pay the severance pay to the Director for Employment Standards in trust. Where the
employee accepts employment made available under the right to recall, the employee is deemed to have abandoned the right to severance pay and the monies held in trust by the Director are returned to the employer. In all other cases, the severance pay shall be paid to the employee and the employee is deemed to have abandoned the right to recall.

All time spent in the employment by the employer, whether or not continuous, and whether or not active, is included in determining entitlement to severance pay and in calculating the amount of severance pay.

In Ontario, if the employer terminates an employee without providing the required notice of termination, the required notice period (8 weeks, for example), is included in the employee’s length of service when actually calculating the amount of severance pay.

Each employee is entitled to receive one regular, non-overtime week’s pay multiplied by the sum of the number of completed years of employment and the number of completed months of employment not included in the number of completed years divided by 12. The resulting amount cannot exceed an amount equal to 26 weeks’ regular pay. The severance pay provided by the Act is payable in addition to any other payments, including payment in lieu of notice of termination.

Example: An worker who makes $500 during a regular work week has worked for her employer for 10 years and 3 months. Her severance pay would be: $500 \times (10 + (3 \div 12)) = $5,125. (Note that this amount does not exceed the worker’s allowed maximum of 26 weeks’ regular pay, which is $13,000.) Again, this amount would be in addition to any other payments, including payment in lieu of notice of termination.

Where the employer and the employee agree, or with the approval of the Director of Employment Standards, severance pay can be paid in installments. However, the installments must be paid out during a period of not more than 3 years. Where an employer fails to make an installment, all unpaid severance pay becomes payable immediately.
Q: What happens if an employee is still working after the date of official termination?

Answer

This issue is addressed in nine jurisdictions: the federal jurisdiction, Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, Nova Scotia, the Northwest Territories, Nunavut, and the Yukon.

Each of the nine jurisdictions basically states that if an employee happens to still be working a specified length of time after the notice of termination should have expired, then the notice of termination is no longer valid. As such, if an employer wishes to terminate an employee’s employment at that point, it must provide the employee with the full notice requirement or pay in lieu of notice as required by law. In these jurisdictions, if an employee happens to be working beyond the end of the notice of termination period, his or her employer cannot merely dismiss the employee without cause.

### Additional Working Period That Invalidates a Notice of Termination

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Additional Working Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>2 weeks after the date specified for termination</td>
</tr>
<tr>
<td>Alberta</td>
<td>After the date specified for termination</td>
</tr>
<tr>
<td>British Columbia</td>
<td>After the expiry of the notice period</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>1 month or more beyond the end of the notice period</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>After the expiry of the notice period</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>After the expiry of the notice period</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>After the expiry of the notice for a time exceeding the length of notice</td>
</tr>
<tr>
<td>Nunavut</td>
<td>After the expiry of the notice period</td>
</tr>
<tr>
<td>Yukon</td>
<td>After the expiry of the notice period</td>
</tr>
</tbody>
</table>

Q: What if an employee has been hired for a fixed term of employment but continues to work beyond this term?

Answer

In Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, and the Yukon, persons who work beyond the period for which the term of their employment is fixed become eligible for the same rights as other workers.
In Alberta, notice of termination is not required if an employee was hired for a definite term or task for a period of less than 12 months, at the end of which the employment terminates. Therefore, if such an employee is not terminated at the end of the period, but continues to be employed, the employee is entitled to notice of termination.

In British Columbia, if a worker continues to work for a period of 3 months or more beyond the completion of the definite term of employment, that worker is no longer considered to be employed for a fixed term, and is entitled to notice of termination rights. The worker’s length of employment is calculated from the beginning of his or her employment for the fixed length.

In Manitoba, if by mutual agreement a worker continues to work beyond a period of fixed employment, or continues to work, again by mutual agreement, after a specified work project is completed, the general notice requirements apply to that employee if the employee’s employment is terminated. In Manitoba, of course, employers have the option of setting up a program whereby they can provide less than the law requires in terms of notice requirements.

In New Brunswick, if an employee continues to work for a period of 3 months beyond the period fixed in the employment contract, the general notice provisions apply if the employee’s employment is terminated.

In Nova Scotia, when an employee who was originally hired for a definite term or task continues to work for a period of 3 months or more after the expiry of the term of employment or the completion of the task, that employee is no longer considered to have been hired for a definite term or task. If the employee is terminated, he or she must be accorded the full right of notification or pay in lieu of notification. The employee’s length of service is considered to have begun at the beginning of the term or task.

In Ontario, if an employee is employed for 3 months or more after the completion of the term or task in the employment contract, general notice provisions apply.

In the Yukon, if an employee is employed for more than 1 month after the completion of the term or task in the employment contract, general notice provisions apply.
Q: If an employer sells the business, can the new owners terminate employees as if they are new employees?

Answer

Generally, when an employer sells its business, employees are protected in that their length of employment is considered to be continuous. As such, the new employer cannot simply dismiss employees without giving them the length of notice or pay in lieu of notice that they would have received had the business not been sold.

Q: Do employees owe their employers any notice if they choose to quit?

Answer

An employee has duties to an employer under a contract of employment, just as the employer has duties to the employee. Like the employer, if an employee terminates the employment relationship without cause, the employee must give notice of termination. The length of this notice varies with the circumstances, depending mainly on how difficult it will be for the employer to replace the employee.

Some jurisdictions specify minimum periods of notice that must be provided to the employer based upon how long the employee has worked for the employer. The Minimum Individual Termination Notice Requirements chart outlines what employees are legally required to offer their employers in terms of the minimum notice of termination.

Although actions by employers against employees for failure to provide reasonable notice are theoretically possible, they are quite rare. In today’s labour market, most employees can be replaced with only moderate difficulty, so there is little incentive for employers to pursue claims against former employees. Also, it can be difficult for employers to prove and quantify damages in such cases.

Q: Are there any situations in which employees would be justified in not giving the minimum notice?

Answer

Yes, there are a number of situations in which notice is unnecessary. If an employee’s term of employment is less than the length of service required for notice to be necessary, then the employee is not required to give notice. Employees are also
not required to give notice if they are hired for a fixed term or task and the term or task comes to an end.

As well, Alberta, Manitoba, Newfoundland and Labrador, and Nova Scotia set out a number of specific situations in which an employee may terminate his or her employment without providing the minimum notice. These situations are listed below, and although they are not addressed in the law of any other jurisdiction, there do seem to be some areas where employees might very well have the option of terminating without notice.

In Alberta, employees are not required to give notice of termination when:

- there is an established custom or practice in any industry that is different from the termination requirements;
- the termination is the result of a danger to the health or safety of the employee;
- the contract of employment has become impossible to perform as the result of unforeseeable or unpreventable causes beyond the control of the employee;
- the employee has been employed for 3 months or less;
- the employee is a casual employee;
- the situation is one of a temporary layoff, strike, or lockout; or
- the employee terminates his or her employment because of a reduction in wage rate, overtime rate, or entitlements.

In Manitoba, employees are not required to give notice of termination when:

- the employee’s period of employment with the employer is less than the probationary period specified in a collective agreement that applies to the employee, if that period is 1 year or less, or in any other case, 30 days;
- the employment is for a fixed term and terminates at the end of the term;
- the employee is employed for a specific task and for a period not exceeding 12 months, on completion of which the employment terminates;
- the employee is employed in construction;
- the employee is employed under an arrangement by which the employee may choose to work or not to work for a temporary period when requested to work by the employer;
Termination of Employment

- the employee is employed under an agreement or contract of employment that is impossible to perform or has been frustrated by a fortuitous or unforeseeable circumstance;
- the employee is on strike or has been locked out and the termination meets the requirements prescribed by regulation; or
- the employer acts in a manner that is improper or violent towards the employee.

In Newfoundland and Labrador, employees are not required to give notice of termination when:
- the employer has mistreated the employee, acted in a manner that has or might endanger the health or welfare of the employee, or otherwise has been in breach of conditions of service that, in the opinion of the Director or the Labour Relations Board, warrants no notice being given;
- the employee pays to the employer an amount equal to the amount the employee would normally earn during the period of notice that the employee would otherwise be required to give;
- the employee is employed for a non-renewable term or for a specific task that is not longer than 12 months, and the employment is not terminated before the completion of that term or task; or
- the employee has been employed for less than 1 month.

In Nova Scotia, employees are not required to give notice of termination if the employer has violated the terms and conditions of employment. An example of a violation of the terms and conditions of employment would be the failure to pay wages owing to the employee.

Q: What if an employer decides to terminate the employment of an employee after the employee has given notice?

Answer

Alberta, Manitoba, and Ontario are the only jurisdictions that explicitly deal with this issue.

In Alberta, if the employee has given only the minimum notice, the employer must give the employee pay in lieu of notice for the remainder of the notice period. If the employee has given notice greater than the minimum, the employer must give the employee pay in lieu of notice for the remainder of the period of termination notice.
that the employer would have been obliged to give the employee if it had been the employer who originally gave notice of termination of the employment relationship.

In Manitoba, the notice requirement applies where the employee has given the employer notice of resignation and the employer wishes to terminate the employee’s employment prior to the expiration of the employee’s notice. The employer must pay the employee a sum of money that is equal to the shorter of: (i) the number of weeks’ notice required by the employer; or (ii) the number of weeks that remain in the notice period provided by the employee.

In Ontario, it is the position of the Employment Standards Program that the notice requirement applies where the employee has tendered a resignation with notice and the employer wishes to terminate the employee prior to the expiration of the notice. A telephone service operated by the Employment Standards Program of the Ministry of Labour will assist in the application of provisions to factual situations.

**Q: What is group termination?**

**Answer**

Group terminations, also known as collective dismissals, generally take place when a business closes or significantly downsizes. The federal government and most of the provinces have instituted special laws in an attempt to cushion the blow caused by the termination of significant numbers of workers.

Generally, the issues surrounding group termination are similar to those encountered by employees who are terminated individually, except that employers have the added responsibility of notifying the Minister of Labour (or equivalent), and may have to provide employees with longer notice periods. As well, employers may have to take responsibility for organizing a joint planning committee to consider ways in which the terminations can be avoided, or to help employees find alternative employment.

Newfoundland and Labrador specifically states that instead of providing a group notice of termination, an employer may pay wages in lieu of notice.

As with individual termination, certain types of layoffs do not count as group termination.
Q: Are there any jurisdictions that do not have group termination provisions?

Answer

Yes. Prince Edward Island is without group termination provisions. As such, in that jurisdiction, the rules that apply to individual terminations will apply when larger groups of employees have their employment terminated.

Q: What constitutes a group termination?

Answer

In those jurisdictions that have group termination provisions, the criteria for group termination differ somewhat. These different criteria are listed below.

In the federal jurisdiction, Alberta, Manitoba, Newfoundland and Labrador, Ontario, a group termination is 50 or more employees within a period not more than 4 weeks. However, in Ontario, where 50 or more persons have their employment terminated in a 4-week period and this number does not comprise more than 10% of the employees at the establishment, individual notice of termination provisions apply, unless the terminations are caused by the permanent discontinuance of all or part of the business at the establishment where the employees are employed.

In British Columbia, a group termination is 50 or more employees at a single location within a 2-month period.

In New Brunswick, a group termination is more than 10 employees in a 4-week period, where the 10 or more employees represent at least 25% of the employer’s workforce.

In Nova Scotia and Saskatchewan, a group termination is 10 or more employees in a period of 4 weeks or less.

In Quebec, a group termination is 10 or more employees within a period of 2 consecutive months, except for situations of a seasonal or intermittent nature, where the terminations are for technological or economic reasons.

In the Northwest Territories, Nunavut, and the Yukon, a group termination is 25 or more employees within a 4-week period.
Q: What are the notice requirements for group terminations?

Answer

Generally, employers must provide notice to the workers who are having their employment terminated, to the Minister of Labour or equivalent, and to the union, if there is one in the workplace. Some jurisdictions specify the information that must be contained in notices.

In the federal jurisdiction, employees are entitled to receive, in their notice, information outlining the employee’s vacation benefits, wages, severance pay, and any other benefits and pay arising from the employment.

In Alberta, the notice must include information on the number of employees to be terminated and the effective date of the terminations.

In British Columbia, the notice to the Minister must include the number of employees being terminated, the effective dates of the terminations, and the reasons for the terminations.

In Manitoba, the notice to the parties must include the date or dates on which the employer intends to terminate employment, the reason for the terminations, the names of at least two persons who are to be appointed to a joint planning committee as employer representatives, and the estimated number of employees in each occupational classification whose employment will be terminated.

In Ontario, the employer may be required to provide information to the Director of Employment Standards, who may in turn require that certain information be included in the notice. The information required may include the economic circumstances surrounding the intended terminations; any consultations that have taken place or are proposed with the local communities, employees, or union; proposed adjustment measures and the number of employees expected to benefit from each; and a statistical profile of the affected employees.

In Quebec, the notice to the Minister must contain names of affected employees and the reasons for termination.

In Saskatchewan, the notice must include the number of employees to be terminated, the effective date of the terminations, and the reasons for the terminations.
## Notice Requirements for Group Terminations

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Notice to Employee</th>
<th>Notice to Minister</th>
<th>Notice to Union</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>Same as for individual termination</td>
<td>16 weeks</td>
<td>Yes</td>
</tr>
<tr>
<td>Alberta</td>
<td>Same as for individual termination</td>
<td>4 weeks</td>
<td>Not stated</td>
</tr>
<tr>
<td>British Columbia</td>
<td>50–100 employees — 8 weeks; 101–300 employees — 12 weeks; 301+ employees — 16 weeks</td>
<td>Same as for employee</td>
<td>Same as for employee</td>
</tr>
<tr>
<td>Manitoba</td>
<td>50–100 employees — 10 weeks; 101–299 employees — 14 weeks; 300+ employees — 18 weeks</td>
<td>Same as for employee</td>
<td>Same as for employee</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>6 weeks</td>
<td>6 weeks</td>
<td>6 weeks</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>50–199 employees — 8 weeks; 200–499 employees — 12 weeks; 500+ employees — 16 weeks</td>
<td>Same as for employee</td>
<td>Not stated</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Same as for individual termination</td>
<td>25–49 employees — 4 weeks; 50–99 employees — 12 weeks; 100–299 employees — 16 weeks</td>
<td>Not stated</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>10–99 employees — 8 weeks; 100–299 employees — 12 weeks; 300+ employees — 16 weeks</td>
<td>Same as for employee</td>
<td>Not stated</td>
</tr>
<tr>
<td>Nunavut</td>
<td>Same as for individual termination</td>
<td>25–49 employees — 4 weeks; 50–99 employees — 8 weeks; 100–299 employees — 12 weeks</td>
<td>Not stated</td>
</tr>
<tr>
<td>Ontario</td>
<td>50–199 employees — 8 weeks; 200–499 employees — 12 weeks; 500+ employees — 16 weeks</td>
<td>Same as for employee</td>
<td>Not stated</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Same as for individual termination</td>
<td>Not stated</td>
<td>Not stated</td>
</tr>
<tr>
<td>Quebec</td>
<td>10–99 employees — 8 weeks; 100–299 employees — 12 weeks; 300+ employees — 16 weeks and must still provide notice of individual termination</td>
<td>Same as for employee</td>
<td>Same as for employee</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>10–49 employees — 4 weeks; 50–99 employees — 8 weeks; 100+ employees — 12 weeks</td>
<td>Same as for employee</td>
<td>Same as for employee</td>
</tr>
<tr>
<td>Yukon</td>
<td>Same as for individual termination</td>
<td>25–49 employees — 4 weeks; 50–99 employees — 8 weeks; 100–299 employees — 12 weeks; 300+ employees — 16 weeks</td>
<td>Not stated</td>
</tr>
</tbody>
</table>
Q: Which jurisdictions require employers to participate in planning committees with regard to group terminations?

Answer

The federal jurisdiction, British Columbia, Manitoba, Ontario, and Quebec require or may require the employer to set up a committee to deal with the issue of re-employment for those workers who are having their employment terminated.

Q: Is anyone excluded from group termination provisions?

Answer

Yes, generally the same types of exclusions apply to group terminations as apply to individual terminations.

Q: What if employees wish to give notice after receiving a notice of group termination?

Answer

In Manitoba and Ontario, individual employees who wish to terminate their employment after a notice of group termination has been given must still give notice to the employer.

In Manitoba, employees must give notice in accordance with individual termination requirements.

In Ontario, those employed less than 2 years must give 1 week’s notice, while those employed for more than 2 years must give 2 weeks’ notice.

In Newfoundland and Labrador, the legislation specifically permits employees to give notice of termination after they have received notice of group termination.

Q: When is a layoff considered a termination?

Answer

In most jurisdictions, being laid off does not automatically qualify employees for rights under termination provisions. However, after a certain length of time, a layoff may be considered a termination. In several jurisdictions, there are also other more specific issues that need to be discussed in terms of layoffs; these are described below.
In the federal jurisdiction, a layoff is not considered to be termination for the purposes of severance pay, group termination, or individual termination if the layoff is:

- the result of a strike or lock-out;
- 12 months or less, and is mandatory pursuant to a minimum work guarantee in a collective agreement;
- 3 months or less;
- more than 3 months and the worker has been notified in writing at or before the layoff that he or she will be recalled on a fixed date or within a fixed period, neither of which is more than 6 months from the date of layoff and the worker is in fact recalled in accordance with this provision;
- more than 3 months and the worker continues to make an agreed-upon salary, the employer continues to make pension payments for the employee, or the worker receives supplementary Employment Insurance benefits or would be entitled to supplementary unemployment benefits but is disqualified from receiving them under the Employment Insurance Act; or
- between 3 and 12 months, during which time the employee maintains recall rights under a collective agreement.

It is important to note that, in calculating the length of a layoff, any period of re-employment less than 2 weeks is not included in the calculation. Any layoffs that do not fall into one of the preceding categories count as either an individual or group termination, at which point termination provisions take effect.

In Alberta, a temporary layoff is defined as a layoff of less than 60 days; or a layoff of 60 days or more during which the employee receives an agreed-upon wage, or the employer makes payments into a pension or insurance plan for the employee, or the employee retains recall rights under a collective agreement. Any layoff which fits this definition is not considered a termination. Once the layoff becomes a termination, however, individual termination requirements come into play. It is also important to note that an employee on temporary layoff who does not return to work within 7 days after being requested to do so in writing loses his or her right to notice of termination.

In British Columbia, a temporary layoff is defined as an interruption in employment of not more than 13 weeks in a period of 20 consecutive weeks, or a period of interruption of more than 13 weeks where the worker is recalled within a
fixed time. A week of layoff is defined as a week in which a worker earns less than 50% of his or her weekly wage, averaged over the previous 8 weeks. Where a period of temporary layoff exceeds the defined time limits, the employee is considered to have been terminated at the beginning of the temporary layoff and is entitled to termination pay.

The B.C. Employment Standards Act does not give employers a general right to temporarily lay off employees. A fundamental term of an employment contract is that an employee works and is paid for his or her services. An employer cannot temporarily lay off an employee unless temporary layoff:

- is expressly provided for in the contract of employment;
- is implied by well-known industry-wide practice (e.g., logging, where work cannot be performed during “break-up”); or
- is agreed to by the employee.

In the absence of an express or implied provision allowing temporary layoff, a layoff constitutes termination of employment. The employer must prove that the employment relationship provides for a temporary layoff based on one of the factors listed above. Where a temporary layoff is permitted by the terms and conditions of employment, the Employment Standards Act limits the length of the layoff.

In Manitoba, if a layoff of one or more periods exceeds, in total, 8 weeks within a 16-week period, an employee’s employment will be considered terminated. This does not apply, however, if, in the business in which the employee is employed, employees are subject to regular and recurring layoffs, and the employee was told about it when he or she was hired; or if, during the lay-off, the employer, by agreement with the employee, continues to pay wages to the employee, or to make payments to the employee in place of wages, or to make payments for the benefit of the employee to a pension plan and or group or employee insurance plan. Once a worker is no longer considered to be laid off, he or she is considered to have been terminated as of the first day of layoff and is entitled to payment in lieu of notice as prescribed by the group termination provisions.

In New Brunswick, an employer can lay off an employee for any reason for a period of up to 6 days, and where there is a lack of work due to any reason unforeseen by the employer at the time notice would normally have been given, for as long as the lack of work continues. There are no provisions stating that a layoff ever becomes a termination.
In Newfoundland and Labrador, a temporary layoff is defined as not lasting more than 13 weeks in a period of 20 consecutive weeks. Any day during which an employee receives pay from the employer, including statutory holiday pay, is not included as a day of layoff. Once the layoff goes beyond 13 weeks, the employee is considered to have been terminated at the beginning of the temporary layoff. At this point, individual pay in lieu of notice requirements are in effect. No notice is necessary when the layoff does not exceed 1 week.

In the Northwest Territories, a temporary layoff is defined as an interruption of employment for not more than 45 days in a period of 60 consecutive days, or more than 45 days where the worker is recalled within a time fixed by the Labour Standards Officer. In order to temporarily lay off an employee, the employer must give the worker written notice of the layoff and indicate the expected date upon which the employee will be asked to return to work. However, a temporary layoff is understood to be a termination if the employer fails to provide the worker with written notice. As well, if a temporary layoff exceeds the limit, the employee is considered to have been terminated on the last day of temporary layoff, and the employer must pay the worker termination pay in accordance with individual notice provisions. A worker on temporary layoff who does not return to work within 7 days after being requested to do so in writing is not entitled to termination pay.

In Nova Scotia, where a worker has been laid off for a period of more than 6 consecutive days, he or she is understood to have been terminated on the day the layoff began, and is entitled to pay in lieu of notice under either the individual or group termination provisions, depending on the circumstance that applies to the worker.

In Nunavut, a temporary layoff is defined as an interruption of employment for not more than 45 days in a period of 60 consecutive days or more than 45 days where the worker is recalled within a time fixed by the Labour Standards Officer. In order to temporarily lay off an employee, the employer must give the worker written notice of the layoff and indicate the expected date upon which the employee will be asked to return to work. A temporary layoff is understood to be a termination if the employer fails to provide the worker with written notice. As well, if a temporary layoff exceeds the limit, the employee is considered to have been terminated on the last day of temporary layoff, and the employer must pay the worker termination pay in accordance with individual notice provisions. A worker on temporary layoff who does not return to work within 7 days after being requested to do so in writing is not entitled to termination pay.
EMPLOYMENT STANDARDS

In **Ontario**, a temporary layoff can also give rise to a termination of employment in the following three circumstances:

1. Where the temporary layoff of an employee exceeds 13 weeks in any period of 20 consecutive weeks, the employment of that person is deemed to have been terminated as of the date of the layoff, and the employer shall immediately pay to that person the required termination pay.

2. Where a temporary layoff exceeds 13 weeks in any period of 20 consecutive weeks, and the layoff equals or exceeds 35 weeks in any period of 52 weeks, and where:
   - the employee continues to be paid;
   - the employer continues to make payments on behalf of the employee under a pension or insurance plan;
   - the employee receives supplementary employment benefits;
   - the employee is entitled to receive supplementary employment benefits, but does not because he or she is employed elsewhere during the layoff;
   - the employer recalls the worker within the time approved by the Director of Employment Standards; and
   - the employee is not represented by a union, when the employer recalls the employee within the time set out in an agreement between the employee and the employer;

   the employee shall be deemed to be no longer temporarily laid off, and if the employee has not been given the required notice of termination, the employee is entitled to termination pay.

3. Where the employee is represented by a union and the layoff lasts longer than in situation 2, and the employer fails to recall the employee within the time fixed by an agreement between the employer and the union.

   A layoff is defined as a period of at least 1 week in which an employee receives less than one-half of the wages he or she would earn at his or her regular rate in a regular non-overtime work week unless the employee was not able to work, was unavailable to work, was suspended, or was unable to work due to a strike or lockout at the place of employment or elsewhere.
Where an employee entitled to termination pay has a right to recall, the employee may elect to be paid the termination pay immediately or may elect to maintain the right to recall. If the employee elects to be paid termination pay, the employee is deemed to have abandoned the right to be recalled. Where the employee elects to maintain the right to recall or fails to make an election, the employer is required to pay the termination pay to the Director for Employment Standards in trust. Where the employee accepts employment made available under the right to recall, the employee is deemed to have abandoned the right to termination pay, and the monies held in trust by the Director are returned to the employer. In all other cases, the termination pay shall be paid to the employee and the employee is deemed to have abandoned the right to recall.

Successive periods of employment of a person by an employer constitute one period of employment for the purposes of determining the proper notice of termination. However, where the successive periods of employment are more than 13 weeks apart, only the last period of employment is used to determine the required notice of termination.

In Prince Edward Island, there are no provisions concerning temporary layoffs.

In Quebec, an employer must provide written notice (in the same form as notice of termination) for layoffs that are longer than 6 months. If a layoff that was expected to last less than 6 months exceeds that period, termination pay must be paid at the 6-month date. Where an employee is entitled to a right of recall for more than 6 months under a collective agreement, the employer is required to make the payment in lieu of notice only from the earliest of (a) the expiry of the right to recall period and (b) 1 year after the layoff. Payment in lieu of notice is not required where the employee is not recalled due to a fortuitous event, or where the employee is recalled before the date the employer is required to make the payment and works for a period equal to or longer than the required notice period.

In Saskatchewan, a layoff refers to the temporary termination of an employee’s employment for a period longer than 6 consecutive days. However, an employer is not required to pay anything in lieu of notice to an employee who is laid off for a period of 6 days or less. Once day 7 is reached, the employer is obliged to provide notice or pay in lieu based upon the employee’s length of service.

In the Yukon, a temporary layoff is defined as an interruption in employment for not more than 13 weeks of layoff in a period of 20 consecutive weeks, or a period of more than 13 weeks where the employer recalls the employee to employment.
within a time fixed by the Director. Once a temporary layoff exceeds the time limit, the worker is understood to have had his or her employment terminated at the commencement of the temporary layoff, and is entitled to termination pay under individual termination provisions. With permission of the Board, however, an employer may in fact extend the length of a temporary layoff.

Q: How does a collective agreement affect notice of termination?

Answer

While collective agreements can change the rules somewhat, they cannot put employees in a position where they are entitled to less than the minimum required by law. We will discuss below the provisions concerning collective agreements only as they are addressed in the laws dealing specifically with termination. It should be noted that some jurisdictions do not specifically address the issues surrounding collective agreements at all. As such, the scope of this discussion is fairly limited.

In the federal jurisdiction, where an employee who has bumping rights based on seniority is to have his or her employment terminated, the employer must give the union and the employee 2 weeks’ written notice of the fact, and post a copy of the notice in a conspicuous place in the workplace. Any employee whose employment is terminated as a result is entitled to 2 weeks’ wages at his or her regular rate.

In Alberta, if an employee has recall rights under a collective agreement and he or she is laid off, the employee is entitled to termination pay under employment standards law only when those rights expire.

In British Columbia, if a collective agreement contains any provision relating to seniority retention, recall, individual termination, and layoff, then the provisions of the collective agreement prevail. On the other hand, if a collective agreement does not contain any provision relating to one of these subject areas, then the provisions of the Act apply to the employees covered by the collective agreement. However, parties to a collective agreement may not negotiate a lower standard than that contained in the Act with respect to group termination requirements. Entitlements under a collective agreement regarding group terminations are in addition to entitlements regarding individual termination.

If an employee in British Columbia is covered by a collective agreement that gives her or him the opportunity to be recalled for employment, the employee has the option to either accept termination pay upon termination, or keep the right of recall. If the employee takes the termination pay, he or she is considered to have renounced
the right to recall and all bumping rights under the collective agreement. If, however, the employee chooses to maintain the right of recall, the employer must pay the amount that the employee would have received to the Director, in trust. This money will either be paid back to the employer if the worker accepts a recall to work, or be paid back to the employee if he or she renounces the right of recall or the recall period runs out. Where an employee has not, within 13 weeks of layoff, made a decision, the employer must pay the amount that the employee would have received to the Director, in trust, in which case the same rules of disposition apply.

In **New Brunswick**, the provisions for individual termination in New Brunswick only apply to workers who are not covered by a collective agreement.

In **Newfoundland and Labrador**, the period of notice required by the employer and the employee can be altered by a collective agreement as long as the employer and the employee are both required to provide the same length of notice.

In **Ontario**, an employee who is entitled to termination pay once a layoff has exceeded 35 weeks in a 52-week period, and who has the right of recall under a collective agreement, may choose to either take the termination pay or retain the right to be recalled. Once the employee chooses to take the termination pay, he or she loses the right to recall.

However, if an employee who is not represented by a union chooses to maintain the right to recall or fails to make a decision at all, the employer must pay the Director the termination pay to be held in trust. The Director will either pay the money back to the employer if and when the worker accepts employment from the employer, or to the employee in any other situation.

If an employee represented by a union chooses to maintain the right to recall or fails to make a choice, the employer and the trade union must try to come to an arrangement to hold the termination pay (and severance pay, if any) in trust for the employee. If they cannot come to an arrangement, the employer must send the termination pay (and severance pay, if any) to the Director of Employment Standards, who holds the money in trust.

If an employee in Ontario is entitled to both termination pay and severance pay, he or she must make the same choice for both.

In **Prince Edward Island**, notice of termination provisions do not apply to employees covered by a collective agreement.
EMPLOYMENT STANDARDS

In Quebec, where an employee is entitled under a collective agreement to recall privileges for more than 6 months, termination pay must be paid upon the expiry of his or her recall period, or after 1 year has passed from the date of the layoff, whichever occurs first. However, such employees are not entitled to termination pay if they are not recalled due to a fortuitous event, or if they are recalled before the date when termination pay is due and work for a period at least equal to the notice period to which they are entitled.

In the Yukon, the individual termination provisions do not apply to workers who are represented by a trade union.

Q: What is wrongful dismissal?

Answer

“Wrongful dismissal” is not a legal term, strictly speaking. It is commonly used to refer to cases before the courts dealing with the termination of employment. At common law, a contract of employment can be terminated at will if there is just cause for doing so. If just cause does not exist, either party can still terminate the employment contract if reasonable notice is provided. Wrongful dismissal claims arise where the parties disagree as to whether just cause for the termination of an employment contract existed, or whether the notice of termination provided was reasonable. These concepts are discussed in further detail in the questions that follow.

Q: Are employment standards laws the only laws that would affect wrongful dismissal issues?

Answer

Employment standards legislation across the country provides minimum standards for termination of employment and sets out the number of weeks of pay that dismissed employees should receive, depending on their length of service with the employer.

However, the common law has not been abolished by employment standards legislation. Even when a contract of service between the employer and the employee is terminated in accordance with employment standards legislation, a party to the contract may still seek redress for wrongful dismissal in court (e.g., an employee may

1 “Common law” is a system of unwritten law developed in the courts.
seek damages in relation to an alleged breach of contract). In some cases, payment of the employment standards minimum will also be sufficient to discharge the employer’s obligations under the common law. In other cases, it will not.

Q: What is constructive dismissal?

Answer

In most cases, it is perfectly clear when the employer has terminated the employment relationship: The employer decides to end the employment relationship and informs the employee of that decision. However, it is sometimes the case that an employer has legally terminated the employment relationship without necessarily intending to, or even being aware of it. For example, if the employer alters a major condition of the contract of employment between the employer and the employee, the employer may be considered to have legally ended the employment contract; it will then be up to the employee to accept the new employment contract containing the new conditions, or to claim compensation for termination of the employment contract. This is what is commonly called constructive dismissal.

There are a number of circumstances in which a constructive dismissal may be considered to have occurred. Some examples are listed below:

- **Major change in compensation, job duties or responsibilities, or reporting arrangements**: This is a particular cause for concern if the changes could be construed as a demotion. Thus, organizations undergoing restructuring, and changing job descriptions, compensation structures, or the organizational design, should give particular thought to the potential issue of constructive dismissal.

- **Change in location**: One of the more common forms of constructive dismissal occurs when the location of the employee’s employment is altered. For example, if a manager hired to oversee the sales operation in Calgary is transferred to the Vancouver operation, the manager may treat the transfer as a dismissal, and sue for wrongful dismissal. The fact that the employer is willing to pay all relocation costs, or that the move may be considered a promotion, will not necessarily matter.

- **The “quit or be fired” scenario**: Sometimes an employee is given to understand, whether implicitly or explicitly, that his options are to resign or be dismissed. Where an employee resigns in such circumstances, it will not be
EMPLOYMENT STANDARDS

considered a resignation at all, but a constructive dismissal, creating the same obligations for the employer as if the employee had been dismissed outright.

- Harassment or discriminatory treatment: Recent cases suggest that harassment or abusive or unfair treatment of an employee may be of such a degree as to constitute a repudiation of the employment contract by the employer, and give rise to a claim for constructive dismissal.

Q: How do you determine if constructive dismissal has occurred?

Answer

Constructive dismissal occurs where an employer unilaterally changes an employee’s terms and conditions of employment, salary, hours, or areas of responsibility. Depending on how disruptive these changes are, they could amount to termination. British Columbia, Ontario, the Northwest Territories, Nunavut, and the Yukon all deal with constructive dismissal in their termination provisions.

In British Columbia, the Northwest Territories, Nunavut, and the Yukon, the major criterion for determining constructive dismissal is a labour officer’s belief that the primary reason for changing the employment conditions is to discourage the employee from continuing work.

In Ontario, constructive dismissal is included in the definition of termination. A constructive dismissal may occur where the employer makes a significant change to a fundamental term or condition of an employee’s employment without the employee’s actual or implied consent, following which the employee resigns within a reasonable time of learning of the change. Examples of constructive dismissal could include a significant reduction in an employee’s salary, or a significant change to an employee’s work location, hours of work, authority, or position. Constructive dismissal may also apply if an employer harasses or abuses an employee or gives an employee an ultimatum to “quit or be fired”. Because constructive dismissal is such a complex subject, employees and employers in need of assistance should contact the Ontario Ministry of Labour for further information.

Q: How can an employer avoid a constructive dismissal lawsuit?

Answer

An employer may feel that because of the factors surrounding constructive dismissal, the right to alter the terms and conditions of employment (as may be necessary for an
organization’s health) is restricted. However, with proper planning, most constructive dismissal cases can be avoided by using the following techniques:

- **Give reasonable notice of major changes to conditions of employment:** In effect, the employer can give the employee notice of termination from the current contract of employment, and replace it with a contract, whether written or unwritten, containing the new conditions. This period of notice gives the employee an opportunity to decide whether to continue to work under the new conditions of employment. Careful thought must be given to what period of notice is reasonable, particularly where the changes will impact numerous employees, since there may be employees whose age, length of service, and level of responsibility entitle them to lengthy notice periods.

- **Draft contracts of employment carefully:** A carefully drafted contract of employment may contain provisions entitling the employer to transfer employees between corporate locations, or alter an employee’s responsibilities and compensation package from time to time, if done in a reasonable manner.

**Q:** When is an employer considered to have “just cause” for dismissing an employee?

**Answer**

The issue of just cause is important because where it exists, an employment contract can be terminated without notice or compensation. What is considered just cause can be determined only in the circumstances of the particular case. However, some grounds for dismissal that the courts have found to constitute just cause include insubordination, incompetence, theft or other violation of the trust relationship between the employer and the employee, conflict of interest, intoxication on the job, excessive absenteeism, and sexual harassment of other employees. Economic pressures on the company or an employee’s behaviour off the job will generally not constitute just cause for dismissal.

It must be stressed that the issue of just cause is never clear-cut, and the behaviour of the employee should be viewed in the context of his or her age, length of service with the company, performance record, and employment history, as well as the employer’s policies and organizational culture.
Q: Can a single incident be considered just cause for dismissal?

Answer

Generally speaking, an employer will not have just cause to dismiss an employee for a single mistake or incident of misconduct unless it is a very grave one, such as interfering with the safe and proper conduct of the business. For example, a single incident of theft or dishonesty may be just cause. A single error in carrying out work responsibilities generally will not.

Q: What if the employer has overlooked behaviour worthy of dismissal in the past?

Answer

Where an employer has condoned certain behaviour by an employee, that behaviour cannot then be cited as just cause for dismissal. Condonation occurs where the employer takes no action for a lengthy period of time after becoming aware of the behaviour in question, or has not responded to similar actions in the past, such that the employee has developed a reasonable expectation that the behaviour in question would not be treated as cause for dismissal.

If an employer wishes to treat behaviour that has been condoned in the past as just cause in the future, employees must be explicitly informed of the change in policy, and of the possible consequences of future incidents of the behaviour in question.

Q: When there is no just cause for termination, how much notice of termination is considered reasonable?

Answer

If an employee’s employment is terminated without just cause, reasonable notice of the termination must be given. The amount of reasonable notice that is required beyond the legislated minimum is almost never a clear-cut issue. The particular circumstances of each case must always be taken into account. The results may vary widely, from a few days or weeks, to up to 2 years. As a general rule of thumb, reasonable notice is the length of time required for the employee who is being discharged to find reasonable alternative employment. Some of the factors that the courts have taken into account in determining this are listed below:
TERMINATION OF EMPLOYMENT

- **Employee’s length of service:** This is one of the most important factors to consider in determining reasonable notice. The longer the employee’s record of service is, the greater the employer’s obligations to that employee is deemed to be, and, consequently, the greater amount of notice.

- **Position held by the employee:** The greater the level of responsibility held by an employee, the greater the period of notice must be. This is based on the assumption that, as there are fewer jobs available as employees become more highly specialized, these employees may have more difficulty finding alternative employment. While some recent cases threw doubt on the appropriateness of considering this factor, its importance was reaffirmed by the Ontario Court of Appeal in *Cronk v. Canadian General Insurance Co*.

- **Availability of similar employment:** Where the possibility of finding similar employment is restricted by geographical location or the nature of the industry, employers will be required to provide their employees with longer notice periods. For example, in single-industry towns, where alternative employment is unavailable, lengthy notice periods may be required.

- **Age:** The greater the age of the employee being discharged, the longer the required notice period will be.

- **Employment history:** The courts tend to order longer notice periods for discharged employees with good work records than for employees with poor work histories.

- **Wrongful hiring:** If the employee was “lured away” from a stable job and discharged shortly thereafter, the courts may order a longer period of notice than would otherwise be given based on the length of service.

This is by no means an exhaustive list of the types of issues that may be considered in determining appropriate periods of notice. The approach to determining reasonable notice must be holistic, taking into account *all* of the particular circumstances in each case.

**Q:** How do collective agreements affect termination disputes?

**Answer**

A collective agreement is really a type of employment contract, except that the bargaining agent agrees to the conditions on behalf of a group of employees whom it represents. If the conditions for termination of employment are contained in a
Q: How are damages calculated in a wrongful dismissal case?

Answer

Damages are generally awarded based on the amount of wages an employee would have earned had reasonable notice of the termination been given. As an example, if the court determines that 6 months’ notice was reasonable, the employee will receive damages in the amount of 6 months’ salary, less any earnings during that 6-month period.

While an employee has a duty to mitigate damages and reduce losses by seeking alternative employment, the employer has the burden of proving that the employee could reasonably have avoided some part of the loss claimed.

Q: Are there other kinds of damages that can be awarded in a wrongful dismissal case?

Answer

The manner of dismissal may also give rise to additional damages in the form of extended notice requirements, damages for mental distress, and punitive damages. For example, where the employer behaves in a particularly high-handed manner during the dismissal and this causes verifiable injury and suffering to the employee, damages may be awarded for mental distress or intentional infliction of nervous shock. Punitive damages may also be awarded in cases where the employer has behaved in a harsh, reprehensible, or malicious manner. The following cases provide examples of these kinds of damages.

In Dixon v. British Columbia Transit, [1995] BCJ No. 1892 (S.C.), an employer dismissed an employee for just cause, even though it knew no cause existed and maintained this position until shortly before trial. As well, the employer leaked information to the press to make the employee appear incompetent or dishonest. In addition to the one-year’s salary provided by the employment contract, the employee was awarded $25,000 in general damages, $50,000 in aggravated damages, and $75,000 in punitive damages.

In Marlowe v. Ashland Canada Inc., 2001 BCSC 954, Marlowe was dismissed by his employer, Ashland Canada. They alleged that Marlowe had violated company
policies and procedures, and at his yearly performance review he had received the lowest possible rating on his overall performance, despite the fact that he exceeded the sales goals set for him for the year. After his termination, Marlowe received another job offer, which was subsequently rescinded after someone at the offering company spoke to the district manager at Ashland. It was evident to Marlowe that the offering company had been informed of some of the alleged policy breaches by Ashland. At trial, Ashland agreed that it did not have just cause to fire Marlowe, and that they owed him four-and-a-half months’ salary. As a result, only the issue of punitive or bad faith damages was left to be determined. According to the Court, the conduct of the national sales manager with respect to Marlowe’s performance review was harsh, vindictive, and malicious. The poor performance reviews deprived Marlowe of a bonus, caused others to whom Marlowe reported directly to recommend his dismissal, and permitted inaccurate information to be given to a prospective employer. The Court found Marlowe was entitled to receive his bonus for the year, and that punitive damages were owing as a result of the unfair, \textit{mala fide} performance review.

The employment contract differs from ordinary commercial contracts by the power imbalance between the parties. At the time when the employment relationship ruptures, the employee is at his or her most vulnerable, and is most in need of protection. To encourage conduct that minimizes the damage and dislocation that results from dismissal, employers may be held to an obligation of good faith and fair dealing in \textit{the manner of dismissal}. At the minimum, employers must be candid, reasonable, honest, and forthright with their employees, and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading, or unduly insensitive.

While a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself, where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment, and damage to one’s sense of self-worth and self-esteem might all be worthy of compensation, depending on the circumstances of the case.
Q: What can an employer do to avoid a wrongful dismissal suit?

Answer

A wrongful dismissal case can be a most unpleasant and expensive experience for an employer. The best way to deal with a wrongful dismissal suit is to avoid it altogether. Some suggestions for preventing wrongful dismissal claims are outlined below:

- **Use employment contracts**: An employment contract can be used to specify the types of employee behaviours that the employer may consider just cause for termination of employment without notice or pay-in-lieu of notice, and the amount of notice that will be considered reasonable if the employee is dismissed without cause. An employment contract, if it has been carefully drafted and properly executed, can be of considerable assistance in reducing the possible areas of dispute between the parties if a termination should occur. Any employment contract provisions dealing with termination of the contract of employment should be clear, reasonable, and meet or exceed the minimum requirements under employment standards legislation.

- **Use probationary periods**: As discussed above, an employee’s rights upon termination of employment are limited during a probation period. A fair and effective probation period can provide the employer with a good opportunity to assess the suitability of an employee for a position.

- **Use good human resource management systems**: The effective use of good human resources management systems can be effective not only in ensuring that personnel problems do not escalate to the point where termination of employment is necessary, but also in ensuring that just cause for termination can be clearly supported if the decision to terminate employment is made. In order to ensure that a decision to dismiss an employee for just cause can be supported, an employer’s human resource systems must ensure that employees know what the employer’s standards for performance and conduct are, that they are given reasonable opportunity to achieve these standards, and that they are aware of the consequences of failure to meet these standards. This involves the development of effective programs for training and orientation, attendance management, performance appraisal, and progressive discipline. An employee who is dismissed for cause should never be taken by surprise. Proper use of human resources management systems will ensure that an employee whose job is in
jeopardy is aware of that fact, and is given every reasonable opportunity to correct the problem and maintain the employment relationship.

- **Handle dismissals fairly and sensitively:** For example, don’t allege just cause or misconduct if it doesn’t exist. Try to make the process as easy as possible for the employee (e.g., provide access to outplacement counselling).
## Equal Pay and Pay Equity

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Q: What is the reason for equal pay and pay equity?

Answer

Across North America, Europe, and Australia, gender remains the biggest predictor of wages; it is a factor that surpasses education, experience, and unionization. In Canada and the United States, women working full-time earn approximately two-thirds of what men earn, aside from small variations from jurisdiction to jurisdiction. A variety of factors contribute to the wage gap; however, when statistical adjustments are made, a shortfall of 15% to 20% remains, due to wage discrimination and occupational segregation.

Equal pay and pay equity laws are legislative attempts to address this wage gap. Equal pay laws predate pay equity laws and are more widespread: They deal with the portion of the wage gap that is due to direct discrimination, where men and women performing the same or similar work are paid differently. Pay equity laws are more complex and controversial: They attempt to address the effects of occupational segregation and the historical undervaluation of work done by women by requiring that female-dominated jobs be compensated in the same way as male-dominated jobs of the same value.

Q: What is equal pay?

Answer

The principle of equal pay requires that men and women be paid the same when they do the same work, or do work that is substantially similar. For example, under equal pay legislation, the pay of female nurses’ aides has been compared to that of male orderlies, and male janitors to that of female cleaners.

Q: Is equal pay mandatory?

Answer

Every jurisdiction in Canada has enacted legislation that prohibits employers from paying employees of one sex wages that are different from those paid to the other sex, where the work required and done by both sexes is the same or substantially similar.
Q: What is “similar or substantially similar” work?

Answer

Four factors are used to determine whether the work of one group is the same or substantially the same as that of another. The work must entail similar:

- skill;
- effort;
- responsibility; and
- working conditions.

The work need not be identical in order to be considered to be the same or substantially similar. Lack of intent to discriminate on the part of the employer is irrelevant.

Q: Are there any exceptions to equal pay requirements?

Answer

Pay differences between men and women performing the same or substantially similar work will be justified if they are due to:

- a seniority system;
- a merit system;
- a quantity or quality of production variation (in most jurisdictions); or
- a differential based on any factor other than sex (in some jurisdictions).

Q: Can men’s rate of pay be reduced to ensure equal pay?

Answer

No. Employers are prohibited from reducing an employee’s wages to comply with equal pay requirements.
Q: How is equal pay enforced?

Answer
In some jurisdictions, the right to equal pay is protected under employment standards legislation; in others, it is protected under human rights laws. In either case, employees who believe that their right to equal pay has been violated can file a complaint with either the employment standards or the human rights body, whichever is appropriate. The complaint will be investigated, and an order may be made to remedy the violation.

Q: Can men file equal pay complaints?

Answer
While it is more common for women to be paid less when men and women are performing similar work, equal pay legislation applies to both sexes. If a man believes that he is being paid less than a woman while performing the same or substantially similar work, he can file a complaint, and his right to equal pay will be enforced.

Q: What is pay equity?

Answer
Because pay equity legislation is highly technical, detailed, and varied amongst the jurisdictions, the following information provides only a general overview of the subject matter.

The purpose of pay equity legislation is to ensure that employees who work in historically undervalued, female-dominated jobs receive compensation determined by the value of their work, not by sex discrimination. Pay equity requires employers to take proactive steps to compare the value of female-dominated jobs with that of male-dominated jobs and address any disparities in pay that become apparent.

Q: How is pay equity different from equal pay?

Answer
Pay equity legislation differs from equal pay legislation in two key respects:
While equal pay legislation deals with pay inequality between persons who are performing the same or similar work, pay equity legislation deals with pay inequality between persons who are performing work of equal value. Pay equity addresses the fact that women historically have been, and continue to be, concentrated in a few occupations, such as caregiving, service, and clerical work. Because women usually perform work that is different from that of men, equal pay legislation tends to have limited application. Pay equity has a much broader effect on gender-based discrimination in compensation.

Pay equity legislation is proactive, rather than complaints-based. Under pay equity legislation, employers are obliged to take active steps to seek out and remove gender discrimination in compensation, rather than simply remedying problems that become apparent through complaints, as is the case with equal pay legislation.

Q: Is pay equity mandatory?

Answer

In the public sector, pay equity is legislatively mandated in eight jurisdictions: Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec, the Yukon, and the federal jurisdiction. As well, British Columbia and Newfoundland and Labrador have implemented administrative pay equity programs for their public sectors.

In the private sector, only the federal jurisdiction, Ontario, and Quebec have passed legislation requiring private-sector employers to implement pay equity. Federal legislation differs from Ontario and Quebec legislation in that it is complaints-based.

Q: Are all employers in pay-equity-mandated jurisdictions required to complete the pay equity process?

Answer

The federal legislation applies to all federally regulated employers.

In Ontario, the Pay Equity Act does not apply to private-sector employers with fewer than 10 employees. As well, private-sector employers with more than 9 but fewer than 100 employees have different and less onerous pay equity obligations than do larger private-sector employers. Specifically, while they are still required to
achieve pay equity, they are not required to prepare and post pay equity plans. As well, their mandatory schedules for payment of compensation adjustments are different.

Similarly, in Quebec, employers with fewer than 10 employees are exempted from the requirements of the legislation. Employers with more than 49 but fewer than 100 employees are exempted from the requirement to develop a pay equity committee. Employers with at least 10 but fewer than 50 employees are not required to post a pay equity plan, although they are still required to determine and make the adjustments to compensation necessary to achieve pay equity.

Q: What are the steps in achieving pay equity?

Answer

The pay equity process is detailed, technical, and complex, and varies somewhat between jurisdictions. However, the following steps are the basic components of a pay equity process:

- Identify the unit for which the pay equity plan will be developed: In some cases this will be self-evident. However, where the employer is large and geographically scattered, or where there is a mix of unionized and non-unionized employees, this issue becomes more complex. It is an important issue, however, as it determines the types of comparisons that can be made to achieve pay equity. For this reason, Ontario, Quebec, and federal legislation sets out specific rules on this issue.

- Identify the job classes: Employees within an organization must be divided into job classes, to determine the units for comparison purposes.

- Identify female and male job classes: A variety of criteria may be used to determine whether a job class is “female” or “male” for comparison purposes.

- Assess the value of jobs: The value of each of the job classes identified must be assessed using a gender-neutral system and the criteria set out in the legislation.

- Compare male and female job classes: Various methods of comparison are set out in different jurisdictions, including the job-to-job approach, the wage line approach, and proxy comparisons.

- Identify where compensation adjustments are required: The comparison between male and female job classes will indicate where there are disparities in
compensation. Not all of these disparities will violate pay equity legislation. The employer must determine where disparities exist that must be corrected.

- **Develop a pay equity plan:** The pay equity plan sets out how the differences in compensation that were discovered through the pay equity process will be remedied.

- **Make compensation adjustments:** Generally, employers are permitted to make the necessary compensation adjustments over a period of years.

**Q: How is a job class defined?**

**Answer**

In Ontario, a job class consists of those positions within an organization that have similar duties, responsibilities, qualifications, recruiting procedures, compensation schedules, and salary grades or range of salary grades. A job class may consist of a single position or a single person doing a job.

The definition in Quebec is the same, except that it does not include consideration of recruitment procedures.

In Manitoba, New Brunswick, Newfoundland and Labrador, and Nova Scotia, it is not permissible to have a job class consisting of a single person, and the minimum number of employees for a job class is defined.

**Q: How does one determine whether a job class is female-dominated or male-dominated?**

**Answer**

The criteria varies from jurisdiction to jurisdiction:

- **Gender predominance:** Perhaps the most obvious criteria is the percentage of each gender in the job class. In Quebec, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island, if 60% or more of the positions in the job class are held by employees of the same sex, that will generally be the gender of the job class. In New Brunswick and Ontario, if 60% of the job class is female, it will be considered female-dominated, but a job class will only be considered male-dominated if 70% of the members are male. In Manitoba, the gender-predominance test is 70% for both male and female job classes. In the federal jurisdiction, the gender predominance test is 70% for both female and
equal pay and pay equity

male job classes if the establishment has fewer than 100 members, 60% if the establishment has from 100 to 500 members, and 55% if the establishment has more than 500 members.

- **Historical incumbency:** This factor may be used to determine the gender of a job class in New Brunswick, Ontario, Prince Edward Island, and Quebec.

- **Gender stereotypes:** This factor may be used to determine the gender of a job class in Ontario, Prince Edward Island, and Quebec.

- **Comparison to the total workforce:** This factor is only permitted in Quebec. In applying this factor, one considers the difference between the rate of representation of women or men in the job class and their rate of representation in the total workforce.

**Q:** How is the value of a job determined?

**Answer**

The criteria that must be used for assessing the value of a job are:

- **Skill:** Includes intellectual and physical qualifications acquired by experience, training, education, or natural ability (the methods by which skills are acquired may not be considered in assessing this factor)

- **Effort:** Includes both physical and intellectual effort

- **Responsibility:** Includes technical, financial, or human resources

- **Working conditions:** Includes both physical and psychological conditions such as noise, temperature, isolation, physical danger, health hazards, and stress

The system used for assessing these criteria for the various job classes must be gender neutral.

**Q:** How is the compensation for a job calculated?

**Answer**

Although the definition of the job rate for a job class differs amongst the jurisdictions, in calculating the wages for a job class for the purposes of making a comparison, the following should be considered:

- salaries, commissions, vacation pay, dismissal wages, and bonuses;
EMPLOYMENT STANDARDS

- flexible pay, including merit and performance pay, and income from gain-sharing schemes;
- reasonable value for board, rent, housing and lodging;
- payments in kind;
- employer contributions to pension funds or plans, long-term disability plans, and all forms of health insurance plans;
- benefits that are not equally available to all job classes subject to comparison; and
- any other advantage received directly or indirectly from an individual’s employer.

Q: How are male and female jobs compared?

Answer

There are a number of methods of comparing male and female job classes. Each of the jurisdictions permit different methods of comparison.

- **Job-to-job:** This is the most common type of comparison. Each female job class is compared with a male job class of equal or comparable value. This method of comparison is permitted in Nova Scotia, Ontario, Prince Edward Island, Quebec, the Yukon, and the federal jurisdiction.

- **Wage line:** In this method of comparison, the wages for job classes are compared indirectly, by comparing female job classes with the earning curve of all predominantly male job classes. This method is used in Manitoba, New Brunswick, Newfoundland and Labrador, Quebec, and the federal jurisdiction.

- **Proportional:** The proportional-value method of comparison is available to employers in Ontario who have female job classes with no appropriate male comparators under the job-to-job system. This system requires employers to look at the relationship between the value of the work performed and the pay received by male job classes and apply the same relationship to setting the appropriate pay for female job classes.

- **Proxy:** This method of comparison, available only to Ontario’s broader public sector and only where it has been determined that pay equity cannot be achieved through either job-to-job or proportional value comparisons, allows female job
classes in public-sector workplaces to be compared with similar female job classes that have achieved pay equity in another public sector establishment.

Q: Are there any circumstances where a pay disparity is acceptable?

Answer

Not all disparities between compensation for male and female job classes can be attributed to gender discrimination. The pay equity legislation in several jurisdictions allows for the following permissible differences in compensation:

- **Seniority**: acceptable in New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, the Yukon, and the federal jurisdiction.

- **Performance ratings**: acceptable in Prince Edward Island and the federal jurisdiction.

- **Red-circling**: 1 acceptable in New Brunswick, Newfoundland and Labrador, Ontario, Quebec, the Yukon and the federal jurisdiction.

- **Rehabilitation assignments**: acceptable in the federal jurisdiction.

- **Demotion pay or phased-in reduction of pay**: acceptable in the federal jurisdiction and the Yukon;

- **Training assignments**: acceptable in the federal jurisdiction, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Quebec, and the Yukon.

- **Skills shortage**: acceptable in New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and the Yukon.

- **Merit pay**: acceptable in New Brunswick, Nova Scotia, and Ontario.

- **Regional rates**: acceptable in Quebec and the Yukon.

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1 Red-circling is the practice of freezing an employee’s compensation at a particular rate for a period of time so that a lower pay rate attached to the position catches up to the employee’s current rate. For example, when an employee’s position is re-evaluated and assigned a new lower-value level, the employee may continue earning his or her old, higher rate until the new, lower rate catches up.
Q: What must a pay equity plan contain?

Answer

A pay equity plan sets out how differences in compensation that violate pay equity legislation will be remedied. Only Ontario and Quebec provide detailed requirements for the contents of a pay equity plan. Generally speaking, a pay equity plan should contain:

- a description of the unit for which the pay equity plan has been developed;
- an identification of all of the job classes that formed the basis of comparisons, including which were female and which were male;
- a description of the gender-neutral system used to evaluate job classes;
- the method of comparison used for each job class (where more than one method of comparison was permissible);
- the results of the comparisons;
- an identification of those job classes where permissible differences in compensation existed;
- a description of how the compensation will be adjusted to achieve pay equity (for job classes where non-permissible differences in compensation exist); and
- a schedule for the payout of compensation adjustments.

Q: What if circumstances change after a pay equity plan is developed?

Answer

Except in Prince Edward Island, employers are required to maintain and implement employment equity. Thus, where there are significant changes in circumstances, employers must update or revise their pay equity programs. Events that should trigger an update of the pay equity plan include the creation or elimination of job classes, changes to the value of job classes, changes in the gender predominance of job classes, or changes to job comparison systems. Large-scale revisions to the plan may become necessary when a business is sold or when there are other important changes of circumstances.
Q: Can compensation be reduced in order to achieve pay equity?

Answer

No. Employers are strictly prohibited from reducing the compensation payable to any employee or the compensation rate for any position in order to achieve pay equity.

Q: How quickly must pay adjustments be made?

Answer

In order to reduce the financial burden on employers of making compensation adjustments, employers are permitted to phase in adjustments over a period of years.

In Quebec, employers must make the first compensation adjustments by the date on which the plan is completed, and have a period of 4 years after that date to complete the payments.

In Ontario, employers are required to set aside at least 1% of their total Ontario payroll for the previous year for making pay equity adjustments.

Q: Are employees involved in the pay equity process?

Answer

Where employees are unionized, they are entitled to participate in the pay equity process through their bargaining agents.

With respect to non-unionized employees in Ontario, the legislation specifically entitles these employees to review and submit comments on an employment equity plan before it is deemed approved. As well, if employees submit a complaint regarding the contents of the plan to the Pay Equity Commission within 30 days after the end of the review period, the plan will not be deemed approved until the complaint has been investigated and resolved.

Quebec has made extensive provision in its legislation for the involvement of employees in the development of pay equity. Where an employer has 100 or more employees, a pay equity committee representative of employees must be established, and this pay equity committee is entitled to participate in the establishment of a pay equity plan.
Q: How is pay equity enforced?

Answer

In the Yukon and the federal jurisdiction, pay equity is enforced through the human rights commissions in these jurisdictions. In the other jurisdictions with legislated pay equity programs, pay equity is enforced through special pay equity bodies. Generally speaking, where pay equity legislation is not being complied with, a complaint may be filed with the appropriate government body, and an officer will investigate the matter. Where a failure to comply is found, an order may be issued. This may include the imposition of a pay equity plan in certain circumstances.

Q: What are the pay equity requirements across Canada?

Answer

See the following chart.
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<th>Nova Scotia</th>
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<th>Prince Edward Island</th>
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<td>Proactive</td>
<td>Proactive</td>
<td>Collective agreement (civil service)</td>
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<td>Wage line</td>
<td>Wage line</td>
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<td>Wage line/job-to-job</td>
<td>Job-to-job</td>
<td>Wage line/job-to-job</td>
<td>Job-to-job</td>
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<tr>
<td><strong>Gender Predominance</strong></td>
<td>Staggered 70% female/male</td>
<td>60% female, 70% male (historical incumbency)</td>
<td>60% female/male</td>
<td>60% female, 70% male (historical incumbency, gender stereotypes)</td>
<td>60% female, 70% male (historical incumbency, gender stereotypes)</td>
<td>60% female, 70% male (historical incumbency, gender stereotypes)</td>
<td>60% female, 70% male (historical incumbency, gender stereotypes, total workforce)</td>
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<td><strong>Establishment</strong></td>
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<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
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<td>N/A</td>
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<td>Functional</td>
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<td>10 employees in a job class</td>
<td>5 employees in a job class</td>
<td>10 employees in a job class</td>
<td>No</td>
<td>No</td>
<td>No</td>
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<td>Demotion procedures, seniority, training programs, skills shortage, regional rates, red-circling</td>
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<td><strong>Agency</strong></td>
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<td>Pay Equity Bureau</td>
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<td>Pay Equity Commission</td>
<td>Pay Equity Bureau</td>
<td>Commission de l’équité salariale</td>
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# Employment Equity

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Q: What is the reason for employment equity?

Answer

Employment equity is a response to the employment issues that face designated groups or others disadvantaged in employment. Generally, the designated groups are:

- women;
- members of visible minorities;
- Aboriginals; and
- people with disabilities.

Although anti-discrimination legislation has been in place for decades, these groups continue to face high rates of unemployment, underemployment, and employment discrimination, as well as systemic discrimination. This is a pressing labour-force issue, as members of these groups will make up an increasing proportion of the labour force as time goes on. Mandatory or voluntary employment equity initiatives are one response to these labour-force issues.

Q: What is employment equity?

Answer

Employment equity is both a process and a result. In a workplace where employment equity has been achieved, all barriers to equal participation and treatment of employees have been removed, with the result that the internal composition of the workplace mirrors the makeup of the population from which the organization recruits, and the organization’s policies, procedures, and practices work equally well for all employees, including those from the four designated groups: women, members of visible minorities, Aboriginal peoples, and people with disabilities. Employment equity is this state of equality, as well as the process by which it is achieved.

Q: How is employment equity different from human rights legislation?

Answer

Human rights legislation is reactive and complaints-based. However, employment equity requires employers to take positive, proactive measures to remove barriers to equality, rather than simply respond to instances of discrimination when they become
apparent. Employment equity requires employers to make adjustments to their employment systems to ensure that systemic discrimination does not occur. To some degree, employment equity has evolved as a response to the types of subtle, complex discrimination that were difficult to tackle through human rights legislation.

Q: Doesn’t employment equity violate human rights laws?

Answer

Because employment equity may require that special programs be put into place to deal with issues specific to members of the four designated groups, it is sometimes perceived that employment equity discriminates against persons who are not members of the designated groups and violates the anti-discrimination provisions of human rights laws.

In fact, human rights laws across the country specifically permit employers to undertake special programs to remedy the conditions of disadvantage experienced by particular groups. The intent of employment equity programs is in harmony with the purpose of human rights legislation, since the intent of employment equity is to remove the effects of past discrimination and ensure equal opportunity for the future.

Q: Is employment equity mandatory?

Answer

Although employment equity programs are permissible across the country, in most places they are not mandatory. However, in some circumstances, employment equity is mandatory.

Federally regulated employers are required to implement employment equity under the Employment Equity Act, which was passed in 1986 and substantially revised in 1996. Employees covered by the federal Employment Equity Act include not only persons in the federal public service, but also those in industries regulated by the federal government, such as banking, aerospace, nuclear power, and telecommunications.

Quebec has similar provisions. Quebec’s An Act Respecting Equal Access to Employment in Public Bodies came into effect on April 1, 2001. This Act legislates employment equity for these specific groups: women, Aboriginal peoples, persons who are members of visible minorities because of their race or the colour of their skin, and persons whose mother tongue is neither French nor English and who belong
to a group other than the Aboriginal peoples group or the visible minorities group. The legislation applies to the following public bodies with more than 100 employees: bodies where a majority of the members or directors are appointed by the Quebec government, school boards and educational institutions, municipal and related bodies, and health and social service institutions. The Act does not apply to private sector corporations.

Q: Do private sector firms who contract with the government need to implement employment equity?

Answer

Yes, two contractors programs exist that make employment equity mandatory for suppliers of goods and services.

Under the Federal Contractors Program, contractors that employ 100 or more persons and that wish to bid on goods or services contracts for the federal government worth $200,000 or more, must achieve and maintain a fair and representative workforce. The requirements under the Federal Contractors Program have essentially been harmonized with those under the federal Employment Equity Act (including attention to the four designated groups). However, while the Federal Contractors Program is not legislated, it is mandatory for organizations that wish to do business with the federal government.

The Quebec government has a similar contract-compliance program that applies to both contractors and subcontractors that have more than 100 employees and that wish to bid on government grants or contracts worth at least $100,000. Employers who fall under the program are required to identify and eliminate discrimination for three target groups: women, visible minorities, and Aboriginal peoples.

Finally, it should also be noted that human rights bodies have the power to order employment equity-type measures as a remedy in cases where it seems necessary to combat pervasive systemic discrimination. Although this action is somewhat rare, it has occurred on a number of occasions.

Q: What must an employer do to implement employment equity?

Answer

Generally speaking, the implementation of an employment equity program involves the following steps:
• **Commit:** Organizations undertaking employment equity must obtain and demonstrate senior-level commitment to the process.

• **Consult:** Employment equity is intended to be a process of organizational change in which employees fully participate. As a result, employers are required to consult with employee representatives regarding the communication, preparation, implementation and maintenance of employment equity. Where the workforce is unionized, this process of consultation must include the union as the employee representative.

• **Communicate:** Employers must provide information to their employees that explains the purpose of employment equity, the measures that have been or will be taken, and the progress of the employer in implementing the employment equity program.

• **Survey:** Every employer must collect information on and conduct an analysis of its workforce, in order to determine the degree of under-representation of persons in designated groups in each occupational group. This information must be obtained by a confidential workforce survey.

• **Review:** Employers must conduct a review of all of their employment systems, policies, and practices in order to identify any employment barriers against persons in designated groups that result from their practices. The systems, policies, and practices reviewed must include those relating to the recruitment, training, development, promotion, retention, and termination of employees, as well as reasonable accommodation of the special needs of the designated groups.

• **Plan:** Based on the information collected from the workforce survey and the employment systems review, each employer must develop an employment equity plan indicating how the employer will remove barriers, institute positive policies and practices to correct the effects of past discrimination, and set goals for correcting under-representation of designated groups in the workforce.

• **Monitor:** The implementation of employment equity must be monitored.

• **Update:** The employment equity plan must be updated on a regular basis to ensure continued progress towards an equitable workplace.
Q: How is an employment equity survey carried out?

Answer

Quantitative information on the makeup of an employer’s workforce is essential to an employment equity initiative. Information on the representativeness of the workforce allows the employer to make an informed decision as to the equity issues that are most pressing. For instance, if the data reveals that members of the designated groups are well-represented in the organization but concentrated in low-paying, low-prestige positions, the types of initiatives that are necessary will be different from those required where the issue is one of low representation. As well, quantitative information allows employers to measure the success of their initiatives, and determine whether progress is being made towards the achievement of employment equity.

Quantitative information on the makeup of an employer’s workforce is gathered through a confidential, organization-wide survey of all employees. The federal Employment Equity Act sets out the exact form of questions to be used. Basically, employees must be asked if they are members of any of the four designated groups (i.e., women, members of visible minorities, Aboriginals, or people with disabilities). While the employer must ensure that all employees have the opportunity to complete a questionnaire, identification must be voluntary. If employees do not wish to complete a questionnaire, they may not be compelled to do so. Confidentiality of the responses to the questionnaire must be stringently protected.

Once the questionnaires have been completed and compiled, the employer must compare their workforce against the available workforce. Information on the representation of members of designated groups in various sectors of the labour market can be obtained from the federal government. Employers must compare internal and external availability for each of 14 occupational groups. Federal legislation also requires employers to track the salary ranges for employees and the degree of representation of designated group members in each range and each subdivision of the range.

Q: What is evaluated in an employment systems review?

Answer

The employment systems review should provide insight into the reasons for the representation patterns that were revealed by the workforce survey and analysis. Employers are required to review all policies, practices, and procedures relating to
employment systems, whether they are written or unwritten, formal or informal. The following systems should be reviewed:

- selecting and hiring;
- training and development;
- promotion and movement of employees between occupational groups;
- termination of employment, including dismissals, resignations, and retirement; and
- accommodation of the special needs of members of the designated groups.

Q: **What criteria are used to evaluate employment systems?**

**Answer**

The federal government has developed the following criteria for evaluating each of the employment systems:

- Is it legal? Does it comply with human rights and employment standards legislation?
- Is it applied consistently? Do all employees, whether from the four designated groups or not, receive consistent treatment?
- Does it have an adverse impact? Does the employment policy or practice affect some employees more than others for non-*bona fide* job-related reasons?
- Is it valid? If it is a test, does it accurately predict performance on the job? Are selection criteria based upon *bona fide* occupational requirements?
- Is it a business necessity? Is the practice necessary for the safe and efficient operation of the organization?

Q: **What must an employment equity plan contain?**

**Answer**

The employment equity plan must contain the following components:

- measures that will be taken to remove any barriers identified in the employment systems review, together with a timetable for completion;
positive policies and practices that the employer will institute for the hiring, training, promotion, and retention of members of the designated groups, along with a timetable for the implementation of these policies and practices; and

short-term numerical goals for the hiring and promotion of members of the designated groups in order to increase their representation.

The employment equity plan must constitute reasonable progress towards the implementation of employment equity.

Q: What is a numerical goal?

Answer

A numerical goal is the proportion of job openings in each occupational group that is targeted for the members of a particular designated group. Numerical goals are set to make the employer’s workforce more representative of the community from which it draws its employees. Job openings may include new hires, promotions, and transfers from other occupational groups within the company. These goals are set by the employer, not by the government. In setting numerical goals, employers consider:

- the degree to which members of each designated group are under-represented in each occupational group within the organization;
- the availability of qualified members of the designated groups within the employer’s workforce and in the Canadian workforce;
- the anticipated growth or reduction of the employer’s workforce during the period in question; and
- the anticipated turnover of employees within the employer’s workforce during the period in question.

Q: How long is an employment equity plan to last?

Answer

For federally regulated employers, an employment equity plan may last from 1 to 3 years. The plan must be periodically reviewed and revised.
Q: How is employment equity enforced?

Answer

For federally regulated employers, their obligations under the Employment Equity Act are enforced by the Canadian Human Rights Commission. Compliance officers have the power to conduct audits of employers and, for that purpose, have powers of search and entry. Where an employer is not in compliance, the officer will first attempt to ensure compliance through negotiation and written undertakings. Where this approach fails, the officer may issue a written direction to an employer. Where an employer fails to comply with a direction, the direction may be confirmed by the president of the tribunal panel, and the tribunal may issue an order, which may be enforced in the same manner as an order of the federal court. Violations of the Act are an offence and may lead to financial penalties.

The Federal Contractors Program is administered by federal department of Human Resources and Skills Development (HRSD). Employers must provide authorization to allow HRSD representatives access to the business premises and records in order to conduct on-site compliance reviews for the purpose of measuring the progress achieved in implementing employment equity. Failure to comply can lead to loss of the employer’s government contracts, and a ban on bidding for future contracts.

For Quebec employers, their obligations under the provincial An Act Respecting Equal Access to Employment in Public Bodies are enforced by the Quebec Human Rights Commission.

The Quebec contractors program is enforced by the Quebec Human Rights Commission. Employers are required to submit regular reports to the Quebec Human Rights Commission, and those who fail to comply with the program may lose the certificate needed to bid on Quebec government contracts.
# Psychological Harassment

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</table>
Q: Does employment standards legislation contain provisions relating to harassment?

Answer

Rules relating to harassment in employment in general are usually found under human rights legislation. However, Quebec is the only province to have employment standards provisions relating specifically to psychological harassment. Quebec’s employment standards legislation (An Act Respecting Labour Standards) prohibits psychological harassment in the workplace.

Q: What is psychological harassment?

Answer

In Quebec, psychological harassment is specifically prohibited in the workplace through the province’s An Act Respecting Labour Standards. According to the Act (s. 81.18), psychological harassment is defined as any vexatious behaviour in the form of conduct, verbal comment, actions, or gestures that:

- is repetitive;
- is hostile or unwanted;
- affects an employee’s dignity or psychological or physical integrity; and
- results in a harmful work environment for the employee.

A single serious incidence of such behaviour may also constitute psychological harassment if it undermines the person’s psychological or physical integrity and if it has a lasting, harmful effect.

“Vexatious behaviour” is defined as humiliating or abusive behaviour that lowers a person’s self-esteem or causes him or her torment. It is also behaviour that exceeds what the person considers to be appropriate and reasonable in the performance of his or her work.

Q: Who is protected from psychological harassment?

Answer

All employers in Quebec, whether private sector, public sector, non-unionized or unionized, are covered by the psychological harassment provisions in the legislation.
Every employee has a right to a work environment that is free from psychological harassment.

**Q:** Can only managers be guilty of psychological harassment?

**Answer**

Psychological harassment may come from a number of sources, including a manager or superior, a colleague, a group of colleagues, a customer, a supplier, etc.

**Q:** What types of behaviour constitute psychological harassment?

**Answer**

The following list, while not exhaustive, provides examples of the types of behaviour that could amount to psychological harassment:

- making rude, degrading, or offensive remarks;
- making gestures that seek to intimidate;
- discrediting a person by spreading rumours, ridiculing, or humiliating the person, calling into question the person’s convictions or private life, shouting abuse at him or her, or sexually harassing the individual;
- belittling a person by forcing the person to perform tasks that are belittling or below his or her skills, simulating professional misconduct;
- preventing a person from expressing himself or herself by yelling at or threatening the person, constantly interrupting the person, or prohibiting him or her from speaking to others;
- isolating a person by no longer talking to the individual at all, denying his or her presence, or distancing the person from others; and
- destabilizing a person by making fun of his or her convictions, tastes or political choices.
Q: **Given the restrictions imposed by psychological harassment provisions, can an employer’s management decisions constitute harassment?**

**Answer**

In Quebec, psychological harassment is specifically prohibited in the workplace through the province’s *An Act Respecting Labour Standards*.

An employer has the right to exercise normal management rights, including the right to assign tasks and the right to reprimand or impose disciplinary sanctions. As long as an employer does not exercise these rights in an abusive or discriminatory manner, the employer’s actions do not constitute psychological harassment.

Q: **What are an employer’s responsibilities regarding psychological harassment?**

**Answer**

In Quebec, it is the employer’s responsibility to take reasonable steps to prevent psychological harassment and to put a stop to such behaviour when it is brought to his or her attention.

Prevention remains the best means of combating psychological harassment. The following list, while not exhaustive, sets out some of the steps an employer should take to prevent psychological harassment:

- promote respectful interpersonal communication;
- manage the members of staff fairly;
- take quick and appropriate action to manage conflicts; do not allow the situation to deteriorate;
- clearly define the responsibilities and tasks of each employee;
- develop and publicize a psychological harassment policy that sets out what psychological harassment is and what employer and employer rights are; include a procedure to report cases of harassment confidentially;
- make employees aware of their individual responsibilities for ensuring that their workplace is free from psychological harassment;
- offer training to managers and intervening parties;
get employee feedback on how to prevent psychological harassment;

post the psychological harassment policy clearly in the workplace and take other steps to educate employees, managers, customers, suppliers, users, visitors, etc., regarding the policy;

include information about and/or the actual harassment policy itself in any HR policies and in orientation materials supplied to new employees; and

resort, in certain cases, to specialized resources to help put a stop to a psychological harassment situation and to prevent other such situations from arising.

Q: What should someone who experiences psychological harassment do?

Answer

An individual who is being subjected to psychological harassment should:

• talk about the problem they are experiencing with someone that they are close to (a trusted person) and not remain isolated;

• very clearly tell the person who is the source of the unwanted behaviour that the behaviour is unwanted and that it should stop immediately;

• check the workplace policies to see if there is a procedure for reporting the unwanted behaviour confidentially; and

• bring the matter to the attention of the employer, who is obligated to put a stop to the behaviour by taking appropriate steps.

Q: How does a person file a psychological harassment complaint?

Answer

In Quebec, an individual who believes that he or she has been subjected to psychological harassment may file a complaint in writing to the Commission des normes du travail (the Labour Standards Commission) or mail it to the address of the Commission within 90 days of the last incidence of the offending behaviour.

After receiving the complaint, the Commission may, with the agreement of the parties, appoint a person who will endeavour to settle the complaint to the satisfaction of the interested parties. If no settlement is reached following receipt of the
complaint by the Commission, the Commission may refer the complaint to the Commission des relation du travail (the Labour Relations Commission).

If the employee has been dismissed and the Labour Relations Commission considers that the employee has not been dismissed for good and sufficient cause, the Commission may order the employer to:

- reinstate the employee;
- pay the employee an indemnity up to a maximum of the wages lost;
- take reasonable action to put a stop to the harassment;
- pay punitive and moral damages to the employee;
- pay the employee an indemnity for loss of employment;
- pay for the psychological support needed by the employee for a reasonable period of time determined by the Commission; or
- modify the disciplinary record of the employee.
Penalties for Employment Standards Violations

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Q: What are the consequences for violating employment standards laws?

Answer

While an investigation into an employment standards complaint can be costly and disruptive for an organization, discovering an employment standards violation will most definitely result in added costs. Violations can not only affect the organization’s public reputation, employee morale and productivity, and future recruitment and turnover, they can also affect the bottom line.

Q: Do all jurisdictions set penalties for employment standards violations?

Answer

All jurisdictions impose penalties for violations of either the employment standard provisions or any specific orders made under the Act. In many cases, the penalties are significant and often increase if the corporation is found liable, or if the violation is a second or subsequent offence.

Q: What level of fines do employers face if they violate employment standards provisions?

Answer

The following list summarizes the fines for general violations of an employment/labour standards Act or orders made under the Act:

- Federal jurisdiction: Up to $5,000.
- Alberta: Up to $50,000 for an individual; up to $100,000 for a corporation.
- British Columbia: $500 for first offence, $2,500 for second offence, and $10,000 for third offence.
- Manitoba: Up to $5,000 for an individual; up to $25,000 for a corporation. For second offences, the previous penalty plus a second fine up to a maximum.
- New Brunswick: Up to $5,000 for a first offence, up to $7,500 for a second offence, and the fine can be multiplied by the number of days the offence continues.
PENALTIES FOR EMPLOYMENT STANDARDS VIOLATIONS

- Newfoundland and Labrador: Up to $500 for an individual; up to $1,000 for a corporation. For second and subsequent offences, up to double the fine. An individual who fails to comply with the Labour Standards Act, where no other penalty is provided for in the Act, is subject to a fine of not less than $200, not more than $2,000, and, in default of payment, imprisonment for a term not exceeding 3 months.

- Nova Scotia: While the violation continues, up to $500 a day for an individual and up to $1,000 a day for a corporation.

- Ontario: Up to $50,000 for an individual; up to $100,000 for a corporation, with the fine increasing to up to $250,000 for a second offence and up to $500,000 for a third offence.

- Prince Edward Island: Up to $2,000.

- Quebec: Up to $1,200 for the first offence; up to $6,000 for a second offence.

- Saskatchewan: Up to $2,000 for the first offence; up to $5,000 for a second offence; up to $10,000 for a third offence.

- Northwest Territories: Up to $50,000 for an individual; up to $100,000 for a corporation.

- Nunavut and the Yukon: Up to $10,000.

Q: Are there fines in addition to the general fines?

Answer

Yes. As well as the fines for general violations of employment standards provisions or violations of orders made under the legislation, many of the provinces also impose additional fines for violations of specific provisions of the legislation. For example, failure to keep required records or make them available for inspection often carries a penalty of between $100 and $500 for each day the offence continues.
EMPLOYEE INFORMATION AND RECORDS

Employee Records

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Q: **Why are employee records so important?**

**Answer**

All employers are required by legislation to keep up-to-date personnel records of each employee. These records are not to be confused with employee appraisals on job performance reviews; the required records are statistics pertaining to such things as age, hours of work, wage rates, and vacation periods. It is from this data that government agencies such as Statistics Canada, Canada Labour, and the various provincial departments of labour compile reports on the characteristics and needs of the labour force and the economy itself.

From an employer’s perspective, if a complaint alleging violation of employment standards is filed against it, this data is necessary for reviews by employment standards officers. These records also contain much of the information needed by the Canada Revenue Agency with respect to statutory deductions and remittances and, should the agency conduct an audit or investigate a complaint, this data could also be reviewed by the agency’s staff.

It is therefore vital that correct records are made and kept in an appropriate place, for the appropriate length of time, and in a form that is as readily accessible as possible.

Due to the varying lengths of record retention required by the jurisdictions, it is recommended that employers keep all records for the longest retention period required. This is especially true when employers have operations and employees in numerous provinces/territories. In many cases, the longest retention period follows the federal rules under the *Income Tax Act*.

---

Q: **What kinds of employment standards records are employers required to keep about their employees?**

**Answer**

All employers are to keep records for each employee that are in compliance with employment standards requirements. For example, each record must indicate the hours worked (regular and overtime) by an employee, the wage rate, the dates on which wages are paid, and information on annual vacations and statutory holidays taken. The requirements for the employment standards personnel records that must be kept are extremely detailed, and vary slightly from province to province.
## Information Required for Employment Standards Personnel Records

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<th>Jurisdiction</th>
<th>Information Recorded for Each Employee</th>
<th>Length Retained</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>Dates of commencement and termination of employment; name; address; SIN; occupational classification; gender; age of employee if under 17; rate of wages and basis for rate; daily hours of work; actual earnings; payments made after deductions and details of deductions; information on annual vacations; information on maternity or parental leave; Information on reservists leave consisting of the dates of the beginning and end of the leave and copies of any documentation relating to reservist leave (i.e., medical certificates, proof of entitlement to leave etc.); information on general holidays; information on averaging if hours of work are averaged; employer’s pay periods; information on sick leave; notice of termination or intention to terminate; information on bereavement leave; notice of work schedules that exceed either the standard or maximum hours of work; information on absence due to work related injury or illness (Canada Labour Code)</td>
<td>36 months after work performed</td>
</tr>
<tr>
<td>Alberta</td>
<td>Regular and overtime hours of work; wage rate and overtime rate; earnings paid showing separately each component; deductions from earnings and the reasons therefore; time off instead of overtime pay provided and taken; hours of work; name; address; date of birth; dates of commencement of present employment; dates on which general holidays are taken; dates of vacations and periods of employment in which the vacation was earned; wage rate and overtime rate and dates and particulars of any changes to these rates; documentation relating to maternity and adoption benefits; copies of documentation relating to reservist leave; copies of termination notices and written requests to employees to return to work after a temporary layoff (Employment Standards Code)</td>
<td>3 years from date record made</td>
</tr>
<tr>
<td>British Columbia</td>
<td>Name; date of birth; occupation; telephone number; residential address; date of commencement of employment, wage rate; hours worked each day; benefits paid to the employee by the employer; gross and net wages for each pay period; each deduction made from the employee’s wages and the reason for it; dates of statutory holidays taken by the employee and the amounts paid by the employer; dates of the annual vacation taken by the employee together with the amounts paid by the employer and the days and amounts owing; the amount of money taken by the employee from the employer’s time bank and how much time remains; the amounts paid and the dates taken (Employment Standards Act)</td>
<td>2 years after termination of employment</td>
</tr>
<tr>
<td>(Farm contractors)</td>
<td>Daily log kept at the work site that records worker name; name and site of employer to whom workers supplies; dates each worker works; the fruit, vegetable, berry, or flower crop pick each day by each worker; the volume or weight picked by each worker (Employment Standards Regulation)</td>
<td>2 years after termination of employment</td>
</tr>
<tr>
<td>(Silviculture industry)</td>
<td>Records kept for each employee must include the number of trees planted, hectares spaced, weeded or brushed; the unit price per tree or hectare; the total hours worked; and the daily camp costs. Both employees and employers should sign the records confirming this information on a per-pay-period basis (Employment Standards Guidelines)</td>
<td>N/A</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Information Recorded for Each Employee</td>
<td>Length Retained</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>-----------------------------------------</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Name; address; date of birth; occupation; date of commencement of employment; regular wage rate and overtime wage rate when employment commenced along with the date and particulars or any changes to the either wage rate; regular hours of work and overtime recorded separately and daily (if paid weekly or monthly, record of the standard hours of work and daily overtime); dates wages are paid; amount of wages paid on each date; deductions for wages and reason for each deduction; time off instead of overtime pay provided and taken; the date on which each general (statutory) holiday is taken and the wage rate paid for hours worked on the general holiday; dates of each annual vacation taken by the employee together with the period of employment in which it is earned and the date and amount of vacation allowance paid; the date and amount of vacation allowance owing and paid on termination; documentation relating to maternity, parental, and other leaves including the dates and number of days taken; the date of termination (The Employment Standards Code)</td>
<td>3 years from date record made</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Name; address; date of birth; social insurance number; date of commencement of employment; hours worked by day and by week; wage rate and gross earnings for each pay period; particulars of deductions; living allowance; vacation periods; vacation pay; public holiday pay due or paid; net payments; documents relating to leaves of absence; dates of the leave of absence and the reason for the leave of absence; dates of all dismissals, suspensions, or layoffs, and corresponding notices (Employment Standards Act)</td>
<td>36 months after work performed</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Name; address; date of birth; wage rate; daily hours worked; wages paid and deductions; dates of commencement and termination; notice of termination and notice of intention to terminate; particulars of annual vacation and wages paid; date of rest periods; date of expiry of contract or specific task for which the employee was hired if applicable (Labour Standards Act)</td>
<td>4 years from date of last entry</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Hours worked each day, gross and actual payments, name, age, address, date of commencement of employment and anniversary date, rate of wages and the date and particulars of any changes, information on annual vacations showing (i) the dates of commencement and completion; (ii) the period of employment covered by the annual vacation, and (iii) the amount of vacation pay given, amount paid in lieu of vacation on termination, amount paid for statutory holidays, amount and purpose of deductions, copy of any notice of termination, amount paid in lieu of notice of termination (Employment Standards Act)</td>
<td>2 years from date record made</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Name; age; sex; address; wage rate; hours of work; vacation periods; leaves of absence; pay and vacation pay; dates of commencement and termination of employment; dates of all layoffs or discharges and corresponding notices; cumulative wages (Labour Standards Code)</td>
<td>12 months after work performed</td>
</tr>
<tr>
<td>Nunavut</td>
<td>Hours worked each day; gross and actual payments; name; age; address; date of commencement of employment and anniversary date; rate of wages and particulars of any changes; information on annual vacations; amount paid in lieu of vacation on termination; amount paid for general holidays; amount and purpose of deductions; copy of any notice of termination; amount paid in lieu of notice of termination (Employment Standards Act)</td>
<td>2 years from date record made</td>
</tr>
</tbody>
</table>
### EMPLOYEE INFORMATION AND RECORDS

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Information Recorded for Each Employee</th>
<th>Length Retained</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ontario</strong></td>
<td>Name, address, date of commencement of employment; 1 date of birth (if student under 18); 2 daily and weekly hours worked; 3 agreements to exceed hours or average hours worked; 4 pay period for which wages are paid; wage rate (if there is one); gross amount of wages and how that amount was calculated; the amount and purpose of all deductions from wages; the amount of room and board (living allowance) considered to have been paid to the employee; net amount of wages; 5 documentation relating to pregnancy, parental, family medical, personal, and declared emergency leave; (Employment Standards Act, 2000)</td>
<td>3 years (see footnotes for details)</td>
</tr>
<tr>
<td><strong>(Vacation time &amp; vacation pay)</strong></td>
<td>Amount of vacation time earned since employment commenced but not taken prior to start of vacation year; vacation time earned during vacation year; amount of vacation time earned since employment commenced but not taken by the end of vacation year; vacation pay paid during vacation year; amount of wages used to calculate vacation pay and the time period for which the wages were paid (Employment Standards Act, 2000)</td>
<td>3 years (see footnotes for details)</td>
</tr>
<tr>
<td><strong>(Alternative vacation entitlement year/sub period)</strong></td>
<td>Amount of vacation earned in the stub period; amount of vacation time taken in the stub period; amount of vacation time earned but not taken in the stub period; amount of vacation pay paid in the stub period; amount of wages used to calculate vacation pay and time period for which the wages were paid (Employment Standards Act, 2000)</td>
<td>3 years after record made</td>
</tr>
<tr>
<td><strong>Prince Edward Island</strong></td>
<td>Name; address; social insurance number; date of birth; wage rate and actual earnings; number of hours worked in each day and week; gross earnings per pay period; deductions from gross earnings and nature of each deduction; starting date of employment and date of termination; type of work performed by the employee; period in which employee received vacation with pay; amount of vacation pay paid to the employee in lieu of vacation (Employment Standards Act)</td>
<td>36 months after work performed</td>
</tr>
<tr>
<td><strong>Quebec</strong></td>
<td>Name; address; social insurance number; occupation; date of commencement; for each pay period; daily and weekly hours of work, overtime hours, number of working days per week, wage rate, particulars of other monies paid, gross wages, particulars of deductions, net wages, work period corresponding to payment, date of payment, reference year, duration and departure date of annual vacation, particulars regarding general holidays (Regulation respecting a registration system or the keeping of a register and report transmittal)</td>
<td>3 years</td>
</tr>
</tbody>
</table>

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1 3 years after employment ceases.
2 3 years after 18th birthday.
3 3 years after the respective days or weeks the information relates to.
4 3 years after the last day work was performed under the agreement.
5 3 years after the information is given to the employee.
6 3 years after the date the leave expires.
7 3 years after the information is given to the employee.
8 Vacation time and vacation pay is to be recorded by the later of (a) 7 days after the start of the next (or first) vacation year, or (b) the first payday of the next (or first) vacation year.
EMPLOYEE RECORDS

<table>
<thead>
<tr>
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<th>Information Recorded for Each Employee</th>
<th>Length Retained</th>
</tr>
</thead>
<tbody>
<tr>
<td>Saskatchewan</td>
<td>Particulars of any unwritten contract and copies of written contracts relating to wages or monetary benefits; name; sex; date of birth; address; rate of wages; total wages for each pay period; time when work and meal breaks begin and end each day; total number of hours each day and week; total number of hours each day and week that employee is required to be at employer’s disposal; amount and purpose of deductions; date of each payment of wages; commencement and termination of employment; information on annual holidays; termination pay; register of work performed at home where applicable and address of home worker (Labour Standards Act)</td>
<td>5 years after termination</td>
</tr>
<tr>
<td>Yukon</td>
<td>Copy of written contract or collective bargaining agreement dealing with wages or monetary benefits; name; sex; date of birth; address; description of job; rate of wages and particulars of any change; wages paid for each pay period; total hours worked each day and week; amount and purpose of deductions (Wages Recovery Act)</td>
<td>24 months after entry made</td>
</tr>
<tr>
<td></td>
<td>Name; address; daily and weekly hours worked; gross wages and particulars of deductions; weekly overtime hours; paid time off in lieu of overtime accumulated and taken weekly; annual vacations taken; leaves of absence taken; conditions of employment (Employment Standards Act)</td>
<td>12 months</td>
</tr>
</tbody>
</table>

Q: Are the types of records and the length they must be kept the same for all employees?

Answer

In some provinces and territories, the type of records and the length of time they must be kept varies by the industry or the particular type of record. For example, in British Columbia, both the type of records and the length of time they must be kept is different for farm contractors and silviculture workers. However, in Ontario, the requirement that records be kept for 3 years varies depending on the specific type of record.

For specific details, please refer to the Information Required for Employment Standards Records chart.

Q: Where must employment standards records be kept?

Answer

In British Columbia, Manitoba, Nova Scotia, and the Yukon, employers are required to keep their personnel records at their principal place of business within the province or territory.

In Saskatchewan, the Northwest Territories, and Nunavut, employers are required to keep records within each place of business within the jurisdiction.

In New Brunswick and Prince Edward Island, the employer is simply required to keep the records within the province.
Ontario does not specify where the records are to be kept, but does require that the records be readily available for inspection by an employment standards officer.

The other jurisdictions do not specify a required location for the maintenance of personnel records.

**Q: How long must employment standards records be kept?**

**Answer**

The length of time for which employment standards personnel records must be retained varies across the country from 12 months to 5 years. For details, please refer to the Information Required for Employment Standards Records chart.

**Q: Where must payroll records be kept?**

**Answer**

In the case of income tax, Employment Insurance, and Canada Pension Plan records, the records and books of account have to be kept at the place of business or residence in Canada or another place designated by the Minister of Revenue; they must, upon request, be made available to officers of the Canada Revenue Agency for audit purposes at all reasonable times.

Records and books of account kept outside Canada and accessed electronically from Canada are not records and books of account in Canada. Access to electronic records must be by direct, physical contact to the medium on which the record is stored (e.g., tape or CD).

**Q: How long must payroll records be kept?**

**Answer**

The Canada Revenue Agency and Revenu Québec require that books, records, and their related accounts and source documents dealing with payroll records relating to income tax, Employment Insurance, and Canada Pension Plan or Quebec Pension Plan have to be kept for a minimum of 6 years from the end of the last tax year to which they relate. The tax year is the fiscal period for corporations and the calendar year for all other taxpayers. Under the Employment Insurance Act and Canada Pension Plan, the retention period begins at the end of the calendar year to which the books and records relate.
Q: Where a business ceases operations, how long must payroll records be kept?

Answer

The payroll books and records of a corporation must be retained for 2 years from the date of the dissolution of the corporation (in the case of corporations that amalgamate or merge, books and records have to be retained on the basis that the new corporation is a continuation of each amalgamating corporation).

Non-incorporated business are required to retain the books and records for 6 years from the end of the tax year in which the business ceased.

Q: Can payroll books and records be destroyed at any earlier date than required?

Answer

Yes, payroll books of account and records may be destroyed at an earlier time than set out if the Minister of Revenue gives written permission for their disposal. To get such permission, a person can use Form T137 “Request for Destruction of Books and Records” or can apply in writing to the director of his or her tax services office.

A written request, signed by the director or an authorized representative, should provide the following information: a clear identification of books, records, or other documents to be destroyed; the tax years for which the request applies; details of any special circumstances that would justify destroying the books and records at an earlier time than that normally permitted; and any other pertinent information.

Q: Who can access payroll books and records?

Answer

The issue of who can access employee records or who information may be to disclosed to (e.g., government agencies, third parties, the employee) is tied to the laws governing privacy.
Posters and Notices

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Q: **What is the reason for posting employment standards information?**

**Answer**

In order to ensure that employees are aware of their rights under employment standards legislation, governments across Canada have passed laws requiring certain information to be posted in conspicuous places within the workplace.

The requirements vary widely between the various provinces and territories, and require anything from a simple posting of minimum wages rules, to a posting of the complete employment or labour standards act.

Q: **Do all jurisdictions require information to be posted?**

**Answer**

Yes, the federal government and all of the provinces and territories require at least some form of workplace posting.

Q: **Do hours of work have to be posted?**

**Answer**

Federal employers are required to post hours of work when an averaging or a modified work schedule is in effect.

In Alberta, Nova Scotia, and Saskatchewan, employers are specifically required to post in the workplace a notice that includes information about the time at which work begins and ends.

In British Columbia, if an averaging schedule is to be used, employees must receive a copy of the agreement to average hours of work before the schedule begins.

In Ontario, employers have a number of requirements that they must follow with respect to both agreements to exceed normal hours of work and agreements to average hours of work. With respect to agreements to exceed normal hours of work, employers must comply with the following requirements:

- provide non-unionized employees with the most recent version of the Ontario Ministry of Labour’s “Information for Employees About Hours of Work and Overtime Pay”;
EMPLOYEE INFORMATION AND RECORDS

- post at least one copy of the application sent to the Director in a conspicuous place where employees can see it and the fact of the application is likely to come to their attention; and

- post a copy of the Director’s approval (when it is received) in the same manner as above.

With respect to agreements to average hours of work, employers must comply with the following requirements:

- post at least one copy of the application sent to the Director in a conspicuous place where employees can see it and the fact of the application is likely to come to their attention; and

- post a copy of the Director’s approval (when it is received) in the same manner as above.

Q: Do minimum wage requirements have to be posted?

Answer

In British Columbia, employers of farm workers must each display a notice in a location where it can be read by all employees that states (a) the volume of each picking container being used; (b) the volume or weight of fruit, vegetables, or berries required to fill each picking container; and (c) the resulting piece rate.

In New Brunswick, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island, a copy of all minimum wage regulations must be posted in a conspicuous place in the workplace.

Q: Which jurisdictions require notice of group termination to be posted?

Answer

In Manitoba, New Brunswick, Ontario, Quebec, and the federal jurisdiction, the notice of group termination must be posted in a conspicuous place in the workplace.
Q: Must general information regarding rights and duties under employment standards legislation be posted?

Answer

In Newfoundland and Labrador and Nunavut, employers are required to post a copy of the full employment standards laws and regulations.

In the federal jurisdiction, Ontario, and Saskatchewan, employers are required to post an abstract or summary of the employment standards rules (in a form determined by the jurisdiction).

In Manitoba, Nova Scotia, Prince Edward Island, Quebec, the Northwest Territories, and the Yukon, employers are required to post any legislation, summaries, orders, etc., relating to the terms and conditions of employment as required by the jurisdiction’s Director of Employment Standards.
DISCRIMINATION

Groups Protected Under Human Rights Legislation

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Q: What does employment mean in the context of human rights?

Answer

Under human rights legislation throughout Canada, employment means much more than just occupying a paid position.

Generally, in federal and provincial/territorial jurisdictions, employment describes the entire employment process, including, but not limited to, employment advertising, interviewing, training, and termination.

In provincial/territorial jurisdictions, the meaning of employment includes full-time and part-time positions, volunteer positions, contract and temporary positions (e.g., for a temporary employment agency), and periods during which an employee is on probation.

Q: Who is responsible for human rights protections and what areas are protected?

Answer

Jurisdictions across Canada have human rights legislation that provides protection against discrimination and harassment. However, human rights legislation in Canada varies by federal and provincial jurisdiction.

Federally, the Canadian Human Rights Act (R.S.C. 1985, c. H-6), administered and enforced by the Canadian Human Rights Commission, protects persons residing in Canada against discrimination within or by federally regulated industries (e.g., federal departments and agencies, Crown corporations, post offices, banks, airlines, television and radio stations, communications and telephone companies, and bus and railway companies that travel across provinces) solely in the areas of services and employment.

Each province and territory has a human rights commission or tribunal that is responsible for the administration and enforcement of its respective provincial or territorial human rights legislation. Generally, provincial/territorial human rights legislation across Canada provides protection in the following areas: employment; services; contracts; housing; membership in a professional association or union; sale of merchandise and real estate; and advertising or public notifications. Not all jurisdictions include all of the above-mentioned areas. The following table outlines the areas covered in each jurisdiction.
Protected Areas Under Human Rights Legislation

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<tr>
<td>Federal</td>
<td>Employment and services</td>
</tr>
<tr>
<td>Alberta</td>
<td>Employment and employment applications and advertising; goods, services,</td>
</tr>
<tr>
<td></td>
<td>accommodations, and facilities publicly available; membership in a trade union or</td>
</tr>
<tr>
<td></td>
<td>occupational association; publications, signs, and notices; tenancy</td>
</tr>
<tr>
<td>British Columbia</td>
<td>Employment; membership in a trade union or occupational association; services</td>
</tr>
<tr>
<td></td>
<td>and facilities publicly available; purchase of property; tenancy; hate propaganda</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Employment; housing; accommodation; provision of services or contracts; signs</td>
</tr>
<tr>
<td></td>
<td>and notices</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Employment; occupancy of residential or commercial property; public accommodations</td>
</tr>
<tr>
<td></td>
<td>services, or facilities; sale of goods and real estate; membership in a union or</td>
</tr>
<tr>
<td></td>
<td>professional association; publicity and signs</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Employment; goods, services, accommodation, and facilities; right to occupy</td>
</tr>
<tr>
<td></td>
<td>commercial and dwelling units; publications; contracts</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Employment; housing; services and facilities; purchase or sale of property;</td>
</tr>
<tr>
<td></td>
<td>volunteer public service; publication, broadcast, or advertisement; membership in</td>
</tr>
<tr>
<td></td>
<td>a union or professional association</td>
</tr>
<tr>
<td>Ontario</td>
<td>Employment; goods, services, and facilities; housing; vocational associations and</td>
</tr>
<tr>
<td></td>
<td>unions</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Employment; leasing or selling property; public accommodations, services or</td>
</tr>
<tr>
<td></td>
<td>facilities; membership in a union or professional association; volunteering;</td>
</tr>
<tr>
<td></td>
<td>publishing, broadcasting, and advertising</td>
</tr>
<tr>
<td>Quebec</td>
<td>Employment; housing; access to a public space or any other right under the</td>
</tr>
<tr>
<td></td>
<td>Charter of Human Rights and Freedoms, R.S.Q., c. C-12</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>Employment; contracts; education; housing; professional trades and associations;</td>
</tr>
<tr>
<td></td>
<td>public services; publications; purchase of property; occupations; trade unions</td>
</tr>
<tr>
<td>Yukon</td>
<td>Employment or application for employment; the provision of goods and services</td>
</tr>
<tr>
<td></td>
<td>to the public; membership in trade unions or other work-related associations;</td>
</tr>
<tr>
<td></td>
<td>tenancy or sale of property; public contracts</td>
</tr>
</tbody>
</table>

Q: Who is protected by human rights legislation in Canada?

Answer

All jurisdictions in Canada have human rights legislation that provides protections against discrimination and harassment. However, human rights legislation in Canada varies by federal and provincial jurisdiction.

At the federal level, the Canadian Human Rights Act (R.S.C. 1985, c. H-6) protects persons living in Canada against discrimination that may occur within or by federally regulated industries in the areas of services and employment. Any service provider or employer is prohibited from discriminating against people on the basis of
race, colour, national or ethnic origin, religion, age, sex (including pregnancy and childbearing), marital status, family status, physical or mental disability (including drug or alcohol dependency), pardoned criminal conviction, and sexual orientation.

At the provincial/territorial level, human rights legislation provides protection from discrimination and harassment in the areas of race, colour, religion or creed, sex, disability (mental and physical, and in some cases perceived), age, sexual orientation, and marital status.

In some jurisdictions (Newfoundland and Labrador, Nova Scotia, Prince Edward Island, the Yukon), discrimination because of association with a protected group is prohibited. Furthermore, in some jurisdictions (Ontario, Manitoba), discrimination can be based on real or perceived characteristics. Each jurisdiction also includes additional grounds upon which employees are protected. The following table outlines these additional grounds.

### Additional Protected Grounds of Discrimination

<table>
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<tr>
<th>Jurisdiction</th>
<th>Additional Protected Grounds</th>
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<tbody>
<tr>
<td>Alberta</td>
<td>Ancestry or place of origin; family status; source of income</td>
</tr>
<tr>
<td>British Columbia</td>
<td>Ancestry; place of origin; political belief; family status; criminal or summary conviction not related to intended employment</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Ancestry (including colour and perceived race); family status; nationality/national origin; ethnic background; political belief; source of income</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Ancestry; national origin; place of origin; political belief or activity; social condition</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Disfigurement; ethnic origin; family status; nationality; political opinion; social origin; source of income; criminal conviction not related to employment</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Ancestry; nationality; place of origin; family status; pardoned criminal conviction</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Ethnic, national, or aboriginal origin; family status; irrational fear of contracting illness or disease; political belief; source of income</td>
</tr>
</tbody>
</table>

1. "Race" can include colour, ancestry, place of origin, and language. In Manitoba, race is included in the ground of "ancestry". "Perceived race" is included in Saskatchewan and Manitoba.

2. The ground of "sex" often, but not always, includes sexual harassment, pregnancy, and pregnancy-related conditions. In Alberta, this ground is described as "gender" and also includes "equal pay for same or similar work". In Quebec, sex and pregnancy are listed as separate grounds.

3. The age range that is protected under provincial human rights legislation varies across jurisdictions.

4. "Marital status" is sometimes paired with the ground of "family status" (e.g., Manitoba Human Rights Code). Marital status is known as "civil status" in Quebec.
**Groups Protected Under Human Rights Legislation**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Additional Protected Grounds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ontario</td>
<td>Ancestry; ethnic origin; place of origin; citizenship; family status; same-sex partnership status; record of offences</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Ethnic or national origin; family status; criminal or summary conviction not related to intended employment; political belief; source of income</td>
</tr>
<tr>
<td>Quebec</td>
<td>Ethnic or national origin; language; social condition; pregnancy; political convictions</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>Ancestry; nationality; place of origin; family status; receipt of public assistance</td>
</tr>
<tr>
<td>Yukon</td>
<td>Ancestry; national origin; ethnic or linguistic origin; family status; criminal charges or criminal record; political beliefs; source of income</td>
</tr>
</tbody>
</table>

**Q:** How do I know which human rights legislation applies?  
**Answer**

Jurisdictions across Canada have human rights legislation that provides protection against discrimination and harassment in a number of areas, including employment. However, human rights legislation in Canada varies by federal and provincial/territorial jurisdiction.

Federally, the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6), administered and enforced by the Canadian Human Rights Commission, protects employees working in the federal government, Crown corporations, or federally regulated industries (e.g., banks, railroads, airlines).

All other employees are protected by the human rights legislation passed by their province or territory. Provincial and territorial human rights commissions or tribunals are responsible for the administration and enforcement of their respective human rights legislation.

**Q:** What protections are afforded on the basis of race?  
**Answer**

Throughout Canada, federal and provincial human rights legislation protects employees from discrimination and harassment on the basis of race. Sometimes this protection is coupled with the grounds of ethnicity, ancestry, place of origin, colour, national origin, or citizenship, and may be associated with language.

Under human rights legislation throughout Canada, employees are entitled to a workplace free from discrimination and harassment on the basis of race. Employers must ensure that the work environment is free from commentary, jokes, actions, and...
behaviours that are discriminatory or harassing on the basis of race. Furthermore, employers must ensure that policies and procedures within the work environment do not inadvertently disadvantage employees on the basis of race. Examples of racially discriminatory actions in the workplace include hiring procedures that screen out particular racial groups; the e-mail distribution and toleration of jokes that are racially derogatory; and the denial of employment opportunities based on a person’s race.

Creating a hostile work environment is also considered a violation of the human rights afforded to employees. In Ontario, this is called a ‘poisoned environment’. A poisoned environment can be created from discriminatory or harassing comments or actions that are based on race for employees to whom the comments or actions are directed, for members of the group with whom that person associates racially, and for other employees in general.

In some cases, human rights legislation allows for exceptions where special interests are concerned. Although legislation varies across Canada, in general, non-profit, charitable, philanthropic, fraternal, religious, or social organizations can be deemed “special interest groups”; on this basis, these organizations may be afforded the ability to favour a person from a particular racial group for employment because of the nature of the job. For example, an agency that primarily serves South East Asian women and children may be able to show that it is necessary to hire someone from the same racial group. It is advisable for an employer to refer to local human rights guidelines regarding such exceptions.

An employer will be held responsible for discrimination that occurs in the workplace, whether it was condoned or whether the employer failed to take reasonable actions to prevent it. Employers can also be held responsible for the racially discriminatory or harassing behaviours of their employees, particularly where the person responsible for the act is a person of authority within the company. Employers may also be held responsible for racially discriminatory or harassing behaviours of employment agencies that they utilize in the hiring process, if it is shown that the agency acted on the request of the employer.

As well, co-workers can be held personally responsible for discriminatory actions that were not carried out as a part of their employment duties (e.g., a co-worker tells a racially derogatory joke at a holiday party).

Unions can also be held responsible for discriminatory behaviour in particular situations. Where a union participates in the formulation of a work rule that has a discriminatory effect on an employee or group of employees, the union may be held
GROUPS PROTECTED UNDER HUMAN RIGHTS LEGISLATION

responsible. If the work rule is a part of a collective agreement, it is assumed that the agreement was developed by both the union and the employer. As a result, both the union and the employer bear the responsibility for discriminatory actions or behaviours that result from the rule.

Q: What protections are afforded on the basis of ethnic origin?

Answer

Throughout most provinces and territories in Canada, employees are protected from discrimination on the basis of ethnic origin. It is only in Alberta, British Columbia, Saskatchewan, the Northwest Territories, and Nunavut that this ground is not specified in human rights legislation. Sometimes this protection is coupled with the grounds of race, ancestry, place of origin, colour, ethnicity, and may be associated with language.

Statistics Canada defines ethnic origin as “the ethnic or cultural origins of the [person’s] ancestors. An ancestor is someone from whom a person is descended and is usually more distant than a grandparent. . . . Ethnic origin refers to a person’s ‘roots’ and should not be confused with his or her citizenship, nationality, language or place of birth”.5

Under human rights legislation (in all jurisdictions except Alberta, BC, Saskatchewan, the Northwest Territories, and Nunavut), employees are entitled to a workplace free from discrimination and harassment on the basis of ethnic origin. Employers must ensure that the work environment is free from commentary, jokes, actions, and behaviours that are discriminatory or harassing on the basis of ethnic origin. Furthermore, they must ensure that policies and procedures within the work environment do not inadvertently disadvantage employees on the basis of their ethnic origin.

Creating a hostile work environment is also considered a violation of the human rights afforded to employees. In Ontario, this is called a ‘poisoned environment’. A poisoned environment can be created from discriminatory or harassing comments or actions that are based on ethnic origin for employees to whom the comments or actions are directed, for members of the group with whom that person associates ethnically, and for other employees in general.

In some cases, human rights legislation allows for exceptions where special interests are concerned. Although legislation varies across Canada, in general,

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non-profit, charitable, philanthropic, fraternal, religious, or social organizations can be deemed “special interest groups”; on this basis, these organizations may be afforded the ability to favour a person from a particular ethnic group for employment because of the nature of the job. For example, an agency that primarily serves Filipino women and children may be able to show that it is necessary to hire someone from the same racial group. It is advisable for an employer to refer to local human rights guidelines regarding such exceptions.

An employer will be held responsible for discrimination that occurs in the workplace, whether it was condoned or whether the employer failed to take reasonable actions to prevent it. Employers can also be held responsible for the discriminatory or harassing behaviours of their employees, particularly where the person responsible for the act is a person of authority within the company. Employers may also be held responsible for discriminatory or harassing behaviours of employment agencies that they utilize in the hiring process, if it is shown that the agency acted on the request of the employer.

As well, co-workers can be held personally responsible for discriminatory actions that were not carried out as a part of their employment duties (e.g., a co-worker tells a derogatory joke about a particular ethnic group at a holiday party).

Unions can also be held responsible for discriminatory behaviour in particular situations. Where a union participates in the formulation of a work rule that has a discriminatory effect on an employee or group of employees, the union may be held responsible. If the work rule is a part of a collective agreement, it is assumed that the agreement was developed by both the union and the employer. As a result, both the union and the employer bear the responsibility for discriminatory actions or behaviours that result from the rule.

Q: What protections are afforded on the basis of place of origin?

Answer

Place of origin is specified as a protected ground in the following jurisdictions: Alberta, British Columbia, New Brunswick, Ontario, Saskatchewan, the Northwest Territories, and Nunavut.

Place of origin refers to the place that a person is from or was born in, whether inside or outside of Canada. Place of origin can also mean the Canadian province or territory that someone is originally from.
Although not always, place of origin can be coupled with other grounds such as race, nationality, national origin, social origin, ancestry, place of origin, and place of residence. For instance, the Saskatchewan Human Rights Commission includes place of origin within the definition of ancestry under its human rights legislation.

An employer cannot discriminate or harass an employee on the basis of his or her place of origin or presumed place of origin. A clear example of such discrimination is the common requirement that applicants have Canadian experience. This automatically eliminates all applicants whose place of origin is outside of Canada and who may have just recently immigrated to Canada (leaving little time to gain Canadian experience), despite the fact that they may possess all other qualifications for the position. Once a person is hired, an employer should not ask questions about a person’s place of origin.

Q: What protections are afforded on the basis of nationality or citizenship?

Answer

Throughout Canada, employees are protected from discrimination on the basis of nationality, national origin, or citizenship. Sometimes this protection is coupled with the grounds of race, ancestry, place of origin, colour, ethnicity, and may be associated with language.

Under human rights legislation throughout Canada, employees are entitled to a workplace free from discrimination and harassment on the basis of nationality or citizenship. Employers must ensure that the work environment is free from commentary, jokes, actions, and behaviours that are discriminatory or harassing on the basis of nationality or citizenship. Furthermore, they must ensure that policies and procedures within the work environment do not inadvertently disadvantage employees on the basis of their nationality or citizenship. Examples of discrimination on the basis of nationality or citizenship include the employment requirement for Canadian experience, and the use of application forms that request information on birth place or nationality.

Creating a hostile work environment is also considered a violation of the human rights afforded to employees. In Ontario, this is called a ‘poisoned environment’. A poisoned environment can be created from discriminatory or harassing comments or actions based on nationality or citizenship for employees to whom the comments or
actions are directed, for members of the group with whom that person associates ethnically, and for other employees in general.

In some cases, human rights legislation allows for exceptions where special interests are concerned. Although legislation varies across Canada, in general, non-profit, charitable, philanthropic, fraternal, religious, or social organizations can be deemed “special interest groups”; on this basis, these organizations may be afforded the ability to favour a person of a particular nationality for employment because of the nature of the job. For example, an agency that primarily serves people from Costa Rica may be able to show that it is necessary to hire someone who shares the same nationality. It is advisable for an employer to refer to local human rights guidelines regarding such exceptions.

An employer will be held responsible for discrimination that occurs in the workplace, whether it was condoned or whether the employer failed to take reasonable actions to prevent it. Employers can also be held responsible for the discriminatory or harassing behaviours of their employees, particularly where the person responsible for the act is a person of authority within the company. Employers may also be held responsible for discriminatory or harassing behaviours of employment agencies that they utilize in the hiring process, if it is shown that the agency acted on the request of the employer.

As well, co-workers can be held personally responsible for discriminatory actions that were not carried out as a part of their employment duties (e.g., a co-worker tells a derogatory joke about a person from a particular country at a holiday party).

Unions can also be held responsible for discriminatory behaviour in particular situations. Where a union participates in the formulation of a work rule that has a discriminatory effect on an employee or group of employees, the union may be held responsible. If the work rule is a part of a collective agreement, it is assumed that the agreement was developed by both the union and the employer. As a result, both the union and the employer bear the responsibility for discriminatory actions or behaviours that result from the rule.
Q: What protections are afforded on the basis of religion or creed?

Answer

In all jurisdictions across Canada except for in the Northwest Territories and Nunavut, employees are protected from discrimination and harassment on the basis of religion or creed. Employers must ensure that the work environment is free from commentary, jokes, actions, and behaviours that are discriminatory or harassing on the basis of religion or creed. Furthermore, they must ensure that policies and procedures within the work environment do not inadvertently disadvantage employees on the basis of their religion or creed. Examples of discrimination on the basis of religion or creed include derogatory comments or jokes about an employee’s religion, denying flexible work arrangements to accommodate religious leave for an employee, or an employer imposing his or her religious beliefs upon an employee.

Creating a hostile work environment is also considered a violation of the human rights afforded to employees. In Ontario, this is called a “poisoned environment”. A poisoned environment can be created from discriminatory or harassing comments or actions based on religion for employees to whom the comments or actions are directed, for members of the religious group with whom that person associates, and for other employees in general.

In some cases, human rights legislation allows for exceptions where special interests are concerned. Although legislation varies across Canada, in general, non-profit, charitable, philanthropic, fraternal, religious, or social organizations can be deemed “special interest groups”; on this basis, these organizations may be afforded the ability to favour a person from a particular religious group for employment because of the nature of the job. For example, Catholic schools have a right to prefer hiring members of the Catholic church. It is advisable for an employer to refer to local human rights guidelines regarding such exceptions.

Employers are required to ensure that if needed, reasonable accommodation, to the point of undue hardship, is provided to an employee to allow that employee to perform the essential duties of the job where barriers to work performance occur because of religion. For example, it may be necessary for an employer to provide flexible work arrangements to accommodate the religious practices of an employee in a way that allows the employee to continue to perform the essential duties of the job.
An employer will be held responsible for discrimination that occurs in the workplace, whether it was condoned or whether the employer failed to take reasonable actions to prevent it. Employers can also be held responsible for the discriminatory or harassing behaviours of their employees, particularly where the person responsible for the act is a person of authority within the company. Employers may also be held responsible for discriminatory or harassing behaviours of employment agencies that they utilize in the hiring process, if it is shown that the agency acted on the request of the employer.

As well, co-workers can be held personally responsible for discriminatory actions that were not carried out as a part of their employment duties (e.g., a co-worker tells a derogatory joke about a particular religious group at a holiday party).

Unions can also be held responsible for discriminatory behaviour in particular situations. Where a union participates in the formulation of a work rule that has a discriminatory effect on an employee or group of employees, the union may be held responsible. If the work rule is a part of a collective agreement, it is assumed that the agreement was developed by both the union and the employer. As a result, both the union and the employer bear the responsibility for discriminatory actions or behaviours that result from the rule.

**Q: What protections are afforded on the basis of sex?**

**Answer**

In all jurisdictions across Canada, employees are protected from discrimination and harassment on the basis of sex or gender. Statistics Canada categorically defined sex as male and female in the 2006 census. However, in some jurisdictions, such as Ontario and British Columbia, the human rights body will also accept human rights complaints related to gender identity under the protected ground of sex. The Ontario Human Rights Commission offers the following definition of gender identity: “Gender identity is linked to an individual’s intrinsic sense of self, and particularly the sense of being male or female. Gender identity may or may not conform to a person’s birth-assigned sex. The personal characteristics that are associated with gender identity include self-image, physical and biological appearance, expression, behaviour, and conduct, as they relate to gender”. People who may experience

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discrimination on the basis of gender identity include transsexuals, transgendered persons, intersexed persons, and cross-dressers.

Employers must ensure that the work environment is free from commentary, jokes, actions, and behaviours that are discriminatory or harassing on the basis of sex or gender. Furthermore, they must ensure that policies and procedures within the work environment do not inadvertently disadvantage employees on the basis of their sex or gender. Examples of discrimination on the basis of sex include screening out female or male candidates when gender has no reasonable bearing on whether the essential duties of the job can be performed; limiting the job opportunities of women within a company to low-level, low-paying positions; derogatory jokes about women or men; disallowing a pregnant woman time off for medical appointments; and applying differential pay scales based on the gender of the employee.

Creating a hostile work environment is also considered a violation of the human rights afforded to employees. In Ontario, this is called a ‘poisoned environment’. A poisoned environment can be created from discriminatory or harassing comments or actions that are based on gender for employees to whom the comments or actions are directed, for members of that gender, and for other employees in general.

In some cases, human rights legislation allows for exceptions where special interests are concerned. Although legislation varies across Canada, in general, non-profit, charitable, philanthropic, fraternal, religious, or social organizations can be deemed “special interest groups”; on this basis, these organizations may be afforded the ability to favour a person of a particular gender for employment because of the nature of the job. For example, a women’s shelter may be able to show that it is reasonably necessary to hire only women. It is advisable for an employer to refer to local human rights guidelines regarding such exceptions.

An employer will be held responsible for discrimination that occurs in the workplace, whether it was condoned or whether the employer failed to take reasonable actions to prevent it. Employers can also be held responsible for the discriminatory or harassing behaviours of their employees, particularly where the person responsible for the act is a person of authority within the company. Employers may also be held responsible for discriminatory or harassing behaviours of employment agencies that they utilize in the hiring process, if it is shown that the agency acted on the request of the employer.

As well, co-workers can be held personally responsible for discriminatory actions that were not carried out as a part of their employment duties (e.g., a co-worker tells a derogatory joke about a particular sex at a holiday party).
Unions can also be held responsible for discriminatory behaviour in particular situations. Where a union participates in the formulation of a work rule that has a discriminatory effect on an employee or group of employees, the union may be held responsible. If the work rule is a part of a collective agreement, it is assumed that the agreement was developed by both the union and the employer. As a result, both the union and the employer bear the responsibility for discriminatory actions or behaviours that result from the rule.

Q: What protections are afforded on the basis of pregnancy?

Answer

In all jurisdictions across Canada, employees are protected from discrimination and harassment on the basis of sex or gender. Although the term “pregnancy” does not appear in most human rights legislation (with the exception of Quebec where pregnancy is considered a ground of discrimination), pregnant women are protected from discrimination and harassment under the ground of sex or gender. The Supreme Court of Canada decision in *Brooks v. Canada Safeway Ltd.* (1989), 59 D.L.R. 321, noted that “discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.” This protection also often extends to women who are breastfeeding and to the period of childbirth following pregnancy. Pregnancy and childbirth are protected under the ground of sex or gender in the following jurisdictions: federal, Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Ontario, Quebec, Saskatchewan, and the Yukon.

Employees are entitled to a workplace free from discrimination and harassment on the basis of pregnancy or childbirth. Employers must ensure that the work environment is free from commentary, jokes, actions, and behaviours that are discriminatory or harassing on the basis of pregnancy or childbirth. Furthermore, they must ensure that policies and procedures within the work environment do not inadvertently disadvantage employees on the basis of their state of pregnancy or experience of childbirth. Examples of discrimination on the basis of pregnancy or childbirth include a job interview in which the potential applicant is asked if she is pregnant or if she plans to have children; refusing to provide a pregnant woman time off for doctor appointments; and demoting or firing a woman because she is pregnant or breastfeeding or because she required leave following childbirth.

Creating a hostile work environment is also considered a violation of the human rights afforded to employees. In Ontario, this is called a “poisoned environment”. A
poisoned environment can be created from discriminatory or harassing comments or actions that are based on pregnancy or childbirth for employees to whom the comments or actions are directed, for other pregnant employees, and for other employees in general.

Employers are required to ensure that where needed, reasonable accommodation, to the point of undue hardship, is provided to allow an employee to perform the essential duties of the job where barriers to work performance occur because of pregnancy or childbirth. For example, an employee may not be able to perform certain duties because of her pregnancy (e.g., a woman who works in a warehouse may not be able to perform heavy lifting during pregnancy or directly following childbirth). The employer has an obligation to work with the employee to develop an accommodation that would allow the employee to continue to perform the essential duties of her job.

An employer will be held responsible for discrimination that occurs in the workplace, whether it was condoned or whether the employer failed to take reasonable actions to prevent it. Employers can also be held responsible for the discriminatory or harassing behaviours of their employees, particularly where the person responsible for the act is a person of authority within the company. Employers may also be held responsible for discriminatory or harassing behaviours of employment agencies that they utilize in the hiring process, if it is shown that the agency acted on the request of the employer.

As well, co-workers can be held personally responsible for discriminatory actions that were not carried out as a part of their employment duties (e.g., a co-worker tells a derogatory joke about pregnant women at a holiday party).

Unions can also be held responsible for discriminatory behaviour in particular situations. Where a union participates in the formulation of a work rule that has a discriminatory effect on an employee or group of employees, the union may be held responsible. If the work rule is a part of a collective agreement, it is assumed that the agreement was developed by both the union and the employer. As a result, both the union and the employer bear the responsibility for discriminatory actions or behaviours that result from the rule.
Q: What protections are afforded to nursing mothers?

Answer

In all jurisdictions across Canada, employees are protected from discrimination and harassment on the basis of sex or gender. Nursing mothers are afforded the right to freedom from discrimination and harassment under the ground of sex or gender. In many jurisdictions across Canada, the right to freedom from discrimination or harassment because of pregnancy includes pregnancy-related conditions such as breastfeeding. Jurisdictions that provide this protection are Ontario, British Columbia, and the federal jurisdiction. In Saskatchewan, this may be addressed under the ground of family status as well.

Employees are entitled to a workplace free from discrimination and harassment because they are nursing or breastfeeding. Employers must ensure that the work environment is free from commentary, jokes, actions, and behaviours that are discriminatory or harassing on this basis. Furthermore, they must ensure that policies and procedures within the work environment do not inadvertently disadvantage employees because they are nursing. Examples of discrimination on the basis of pregnancy or childbirth include disallowing an employee to bring her child to work on breaks to feed the child; not allowing a woman a place to pump breast milk for later use; or requiring that a woman pump milk or feed her child in unsuitable and demeaning locations (e.g., the bathroom).

Creating a hostile work environment is also considered a violation of the human rights afforded to employees. In Ontario, this is called a “poisoned environment”. A poisoned environment can be created from discriminatory or harassing comments or actions that are based on breastfeeding for employees to whom the comments or actions are directed, for other employees who are nursing, and for other employees in general.

Employers are required to ensure that where needed, reasonable accommodation, to the point of undue hardship, is provided to an employee where work requirements conflict with breastfeeding. For example, an employee may require an extra 15 minutes on a break to ensure her baby receives enough food or that she is able to pump enough milk. An employer should allow for flexibility in break schedules to accommodate this temporary need of the employee. The employer has an obligation to work with the employee to develop an accommodation that would allow the employee to continue to perform the essential duties of her job.
An employer will be held responsible for discrimination that occurs in the workplace, whether it was condoned or whether the employer failed to take reasonable actions to prevent it. Employers can also be held responsible for the discriminatory or harassing behaviours of their employees, particularly where the person responsible for the act is a person of authority within the company. Employers may also be held responsible for discriminatory or harassing behaviours of employment agencies that they utilize in the hiring process, if it is shown that the agency acted on the request of the employer.

As well, co-workers can be held personally responsible for discriminatory actions that were not carried out as a part of their employment duties (e.g., a co-worker tells a derogatory joke about a colleague who is breastfeeding at work).

Unions can also be held responsible for discriminatory behaviour in particular situations. Where a union participates in the formulation of a work rule that has a discriminatory effect on an employee or group of employees, the union may be held responsible. If the work rule is a part of a collective agreement, it is assumed that the agreement was developed by both the union and the employer. As a result, both the union and the employer bear the responsibility for discriminatory actions or behaviours that result from the rule.

Q: In which jurisdictions is sexual orientation a protected ground of discrimination?

Answer

Discrimination on the basis of sexual orientation is prohibited in the following jurisdictions: federal, Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, Saskatchewan, and the Yukon.

Q: What protections are afforded on the basis of sexual orientation?

Answer

In all jurisdictions across Canada, except for the Northwest Territories and Nunavut, employees are protected from discrimination and harassment on the basis of sexual orientation. A number of definitions of sexual orientation exist; however, the Ontario Human Rights Commission offers the following comprehensive definition of sexual orientation: “Sexual orientation is more than simply a ‘status’ that an individual
DISCRIMINATION

possesses; it is an immutable personal characteristic that forms part of an individual’s core identity. Sexual orientation encompasses the range of human sexuality from gay and lesbian to bisexual and heterosexual orientations. In some jurisdictions across Canada, the ground of sexual orientation can be interpreted to include protections for persons in same-sex partnerships as well.

Employees are entitled to a workplace free from discrimination and harassment because of their sexual orientation. Employers must ensure that the work environment is free from commentary, jokes, actions, and behaviours that are discriminatory or harassing on this basis. Furthermore, they must ensure that policies and procedures within the work environment do not inadvertently disadvantage employees because their sexual orientation. Examples of discrimination on the basis of sexual orientation include derogatory jokes about a particular sexual orientation, limiting the job opportunities for gay or lesbian employees, or excluding same-sex partners of employees from employee benefit schemes.

Creating a hostile work environment is also considered a violation of the human rights afforded to employees. In Ontario, this is called a “poisoned environment”. A poisoned environment can be created from discriminatory or harassing comments or actions based on sexual orientation for employees to whom the comments or actions are directed, for other employees who share the same sexual orientation, and for other employees in general.

In some cases, human rights legislation allows for exceptions where special interests are concerned. Although legislation varies across Canada, in general, non-profit, charitable, philanthropic, fraternal, religious, or social organizations can be deemed “special interest groups”; on this basis, these organizations may be afforded the ability to favour a person of a particular sexual orientation for employment because of the nature of the job. For example, a social service agency that provides services to gay men may be able to show that it is reasonably necessary to preference gay men in their hiring practices. It is advisable for an employer to refer to local human rights guidelines regarding such exceptions.

An employer will be held responsible for discrimination that occurs in the workplace, whether it was condoned or whether the employer failed to take reasonable actions to prevent it. Employers can also be held responsible for the discriminatory or harassing behaviours of their employees, particularly where the person responsible for the act is a person of authority within the company. Employers may

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also be held responsible for discriminatory or harassing behaviours of employment agencies that they utilize in the hiring process, if it is shown that the agency acted on the request of the employer.

As well, co-workers can be held personally responsible for discriminatory actions that were not carried out as a part of their employment duties (e.g., a co-worker tells a derogatory joke about a particular sexual orientation at a holiday party).

Unions can also be held responsible for discriminatory behaviour in particular situations. Where a union participates in the formulation of a work rule that has a discriminatory effect on an employee or group of employees, the union may be held responsible. If the work rule is a part of a collective agreement, it is assumed that the agreement was developed by both the union and the employer. As a result, both the union and the employer bear the responsibility for discriminatory actions or behaviours that result from the rule.

Q: What protections are afforded on the basis of marital status?

Answer

In all jurisdictions across Canada, employees are protected from discrimination and harassment on the basis of marital status (or “civil status” in Quebec). Statistics Canada states that a person’s marital status “refers to the conjugal status of a person” and includes the following categories: married and common-law; separated, but still legally married; divorced; widowed; and never legally married (single). Additionally, in some jurisdictions (e.g., Ontario), same-sex partnership status is included wherever marital status is a prohibited ground of discrimination.

Employees are entitled to a workplace free from discrimination and harassment because of their marital status. Employers must ensure that the work environment is free from commentary, jokes, actions, and behaviours that are discriminatory or harassing on this basis. Furthermore, they must ensure that policies and procedures within the work environment do not inadvertently disadvantage employees because their marital status. Examples of discrimination on the basis of marital status include derogatory comments or jokes about a person’s marital status, and denying employment opportunities based on a person’s marital status (e.g., an employer overlooks a married woman for a job that involves travel on the assumption that she would have less flexibility due to her marital status than would a single woman).
Creating a hostile work environment is also considered a violation of the human rights afforded to employees. In Ontario, this is called a "poisoned environment". A poisoned environment can be created from discriminatory or harassing comments or actions based on marital status or same-sex partnership status for employees to whom the comments or actions are directed, for other employees who share the same marital status, and for other employees in general.

An employer will be held responsible for discrimination that occurs in the workplace, whether it was condoned or whether the employer failed to take reasonable actions to prevent it. Employers can also be held responsible for the discriminatory or harassing behaviours of their employees, particularly where the person responsible for the act is a person of authority within the company. Employers may also be held responsible for discriminatory or harassing behaviours of employment agencies that they utilize in the hiring process, if it is shown that the agency acted on the request of the employer.

As well, co-workers can be held personally responsible for discriminatory actions that were not carried out as a part of their employment duties (e.g., a co-worker tells a derogatory joke about single people at a holiday party).

Unions can also be held responsible for discriminatory behaviour in particular situations. Where a union participates in the formulation of a work rule that has a discriminatory effect on an employee or group of employees, the union may be held responsible. If the work rule is a part of a collective agreement, it is assumed that the agreement was developed by both the union and the employer. As a result, both the union and the employer bear the responsibility for discriminatory actions or behaviours that result from the rule.

Q: What protections are afforded on the basis of family status?

Answer

In all jurisdictions across Canada, except for New Brunswick, employees are protected from discrimination and harassment on the basis of family status (known as "civil status" in Quebec).

Family status refers to a parent–child relationship. This includes biological and adoptive parents, as well as persons who act in the position of a parent to a child, such as a legal guardian.
Employees in the jurisdictions in which this ground applies are entitled to a workplace free from discrimination and harassment because of their family status. Employers must ensure that policies and procedures within the work environment do not inadvertently disadvantage employees because of their family status. Examples of discrimination on the basis of family status include asking during an employment interview whether a person has children or plans to have children, making derogatory comments or jokes about a person’s family status, and denying employment opportunities based on a person’s family status.

Please note, however, that in some jurisdictions there are exceptions to family status protection in the workplace. For example, in Ontario, an employer can refuse the hiring of a person or deny the advancement of an employee for reasons that the person is a spouse, same-sex partner, parent, or child of an employee. It is advisable for an employer to refer to his or her jurisdiction’s human rights legislation or human rights commission if they require additional information regarding such rules.

Employers are required to ensure that reasonable accommodation, to the point of undue hardship, is provided to an employee where work requirements conflict with family status-related needs. For example, an employee may require a flexible arrival and departure time in order to ensure his or her children arrive at or are picked up from school. An employer has an obligation to canvass solutions that would accommodate the employee’s needs, while at the same time allowing the employee to continue to perform the essential duties of the position.

Creating a hostile work environment is also considered a violation of the human rights afforded to employees. In Ontario, this is called a “poisoned environment”. A poisoned environment can be created from discriminatory or harassing comments or actions based on family status for employees to whom the comments or actions are directed, for other employees who share the same family status, and for other employees in general.

An employer will be held responsible for discrimination that occurs in the workplace, whether it was condoned or whether the employer failed to take reasonable actions to prevent it. Employers can also be held responsible for the discriminatory or harassing behaviours of their employees, particularly where the person responsible for the act is a person of authority within the company. Employers may also be held responsible for discriminatory or harassing behaviours of employment agencies that they utilize in the hiring process, if it is shown that the agency acted on the request of the employer.
As well, co-workers can be held personally responsible for discriminatory actions that were not carried out as a part of their employment duties.

Unions can also be held responsible for discriminatory behaviour in particular situations. Where a union participates in the formulation of a work rule that has a discriminatory effect on an employee or group of employees, the union may be held responsible. If the work rule is a part of a collective agreement, it is assumed that the agreement was developed by both the union and the employer. As a result, both the union and the employer bear the responsibility for discriminatory actions or behaviours that result from the rule.

Q: **What protections are afforded on the basis of age?**

**Answer**

All jurisdictions in Canada have anti-discriminatory measures against age, although the definition of age differs across the jurisdictions. The restriction on age discrimination applies to people 18 years of age or over in Alberta, Ontario, and Saskatchewan; and 19 years of age or over in British Columbia. A general reference to age exists in Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec, Nunavut, the Northwest Territories, and the Yukon. Federal legislation states that it is not discriminatory to refuse or terminate employment where a person has either not reached the minimum age or has reached the maximum age that applies to that employment (as determined by law or under regulations).

Despite these limitations on the basis of age, workers who have not yet reached 65 often experience age-based discrimination. The Ontario Human Rights Commission’s *Policy on Discrimination Against Older Persons Because of Age* states that “as a general principle, older workers should be treated as individuals, assessed on their own merits instead of presumed group characteristics, and offered the same opportunities as everyone else in hiring training and promotion . . . . Age, including assumptions based on stereotypes about age, should not be a factor in decisions about lay-off or termination”.

Employers must not treat older workers in a discriminatory and harassing manner within the workplace. For example, it would be discriminatory to hire a younger candidate over an older candidate simply on the assumption that younger people learn faster.

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Creating a hostile work environment is also considered a violation of the human rights afforded to employees. In Ontario, this is called a ‘poisoned environment’. A poisoned environment can be created from discriminatory or harassing comments or actions based on age for employees to whom the comments or actions are directed, for other employees who are in the same age group, and for other employees in general.

An employer will be held responsible for discrimination that occurs in the workplace, whether it was condoned or whether the employer failed to take reasonable actions to prevent it. Employers can also be held responsible for the discriminatory or harassing behaviours of their employees, particularly where the person responsible for the act is a person of authority within the company. Employers may also be held responsible for discriminatory or harassing behaviours of employment agencies that they utilize in the hiring process, if it is shown that the agency acted on the request of the employer.

As well, co-workers can be held personally responsible for discriminatory actions that were not carried out as a part of their employment duties (e.g., a co-worker tells a derogatory joke about young people at a holiday party).

Unions can also be held responsible for discriminatory behaviour in particular situations. Where a union participates in the formulation of a work rule that has a discriminatory effect on an employee or group of employees, the union may be held responsible. If the work rule is a part of a collective agreement, it is assumed that the agreement was developed by both the union and the employer. As a result, both the union and the employer bear the responsibility for discriminatory actions or behaviours that result from the rule.

**Q:** What protections are afforded on the basis of social condition?

**Answer**

In Quebec and New Brunswick, employees are protected from harassment and discrimination on the basis of social condition. These protections are specific to these provinces and therefore do not protect employees who fall under federal jurisdiction and the *Canadian Human Rights Act*.

In New Brunswick, social condition is defined by the New Brunswick Human Rights Commission as “the condition of inclusion of the individual in a socially
identifiable group that suffers from social or economic disadvantage on the basis of his or her source of income, occupation or levels of education”.9

In Quebec, social condition is defined as “a specific place or position in society as a result of particular facts or circumstances (income, occupation, education); for example, socially underprivileged people including welfare recipients or the homeless”.10

A number of groups, including students, casual workers, and workers participating in welfare-to-work programs, could be considered particularly vulnerable under the ground of social condition.

It is important to note that merely one element of social condition (e.g., source of income) need be the source of discrimination in order for someone to bring forth a complaint. Furthermore, not only is an objective interpretation of the ground available, but also a subjective interpretation. That is, if someone is treated differently merely because he or she is perceived to be a part of a socially identifiable group that suffers from disadvantage because of income, education, or occupation, that person can file a complaint.

Employers must ensure that the work environment is free from commentary, jokes, and behaviours that are discriminatory or harassing on the basis of social condition. Furthermore, they must ensure that policies and procedures within the work environment do not inadvertently disadvantage employees on the basis of their social condition. Examples of discrimination on the basis of social condition include making derogatory comments or jokes about people receiving social assistance, requiring a job applicant to reveal whether or not he or she has ever received social assistance, or inquiring as to whether someone is receiving workers’ compensation income and then excluding the person on such a basis.

Creating a hostile work environment is also considered a violation of the human rights afforded to employees. In Ontario, this is called a “poisoned environment”. A poisoned environment can be created from discriminatory or harassing comments or actions that are based on social condition for employees to whom the comments or actions are directed, for members of a particular socially identifiable group with whom that person associates, and for other employees in general.

However, employers do have the right to establish and maintain bona fide occupational requirements that are linked to social condition. For instance, an employer may require that for a certain job, an applicant must hold a certain level of

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education. However, an employer cannot put in place rules or requirements that are not bona fide in nature (e.g., an employer asks applicants to identify if they have ever received social assistance and then proceeds to exclude such applicants from the group chosen to be interviewed).

Employers are required to ensure that, if needed, reasonable accommodation, to the point of undue hardship, is provided to an employee to allow him or her to perform the essential duties of the job where barriers to work performance exist because of social condition. For example, an employee has worked at a company for many years and can perform her current job. Following a reorganization of the company, the employee is identified as a potential person to be laid off because she lacks a high school diploma. In this case, a reasonable accommodation may be for the employer to help the employee obtain her diploma by providing flexible scheduling (e.g., arrival and departure times) to allow her to obtain her credentials while she continues to perform her duties.

An employer will be held responsible for discrimination that occurs in the workplace, whether it was condoned or whether the employer failed to take reasonable actions to prevent it. Employers can also be held responsible for the discriminatory or harassing behaviours of their employees, particularly where the person responsible for the act is a person of authority within the company. Employers may also be held responsible for discriminatory or harassing actions of employment agencies that they utilize in the hiring process, if it is shown that the agency used discriminatory or harassing actions at the request of the employer.

As well, co-workers can be held personally responsible for discriminatory actions that were not carried out as a part of their employment duties (e.g., a co-worker tells a derogatory joke about people on social assistance at a holiday party).

Unions can also be held responsible for discriminatory behaviour in particular situations. Where a union participates in the formulation of a work rule that has a discriminatory effect on an employee or group of employees, the union may be held responsible. If the work rule is a part of a collective agreement, it is assumed that the agreement was developed by both the union and the employer. As a result, both the union and the employer bear the responsibility for discriminatory actions or behaviours that result from the rule.

It is important to note that in New Brunswick, complaints brought forth based on the ground of social condition must be with regard to situations that occurred on
or after January 31, 2005, the date upon which the amendments to the New Brunswick Human Rights Act came into effect.

**Q:** What protections are afforded on the basis of political beliefs or activity?

**Answer**

In British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Prince Edward Island, Quebec, and the Yukon, employees are protected from harassment and discrimination on the basis of political belief and/or activity. These protections are specific to these provinces and therefore do not protect employees who fall under the federal jurisdiction and the Canadian Human Rights Act.

Political activity includes choosing to be associated with a particular political party, holding a certain ideology, and taking part in a political candidate’s campaign. Please note that in each province or territory, there may be slight differences in wording and definitions used to describe political belief and/or activity (e.g., in Newfoundland and Labrador, the ground is political opinion), and it is important for employers to be aware of how such differences apply to their employment situations.

In some provinces, not only is an objective interpretation of the ground available, but also a subjective interpretation. That is, even if someone is treated differently merely he or she is perceived to be a part of a political group, that person can file a complaint.

Employers must ensure that the work environment is free from commentary, jokes, and behaviours that are discriminatory or harassing on the basis of political belief and/or activity. Furthermore, they must ensure that policies and procedures within the work environment do not inadvertently disadvantage employees on the basis of their political belief and/or activity. Examples of discrimination on the basis of political belief and/or activity include making derogatory comments or jokes about people who hold a particular political belief, asking about political beliefs on a job application, and disallowing the advancement of an employee who adheres to a particular political belief or participates in a particular political activity.

Creating a hostile work environment is also considered a violation of the human rights afforded to employees. In Ontario, this is called a “poisoned environment”. A poisoned environment can be created from discriminatory or harassing comments or

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actions based on the political belief of employees to whom the comments or actions are directed, for members of a particular socially identifiable group with whom that person associates, and for other employees in general.

However, employers do have the right to establish and maintain *bona fide* occupational requirements that are linked to political activity. For instance, an employer whose sole purpose is political advocacy may establish that holding a certain political belief is a *bona fide* occupational requirement. However, an employer cannot put in place rules, requirements, or policies that are not *bona fide* in nature (e.g., an employer whose business is not engaged in political lobbying cannot ask applicants to identify if they have ever belonged to a certain political group, and then proceed to exclude such applicants from the group chosen to be interviewed).

Employers are required to ensure that if needed, reasonable accommodation, to the point of undue hardship, is provided to an employee to allow him or her to perform the essential duties of the job where barriers to work performance exist because of political belief or activity. An accommodation in this sense might be ensuring tolerance in the workplace for expression of political beliefs, which would include refraining from reprimanding employees for taking part in political activities outside of the workplace (e.g., tolerating employee participation in a union-organized event outside of the workplace).

An employer will be held responsible for discrimination that occurs in the workplace, whether it was condoned or whether the employer failed to take reasonable actions to prevent it. Employers can also be held responsible for the discriminatory or harassing behaviours of their employees, particularly where the person responsible for the act is a person of authority within the company. Employers may also be held responsible for discriminatory or harassing behaviours of employment agencies that they utilize in the hiring process, if it is shown that the agency used discriminatory actions at the request of the employer.

As well, co-workers can be held personally responsible for discriminatory actions that were not carried out as a part of their employment duties (e.g., a co-worker tells a derogatory joke about people who hold certain political beliefs at a holiday party).

Unions can also be held responsible for discriminatory behaviour in particular situations. Where a union participates in the formulation of a work rule that has a discriminatory effect on an employee or group of employees, the union may be held responsible. If the work rule is a part of a collective agreement, it is assumed that the agreement was developed by both the union and the employer. As a result, both the
Q: What is a disability?

Answer

Determining what a disability is remains a complex process in the context of human rights in Canada. All jurisdictions provide that both physical and mental disabilities are prohibited grounds of discrimination. In addition, as a result of Granovsky v. Canada, 2000 SCC 28, the Supreme Court of Canada identified that the way that society responds to real and perceived disabilities should be taken into account. For example, where a person is perceived to have some form of a disability (whether they actually have one or not) and is harassed or discriminated against on the basis of that perception, this could be grounds for a human rights complaint.

In many cases, the disability is obvious. Persons with mobility limitations, visual or hearing impairments, epilepsy, or diabetes are clearly understood to be persons with disabilities. However, in other cases, the disability is not always clear-cut. For example, is a broken leg, an alcohol dependency, or obesity a disability? While these conditions may not fit into our general understanding of what a disability is, these conditions have given rise to complaints under human rights legislation. However, over time, through human rights cases, these questions may become clearer. For instance, in Ontario, drug and alcohol dependencies have been found to be a disability.

Unfortunately, the law does not provide cut and dry answers to questions about disability. In some jurisdictions, the human rights legislation provides a detailed definition of the term “disability” or “handicap”, but in other jurisdictions, the legislation provides no guidance whatsoever. Some human rights bodies have developed extensive guidelines on the issue. These guidelines are not binding in human rights tribunals or courts, but they are increasingly being taken into account within the decisions of the human rights tribunals and courts. Thus, while much of the important information about disability and the law comes from case law, these guidelines are helping to redefine how we understand the concept of disability in the context of human rights.

In those cases where a particular condition is explicitly included in the human rights statute that applies to the employer, the employer’s obligations will be clear. In
those cases that seem unclear, it is advisable for an employer to contact their local human rights body for clarification.

**Q: What protections are afforded on the basis of disability?**

**Answer**

In all jurisdictions across Canada, mental and physical disabilities are prohibited grounds of discrimination.

Employees are entitled to a workplace free from discrimination and harassment because of a disability. Employers must ensure that the work environment is free from commentary, jokes, actions, and behaviours that are discriminatory or harassing on this basis. Furthermore, they must ensure that policies and procedures within the work environment do not inadvertently disadvantage employees because of their disabilities. Examples of discrimination on the basis of disability include failing to provide ramps that allow access to the front of the building, asking an interview question like "How long have you had this disability and what caused it?", not allowing for flexible arrival and departure schedules where such is required by disability-related transit, failing to provide workstation accommodations, and overlooking an employee with a disability for a job opportunity based on the assumption that the disability would act as a barrier to the employee performing the essential duties of the job.

Creating a hostile work environment is also considered a violation of the human rights afforded to employees. In Ontario, this is called a ‘poisoned environment’. A poisoned environment can be created from discriminatory or harassing comments or actions based on disability for employees to whom the comments or actions are directed, for other employees who have disabilities, and for other employees in general.

Employers are required to ensure that where needed, reasonable accommodation, to the point of undue hardship, is provided to an employee where work requirements conflict with disability-related restrictions. For example, an employee may require a flexible arrival and departure time due to disability-related transit schedules over which the employee has no control. An employer has an obligation to canvass solutions that would accommodate the employee’s needs while at the same time allowing the employee to continue to perform the essential duties of the position.
An employer will be held responsible for discrimination that occurs in the workplace, whether it was condoned or whether the employer failed to take reasonable actions to prevent it. Employers can also be held responsible for the discriminatory or harassing behaviours of their employees, particularly where the person responsible for the act is a person of authority within the company. Employers may also be held responsible for discriminatory or harassing behaviours of employment agencies that they utilize in the hiring process, if it is shown that the agency acted on the request of the employer.

As well, co-workers can be held personally responsible for discriminatory actions that were not carried out as a part of their employment duties (e.g., a co-worker tells a derogatory joke about a person’s disability at a holiday party).

Unions can also be held responsible for discriminatory behaviour in particular situations. Where a union participates in the formulation of a work rule that has a discriminatory effect on an employee or group of employees, the union may be held responsible. If the work rule is a part of a collective agreement, it is assumed that the agreement was developed by both the union and the employer. As a result, both the union and the employer bear the responsibility for discriminatory actions or behaviours that result from the rule.

Q: What protections are afforded on the basis of a criminal conviction?

Answer

Conviction for which a pardon has been granted is a prohibited ground of discrimination in the federal jurisdiction, Ontario, Quebec, and the Northwest Territories. Conviction for an indictable or summary conviction offence is also a prohibited ground of discrimination in British Columbia and the Yukon, unless such charge relates to the occupation or employment of a person. Record of a criminal conviction is a prohibited ground of discrimination in Quebec and Prince Edward Island. Discrimination on basis of a criminal conviction for an offence that is unrelated to the employment of an individual is prohibited in Newfoundland and Labrador.

Employees with such histories cannot be treated in a discriminatory or harassing manner in the workplace. For example, employment decisions should not be affected by employer knowledge that a person has been convicted of an offence for which a pardon was granted. However, there is an exception to this rule. Where an employer can show that it is necessary to exclude such persons from a hiring process because
of the nature of the job, the employer may be excluded from the prohibition against
discrimination based on criminal conviction. The employer must show that they
would be subject to undue hardship if they were to hire the person with the criminal
conviction.

An employer will be held responsible for discrimination that occurs in the
workplace, whether it was condoned or whether the employer failed to take reason-
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tory or harassing behaviours of their employees, particularly where the person
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responsible. If the work rule is a part of a collective agreement, it is assumed that the
agreement was developed by both the union and the employer. As a result, both the
union and the employer bear the responsibility for discriminatory actions or
behaviours that result from the rule.

Q:  Can I refuse a job to someone who was convicted of a criminal
offence?

Answer

“Conviction for which a pardon has been granted” is a prohibited ground of discrimi-
nation in the following jurisdictions: federal, Ontario, Quebec, the Northwest Territo-
ries, and Nunavut.

“Conviction for a criminal or summary conviction offence” is also a prohibited
ground of discrimination in British Columbia and the Yukon, unless the offence
relates to the occupation or employment of the person.

“Conviction for an offence that is unrelated to the employment of the person” is
a prohibited ground in Newfoundland and Labrador.
Employees with such histories cannot be treated in a discriminatory or harassing manner in the workplace. For example, employment decisions should not be affected by knowledge that a person has been convicted of an offence for which a pardon was granted.

However, there is an exception to this rule. Where an employer can show that it is necessary to exclude such persons from a hiring process because of the nature of the job, they may be excluded from the prohibition against discrimination based on criminal conviction. An employer in such a situation has an obligation to show that they would be subject to undue hardship if they were to hire the person with the criminal conviction.

Q: What protections are afforded to employees who participate in discrimination or harassment investigations or who oppose discriminatory practices?

Answer
Retaliation against an employee for complaining about a human rights violation is itself a violation of human rights laws. Employers are required to refrain from retaliation against employees who bring forth complaints, employees who oppose discriminatory practices, and employees who participate in human rights investigations. Employers also have an obligation to protect the aforementioned employees from retaliation by co-workers.

If an employee does experience retaliation, or if an employer does not take steps to protect employees from retaliation, this can be the subject of a human rights complaint. Even if the original complaint is dismissed, an employer may still be found responsible for the retaliation.

Q: Is a drug or alcohol dependency considered a disability under human rights legislation?

Answer
Generally, yes, across Canada, human rights legislation includes drug or alcohol dependency as a form of disability to which human rights protections apply. While the words “drug or alcohol dependency” may not appear directly in the legislation, policy interpretations of human rights agencies include drug or alcohol dependency as a form of disability. Furthermore, employees who have had a past drug or alcohol dependency, and even those employees who are perceived to have a drug or alcohol
dependency (whether they have one or not) and are treated differently as a result, are protected. Therefore, the duty to accommodate and the principle of undue hardship that are key regarding any employee with a disability, also apply where an employer becomes aware of an employee with a drug or alcohol dependency.

Q: Are the human rights of employees with same-sex partners protected in the workplace?

Answer

While the ground of sexual orientation has been protected in the federal and provincial jurisdictions for several years, it was not until recent times that same-sex couples were guaranteed protection on the basis of their marital status. Through key cases (e.g., M v. H, [1999] 2 S.C.R. 3) and legislative changes that legalized same-sex marriage (e.g., the Civil Marriage Act, 2005), human rights protections for employees living in same-sex marriages have gradually come to fruition.

For many years, people living in same-sex relationships experienced discrimination in the workplace in the application of a wide array of employment benefits (e.g., spousal benefits, insurance benefits, survivor benefits), and often endured poisoned work environments in which their relationship choices were the basis for workplace jokes and comments.

Now, employees with same-sex spouses are afforded the same human rights protections that employees with opposite-sex spouses historically enjoyed. This protection is provided for under the ground of marital status, but could also be provided for by the intersecting ground of sexual orientation found in (or read into) various federal and provincial human rights legislation. The results of such protections may include extending pension plan coverage and insurance coverage to the same-sex spouses of employees, or extending workplace policies (e.g., policy that provides an employee with time off to care for his or her sick spouse) to employees with same-sex spouses. Employers should ensure discrimination on the basis of same-sex marriage does not occur in the following:

- employment benefits and opportunities (e.g., advancements, transfers, training) afforded to employees with opposite-sex spouses must also be extended to employees with same-sex spouses;
- pre-employment interviews must be free from questions about a person’s same-sex marital status; and
the reasoning behind taking disciplinary actions against an employee or in terminating an employee must be non-discriminatory.

Additionally, employers have a responsibility to ensure that the organizational culture does not include outright or subtle forms of discrimination or harassment against employees living in same-sex marriages. All workplace interactions, including lunchroom discussions, e-mails, and after-work social gatherings, must be free of commentary or actions that could be considered discriminatory against those living in same-sex marriages. Employers must ensure that the work environment is not poisoned by any such behaviour. Any condoning of, or avoidance of, addressing such behaviour opens the employer up to a human rights complaint.

An important first step for an employer in ensuring such protections is to make itself and its employees aware of the requirements of the human rights legislation that applies to its jurisdiction.
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Q: What is discrimination?

Answer

Discrimination is simply the act of setting up or acting upon perceived distinctions or differences. As such, all of us are discriminating in the process of making our decisions (e.g., Is this a good book or a bad book? Is this a qualified candidate for a job or not a qualified candidate?).

The problem arises when the differences or distinctions that we use to make our decisions are irrelevant or based on stereotypes that have little or no basis in fact. This is particularly serious where such distinctions are used to make decisions about some of the fundamental requirements of human existence, such as housing, access to services, or employment. In these cases, our distinctions between various people, if not made fairly and accurately, can place heavy burdens on certain groups of people.

Negative stereotypes about the abilities and characteristics of women, members of visible minorities, persons with disabilities, Aboriginal persons, gays and lesbians, and other groups have led to greater difficulty in obtaining and maintaining satisfactory employment for these groups. Their opportunities in employment have often been limited because of perceived negative differences from the norm. This is what we mean when we commonly talk about discrimination.

Of course, the concept of discrimination has been given a great deal of legal consideration in recent years, and has been defined in a more precise and technical way. One of the most useful legal definitions of discrimination is the one given by the Supreme Court of Canada in Andrews v. Law Society of British Columbia. Here, discrimination is defined as “... a distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.”
Q: **What is the definition of discrimination?**

*Answer*

In Canada, discrimination has been defined as any distinction, exclusion, or preference based on certain grounds that nullifies or impairs equality of opportunity in employment or equality in the terms and conditions of employment. All jurisdictions express fundamental opposition to discrimination based on race, nationality or place of origin, colour, religion or creed, marital status, physical disability, or sex.

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Q: **What is direct discrimination?**

*Answer*

Direct discrimination occurs when a person consciously acts in a discriminatory manner by making certain distinctions between certain groups. For example, a rule that women cannot be police officers would be considered direct discrimination.

---

Q: **What is systemic discrimination?**

*Answer*

Sometimes policies and practices appear neutral on the surface but have the effect of discriminating against certain groups. For instance, a rule requiring police officers to be over six feet tall and weigh over 150 pounds would have the effect of excluding a large percentage of women, even though this prohibition is not directly stated. This is what is meant by systemic discrimination. Systemic discrimination is also known as “adverse effect discrimination”.

Systemic discrimination is often unintentional. It is sometimes difficult to detect and eradicate because employment policies and practices may go long periods of time without being examined to determine their validity and relevance to the performance of a job. People may also be unaware that it is happening. Regardless, an employer is still legally responsible for ensuring that the workplace is free from discrimination and harassment, and is therefore liable when systemic discrimination occurs within the workplace.
Q: **What is indirect discrimination?**

**Answer**

Indirect discrimination is discriminatory treatment that happens through the actions of another. For instance, if an employer asked an employment agency to screen out all non-Caucasian applicants, this would be considered indirect discrimination.

Q: **What is “discrimination because of association”?**

**Answer**

Discrimination because of association means that a person is treated in a discriminatory manner because he or she is, has been, or is assumed to be, associated with a protected group under human rights legislation. The person being discriminated against does not have to be a member of a group protected by human rights legislation.

Q: **What is “discrimination through reprisal”?**

**Answer**

Where a person experiences reprisal or is threatened with reprisal because he or she has made or intends to make a complaint regarding a human rights violation, or has refused to discriminate against a group protected by human rights legislation, this is considered discrimination through reprisal. For example, where an employer threatens to fire a female employee if she makes a complaint about sexual solicitations from her boss, this would be considered discrimination through reprisal.

Q: **What are the grounds upon which employers may not discriminate?**

**Answer**

In all parts of Canada, discrimination in employment on the grounds of race, colour, religion or creed, age, sex, marital status, and mental or physical disability is prohibited. In most parts of the country, discrimination is also prohibited with respect to national or ethnic origin, place of origin, family status, ancestry, and sexual orientation. Some parts of the country prohibit discrimination in employment based on criminal conviction, political beliefs, language, social origin or conditions, and place of residence.
# Prohibited Grounds of Discrimination in Employment

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<tr>
<td>Federal</td>
<td>Age, colour, criminal conviction, family status, marital status, mental disability, national or ethnic origin, physical disability, race, religion, sex (discrimination on the ground of pregnancy or childbirth is considered to be on the ground of sex), sexual orientation</td>
</tr>
<tr>
<td>Alberta</td>
<td>Age (18 and older), ancestry, colour, family status, gender, marital status, mental disability, physical disability, place of origin, race, religious beliefs, sexual orientation, source of income</td>
</tr>
<tr>
<td>British Columbia</td>
<td>Age (19 and older), ancestry, colour, criminal conviction, family status, gender identity, marital status, mental disability, physical disability, place of origin, political beliefs, race, religion, sex, sexual orientation</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Actual or presumed association with a protected group, age, ancestry (including colour and perceived race), ethnic background, family status, marital status, mental disability, nationality or national origin, physical disability, political belief, religion or creed, sex (including pregnancy), sexual orientation, source of income</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Age, colour, marital status, mental disability, national origin, physical disability, political belief and activity, race, religion, sex, sexual orientation, social condition</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Actual or presumed association with protected group, age, colour, disability, disfigurement, ethnic origin, family status, marital status, nationality, political opinion, race, religion, religious creed, sex (including pregnancy), sexual orientation, social origin, source of income</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Age, ancestry, colour, creed, criminal conviction, family status, family affiliation, gender identity, marital status, mental disability, ethnic origin, nationality, physical disability, place of origin, political belief or association, race, religion, sex, sexual orientation, social condition</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Aboriginal origin, actual or presumed association with a protected group, age, colour, creed, ethnic origin, family status, irrational fear of contracting an illness or disease, marital status, mental disability, national origin, physical disability, political belief or activity, race, sex, sexual orientation, source of income</td>
</tr>
<tr>
<td>Nunavut</td>
<td>Age, ancestry, colour, creed, criminal conviction, ethnic origin, family status, marital status, mental disability, citizenship, physical disability, place of origin, pregnancy, race, religion, sex, sexual orientation, source of income</td>
</tr>
<tr>
<td>Ontario</td>
<td>Age (18 and older), ancestry, citizenship, colour, creed, ethnic origin, family status, marital status, mental disability, physical disability, place of origin, race, record of offences, sex, sexual orientation</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Age, colour, creed, family status, marital status, mental disability, national or ethnic origin, physical disability, political belief, race, religion, sex, sexual orientation, source of income</td>
</tr>
<tr>
<td>Quebec</td>
<td>Age, civil status, colour, language, mental disability, national or ethnic origin, physical disability, political beliefs, pregnancy, race, religion, sex, sexual orientation, social condition</td>
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</tbody>
</table>
**Jurisdiction** | **Prohibited Grounds**
--- | ---
Saskatchewan | Age (18 and older), ancestry, colour, creed, family status, marital status, mental disability, nationality, physical disability, place of origin, race or perceived race, receipt of public assistance, religion, sex, sexual orientation
Yukon | Actual or presumed association with protected group, age, ancestry, colour, creed, criminal conviction, family status, marital status, mental disability, national or ethnic origin, linguistic background, physical disability, political belief or association, pregnancy, race, religion, sex, sexual orientation, source of income

**Q: What types of discrimination should an employer be aware of during the recruitment and selection process?**

**Answer**

Discrimination can occur throughout the recruitment and selection process. Following are some of the main areas where discrimination may arise during the hiring process:

- **Employment agencies:** Employers who use employment agencies should ensure that the agencies they use are not screening out applicants on the basis of prohibited grounds of discrimination. Human rights legislation prohibits agencies from refusing to refer applicants for employment on the basis of a prohibited ground of discrimination (e.g., age, race, sex). There are cases in which this has occurred, either at the employer’s request or because the agency had made assumptions about the kind of applicants the employer wanted. Employers should ensure that the employment agencies they use are aware that they are equal opportunity employers, and want to see a broad range of applicants.

- **Advertisements:** Advertisements should be reviewed carefully to ensure that they do not discourage applications from any particular group. For example, gender-neutral job titles should be used: An advertisement for a “waitress” is not likely to encourage applications from qualified men. The advertisement should not contain any requirements that may be discriminatory. For instance, many employers state that applicants should have “Canadian experience”. This is rarely a true job requirement, and can have the effect of screening out potential applicants by their place of origin (a prohibited ground of discrimination). It is also wise to ensure that advertisements are placed in venues where they will be seen by a range of applicants.

- **Application forms:** Human rights legislation prohibits employers from making enquiries related to a prohibited ground of discrimination. Employers should therefore carefully review their application forms to ensure that they are not
inadvertently soliciting inappropriate information. For example, job application forms should not ask for the marital status of the applicant or request the applicant to provide a photograph. Any questions on the application form should be clearly related to ability to perform the job. Employers should avoid making assumptions on the basis of group membership. For example, employers may assume that married people will be reluctant to relocate, or that persons with children will have difficulty with business travel, and may therefore ask discriminatory questions about sex, marital status, or family status. Instead of asking for prohibited information, the employer should ask directly whether the applicant is available for business travel, or would be willing to relocate.

As well, employers sometimes wish to ask questions about such topics as marital status or family status because such information is required for the administration of benefit plans. However, an employer does not need this information until after an applicant is hired. It is therefore wise to clearly separate pre-employment and post-employment inquiries.

Specific suggestions on the types of questions that may be asked on application forms and those which may not are provided in guidelines published by the various human rights bodies. These guidelines are essential references for employers who are reviewing or revising their application forms.

- **Hiring criteria:** One of the most difficult areas around hiring involves the use of pre-employment tests. Many organizations use psychological or cognitive tests to evaluate applicants. Employers should regularly review their pre-employment tests to ensure that they are job-related, valid, and non-discriminatory. This is not always as straightforward as it seems, as tests may have subtle adverse impacts on the protected groups. Extreme care should be used when selecting and using pre-employment tests.

One type of pre-employment test is the medical test. Medical tests should never be given before a conditional offer of employment has been made, and then only where there is a reasonable, job-related rationale for applying the test. Medical tests should not be general examinations of the health of the applicant, but should be specifically directed to the applicant’s ability to do the job. If difficulties are revealed through the medical test, the employer should consider whether it would be possible to accommodate the applicant in the job.

Since hiring criteria are usually based on the job description, it is important, when developing the hiring criteria, to ensure that the job description is accurate and up to date.
DISCRIMINATION

- **Employment interview**: Many of the same concerns as were discussed with respect to application forms also apply to the employment interview. Employers should ensure that anyone who conducts employment interviews has been given training on human rights issues. In order to eliminate individual bias, it may also be helpful to have more than one person doing the interviewing. Interviewers must take care when they are making notes during the interview; they should not make notes regarding any of the protected characteristics of the applicant, even if those factors do not later influence the hiring decision.

**Q**: What types of discrimination should an employer be aware of with regard to the conditions of employment?

**Answer**

Discrimination in conditions of employment is prohibited. Conditions of employment include every program, policy, or aspect of the workplace that impacts on employees, including compensation systems, access to and delivery of training and development programs, benefit programs, and the general workplace environment. Following are some of the main areas in the conditions of employment where discrimination may arise:

- **Working environment**: If an employee is required to work in an atmosphere that is hostile to members of protected groups, this will be considered discrimination. This issue is usually raised in the context of workplace harassment.

- **Compensation and benefits**: The right to equal treatment with respect to compensation and benefits includes issues such as equal pay for doing the same or similar work. Equal pay provisions for women are included in many human rights statutes, as well as in employment standards statutes. If women are paid less for doing work that is the same or similar to that which a man is doing, they can file a complaint against the employer. It should be remembered as well that women are not the only group that sometimes does not receive equal pay, and although other groups are not explicitly protected under the statute, if, for example, members of visible minorities were systematically being paid less for their work than non-minority colleagues doing the same work, they would be protected under the general provisions of human rights legislation. Employers should ensure that their compensation systems treat all groups neutrally, compensating for merit and not for membership in a particular group.
Benefits are a hot human rights issue these days. One issue that has been frequently in the news is the provision of benefits for same-sex spouses. Another hot issue is benefits for pregnant women, and particularly their entitlement under their employer’s sickness and disability benefit programs. These are complex issues, and employers would be well-advised to obtain expert assistance in ensuring that their benefit policies and programs are non-discriminatory.

- **Training and promotion opportunities**: Training is part of the terms and conditions of the employment relationship, and employers are therefore required to carry out their training programs in conformance with the principles of human rights legislation. All employees must have equal access to training opportunities. For example, if an employer decided that it was not worthwhile to provide training to older workers because they would be retiring in the next few years, this could be considered discrimination on the basis of age, and a violation of human rights legislation. Another example of potential discrimination would be the failure to develop training programs that could be accessed by persons with a physical disability. Failure to provide equal access to training opportunities can result in lack of opportunity for promotion among the protected groups. Policies and procedures surrounding promotions should be as carefully scrutinized as those surrounding recruitment and selection.

**Q**: What types of discrimination should an employer be aware of with regard to the termination of employment?

**Answer**

As with other aspects of employment, the decision to terminate the employment of an employee should be made on neutral grounds, without reference to membership in a protected group.

This is not always as straightforward as it sounds. For example, one issue that many employers grapple with is absenteeism. Chronic absenteeism may be just cause for the termination of employment. However, if the absenteeism is caused by a disability, the issue becomes complex, and prior to termination, the employer must be sure that the employee is not capable of performing the essential duties of the job, and must be sure that the employee cannot be accommodated without undue hardship to the employer.
Another area to be carefully examined is retirement policies. In some provinces, it remains permissible for an employer to set a normal retirement date, and the respective human rights statutes of the province make allowances for this practice.

Finally, when considering termination of employment, employees should never have their employment terminated in retaliation for filing a human rights complaint, or other exercise of their rights under a human rights statute.

Q: If behaviour is unintentional, will it still be considered discrimination?

Answer

Unintentional behaviour can still be considered discriminatory. It is the effect of an action, not the intention behind it, that determines whether an action is discriminatory.

For example, in barring women from certain jobs in which chemicals are used that could be harmful to fetuses, an employer may not be intending to discriminate, but only dealing with health and safety concerns. However, the effect of the action is to discriminate against women, preventing them from obtaining certain types of jobs. The discrimination is unintentional, but it is still discrimination.

Q: What can an employee who has been subjected to discrimination do?

Answer

An employee who believes that he or she has been the victim of discrimination in the workplace has several options for seeking redress:

- **File a complaint within the organization**: Some organizations have in-house anti-discrimination policies and procedures, which may be an effective means for an employee to seek rapid resolution of the problem.

- **File a human rights complaint**: Human rights bodies will provide advice and assistance to persons who believe they have been victims of discrimination in employment. Persons who believe that they have been discriminated against have the right to file a human rights complaint (often within a certain period of time following the alleged incident). Once a complaint has been filed, a human rights body will investigate the complaint and try to settle it. In some jurisdictions, one method of settling the complaint is mediation. If settlement is not
possible, the case may be referred to a board of inquiry or tribunal, which will provide a relatively informal adjudication of the dispute, allowing each party to present its side of the story. If discrimination is found to have occurred, the board of inquiry or tribunal can make an order to redress the wrong done.

- **File a grievance:** An employee who is represented by a union may be able to file a grievance under the collective agreement, with the assistance of the union. Many collective agreements have clauses prohibiting discrimination in the workplace. Filing a grievance is often an expeditious method of resolving a dispute.

- **File a health and safety complaint:** In a relatively recent development, some employees have filed health and safety or workers’ compensation complaints in cases where discrimination has damaged the work environment severely enough as to cause illness or unsafe conditions for the complainant.

- **File a civil suit:** In some cases, employees may be able to file a civil suit to redress the discrimination. For example, if severe harassment in the workplace has been tolerated by the employer, and the employee feels that he or she has no choice but to quit, the employee may be able to file a wrongful dismissal suit, alleging constructive dismissal by reason of the harassment.

**Q:** Is harassment a form of discrimination?

**Answer**

Yes, harassment is a form of discrimination. Harassment occurs when people experience a work environment that is degrading, disrespectful of their fundamental human dignity, or, in some cases, even dangerous to their safety. Harassment puts those who experience it at an unfair disadvantage in terms of work opportunities and benefits. For example, a person who is constantly a target of racial slurs and jokes may not be able to concentrate enough on the job to be productive and move ahead in the organization.

Harassment has been defined in many different ways. For example, the Canadian Human Rights Commission has defined it as “any unwanted physical or verbal conduct that offends or humiliates you”. Another definition, that of the Manitoba Human Rights Commission, states that it is “a course of abusive and unwelcome conduct or comment that is directed at individuals because of the group to which they belong or appear to belong”. In essence, any behaviour that is demeaning or offensive and based upon membership or presumed membership in a group protected by
human rights law can be considered harassment. The definition of harassment differs across jurisdictions. Please refer to your provincial/territorial human rights commission for their distinct definition of harassment.

**Q:** Who is protected against harassment in the workplace?

**Answer**

All human rights laws prohibit discrimination and harassment against a person because of his or her race, colour, religion or creed, age, sex (often includes pregnancy and child birth), marital status, or disability. Carriers of the HIV virus and persons with AIDS are protected against discrimination because they are considered to suffer from a disability. Harassment is a form of discrimination, and therefore harassment based on any of these factors is prohibited. As well, the laws in most parts of Canada prohibit discrimination and harassment on the grounds of sexual orientation.

**Q:** What kinds of behaviour can be considered harassment?

**Answer**

There is no complete list of the behaviours that can be considered harassment. Generally, any demeaning or offensive behaviour based on actual or perceived membership in a protected group can be harassment. The following list gives some examples of behaviours that have been deemed to be harassment:

- verbal threats, intimidation, or abuse;
- unwelcome remarks or jokes about subjects like race, religion, disability, or age;
- the display of sexist, racist, or other offensive pictures or posters;
- repeated ridicule or practical jokes where the circumstances indicate that the treatment is motivated by a ground protected under human rights law; and
- physical assault.

Where harassment includes threatening or violent behaviour, a superior should be told immediately. Additionally, employees have the right to contact the local police to report such incidences.
Q: Is it harassment if the harasser is not a superior?

Answer

Yes. When people think of workplace harassment, they usually think of it as being inflicted upon an employee by a supervisor or superior. However, harassment can also be inflicted by co-workers, customers, clients, volunteers, business associates, or anyone connected with the workplace. All harassment in the workplace violates human rights laws, regardless of who is inflicting it. Employers have a responsibility to ensure that the workplace is free from harassment.

Q: What if the behaviour that is deemed to be harassment wasn’t intended to offend or upset anyone?

Answer

Some behaviour is so obviously intended to cause stress and humiliation to the recipient that it is clearly harassment. With other behaviour, the intent may be less clear. What one person considers to be light-hearted teasing or fun may be a source of stress, anxiety, and unhappiness to another. Whether something is harassing or not depends on the effect it has on the person who is its target, not on the intent of the harasser. If behaviour is unwelcome, it is harassing. However, if it is behaviour that the harasser could not reasonably have known to be unwelcome, the person who is upset by the behaviour should make his or her discomfort known. If a person, after being informed, persists in behaviour that is unwelcome, that person is engaging in harassment.

Informing the harasser is not always necessary. For instance, the Ontario Human Rights Commission’s *Policy on Racial Slurs and Harassment and Racial Jokes* notes that a person being harassed is often in a vulnerable situation, making it difficult or impossible for that person to object to the behaviour. Under the Ontario *Human Rights Code*, a person does not have to object to such behaviour for the Code to apply.

Q: Can a joke really be harassment?

Answer

While humour is a normal part of workplace interaction and can have a very positive effect on the workplace, it can also be used quite effectively to degrade or insult. For example, “dumb blonde” jokes or ethnic jokes can send the message that some
members of the work force are less valuable than others and don’t really belong in the workplace. If a joke will offend a member of a particular group and make members of that group feel excluded and humiliated, it may be harassment.

**Q:** Does the rule against workplace harassment extend beyond the workplace itself and regular working hours?

**Answer**

The workplace includes not only the physical site, but also other locations and activities associated with the work of the organization, such as company social gatherings, conferences, symposiums, training sessions, business travel, and customer calls. Places and occasions where people are gathered together for work purposes are situations where discrimination and harassment can potentially occur.

**Q:** Can one upsetting incident be considered harassment?

**Answer**

It depends on the nature of the incident. We usually think of harassment as a series of offensive incidents. However, a single incident, if sufficiently offensive, can be enough to poison a work environment and be considered harassment. For example, if the supervisor of a member of a visible minority was overheard to say, “I don’t know why these people are working here — they should all stay in their own countries”, this could taint the employee’s working environment. In such cases, there is no need for repeated harassment to occur.

**Q:** What is sexual harassment?

**Answer**

Sexual harassment is any conduct or comment of a sexual or gender-related nature that is likely to cause offence or humiliation to an employee, or any action that might be perceived as placing a condition of a sexual nature on employment or on an employment opportunity. It often exploits an employee’s sexual or gender-related differences in a way that degrades and humiliates; it is usually an attempt by one person to exercise power over another. Sexual harassment is unwelcome behaviour that the harasser knew or should have known would be objectionable.

The harasser may demand sexual favours or require sexual activity in return for employment benefits; he or she may threaten employment-related reprisals, such as
FORMS OF DISCRIMINATION

demotion or dismissal, if such demands are not met. Sexual harassment does not have to be purely sexual in nature. It would also be considered sexual harassment for a person to make jokes that are at the expense of another person’s gender (i.e., because the person is a man or a woman).

Sexual harassment is emotionally and/or physically abusive, and creates an unhealthy work environment. It forces victims to experience a work environment that is stressful, degrading, disrespectful of their fundamental human dignity, and, in some cases, even dangerous to their safety. As with other forms of harassment, sexual harassment puts those who experience it at an unfair disadvantage in terms of work opportunities and benefits.

Q: Are gender harassment and sexual harassment the same?

Answer

In Canada, gender-based harassment and sexual harassment generally fall under the one heading of sexual harassment. Sexual harassment is a special kind of workplace harassment involving conduct of a sexual or gender-related nature. Sexual harassment is any conduct or comment of a sexual or gender-related nature that is likely to cause offence or humiliation to an employee, or that might be perceived as placing a condition of a sexual nature on employment or on an employment opportunity. It often exploits an employee’s sexual or gender-related differences in a way that degrades and humiliates. It is usually an attempt by one person to exercise power over another.

For example, in company A, a supervisor inappropriately makes comments about an employee’s figure to the employee and to other employees. This is a clear example of sexual harassment that is explicitly sexual in nature.

However, sexual harassment does not have to be explicitly sexual in nature. For example, it could be considered sexual harassment if an employee makes a derogatory comment about another employee simply because that employee is a man or woman. The comment “You’re a woman, what do you know?” is a clear example of sexual harassment that is more directed at the victim’s gender.

It is important to note that sexual harassment can occur between people of the same sex, and it can also be experienced by men.
Q: What kinds of behaviour can be considered sexual harassment?

Answer

Any sexual conduct in the workplace can potentially be considered sexual harassment. Actions that have been found to constitute sexual harassment include:

- unwelcome physical contact, such as pinching, hugging, brushing up against, or patting;
- unwelcome sexual requests, remarks, jokes, or gestures;
- unfair evaluations or reprimands, reduced working hours, overwork, dismissals, discipline, or refusals to hire when these actions are in retaliation for refusal to submit to sexual harassment;
- sexually suggestive remarks or gestures;
- leering or whistling; and
- sexual assault.

Q: Can sexual attraction in the workplace be considered sexual harassment?

Answer

People are sometimes confused about sexual harassment because of the occurrence of sexual attraction in the workplace. Sexual attraction in the workplace can occur on a consensual basis and may not be considered sexual harassment by the individuals involved, although distinguishing between the two is likely a difficult Human Resources issue. The distinction between consensual sexual attraction and sexual harassment is that latter is behaviour that is unwanted or perceived as coercive by one of the parties.
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**Q:** Why should an employer be concerned about discrimination in employment?

**Answer**

Employment discrimination is, of course, against the law, and if a complaint is made, an employer can find itself facing an intrusive and potentially lengthy investigation that may impact company morale and public image. Additionally, the remedies awarded by human rights tribunals can be expensive and far-reaching.

Aside from the potential impact of a complaint, there are other good reasons for employers to ensure their organizations are free from discrimination. Employees from affected groups are unlikely to be attracted to join organizations where discrimination occurs, resulting in the organization having less of a chance of employing the best people available, and thus losing a key competitive edge. As well, if such employees do join the organization, employees from affected groups are less likely to reach their full potential for productivity and achievement. They are also more likely to leave, and turnover can be costly to employers. Clearly, ensuring a working environment free from discrimination is the right thing to do.

**Q:** Who is responsible for human rights in the workplace?

**Answer**

Human rights legislation prohibits discriminatory practices in employment, trade unions, employer or employee associations, and in employment agencies. This means that employers, trade unions, employer or employee associations, and employment agencies have a responsibility to ensure that workplaces are free of discrimination and harassment.

An employer can be held liable for discrimination in a workplace where the employer carried out, condoned, or failed to take reasonable steps to prevent or remedy discrimination. Employers can also be held liable where they use employment agencies that implement discriminatory practices or where the employer itself directs an agency to screen applicants on the basis of discriminatory grounds.

As well, co-workers can be held personally liable for discriminatory actions that were not carried out as part of their employment duties (e.g., discriminatory or harassing behaviour that occurs at an after-work staff party held at a local restaurant). Unions can also be held responsible for workplace discrimination and harassment in certain circumstances.
Q: What laws provide human rights protections in the workplace?

Answer

Within the workplace, federal and provincial/territorial human rights legislation provides protections to employees. Federally, the Canadian Human Rights Act provides protections to employees who work in federal departments and agencies, Crown corporations, and other federally regulated industries such as airlines, post offices, banks, railroads, and telecommunications companies. All other employees are protected by provincial/territorial human rights legislation.

Other laws that provide protections for employees in the workplace include federal and provincial/territorial employment standards laws and labour laws, occupational health and safety laws, privacy laws, and the Canadian Charter of Rights and Freedoms.

Q: How does human rights legislation interface with other legislation in Canada?

Answer

Human rights legislation is paramount in Canada. This means that where other legislation imposes rules or requirements that may in some way disadvantage a certain group that is protected by human rights legislation, the human rights legislation prevails. If a particular piece of legislation requires a workplace practice that may disadvantage a group based on a prohibited ground of discrimination, the employer is obliged to comply first with the human rights legislation requirements and then with the other legislation’s requirements.

For example, in some industries, health and safety regulations require a certain dress code. For employees with particular religious observances (e.g., certain clothing or hair length required by a religion), the health and safety requirements may conflict with their religious observances, thereby creating a barrier to their employment. An employer has an obligation to comply first with human rights requirements by discussing the potential limitations to the employee’s ability to perform the essential duties of the job and implementing an appropriate accommodation. The only limit to the employer’s accommodation responsibility is the defence of undue hardship, in which cost and health and safety factors are taken into account.
Q: Does the law protect employees from harassment?

Answer

Employees are protected by federal and provincial/territorial human rights laws that make harassment in the workplace illegal. All employees have a right to a work environment in which their dignity is respected and where they are free from harassment. Given that there are various definitions of harassment across Canada, please refer to the human rights body in your jurisdiction for the specific definition that applies.

Q: What responsibility does an employer have for harassment occurring in the workplace?

Answer

Employers are responsible for providing their employees with a work environment that is free of any form of discrimination and harassment, and for dealing effectively with human rights complaints when they occur within the workplace. Employers are, therefore, required by law to take steps to prevent harassment in the workplace.

Employers should make sure that every step of the employment process, from job advertising to termination, is free from discriminatory or harassing behaviour and the potential for such behaviour. For example, this would include steps such as reviewing application forms to ensure that they are not asking questions that are prohibited under local human rights legislation. Furthermore, employers should ensure that a fair complaints process is in place for an employee to address their workplace discrimination and harassment issues. Additionally, it is wise for employers to include a human rights education component within their employee training process.

Many human rights bodies across Canada have developed guides to assist employers in ensuring that their hiring and employment activities are free from discrimination and harassment. For instance, the Ontario Human Rights Commission, in association with CCH Canadian Limited, publishes *Human Rights at Work*, a guide that includes information such as the questions that can and cannot be asked at the interview stage. Many jurisdictions provide guides of this type that outline the unique steps required of employers.
Creating a Harassment-Free Workplace Checklist

- Have you made it clear that this is a workplace where harassment will not be tolerated?
- Have you developed an anti-harassment policy?
- Have you communicated that policy to all employees?
- Have you ensured that all managers and supervisors understand their responsibility to provide a harassment-free work environment?
- Have you made sure that all employees understand the company policy and procedures for dealing with harassment?
- Have you taken action to eliminate discriminatory jokes, posters, graffiti, and photos at the work site?
- Do you promptly investigate and deal with all complaints of harassment?
- Do you appropriately discipline employees who harass other employees?
- Do you provide protection and support for the victims of harassment?

**Q:** What if an employer honestly doesn’t know that the harassment is occurring?

**Answer**

If an employer has not taken all reasonable steps to prevent and deal with harassment in the workplace, the employer may be liable for any harassment that does occur, even if he or she was unaware that the harassment was occurring.

**Q:** What responsibilities do trade unions have in ensuring a discrimination-free workplace?

**Answer**

According to a decision of the Supreme Court of Canada, “Discrimination in the workplace is everyone’s business”. Thus, unions share a joint responsibility with employers to promote and protect equality in the workplace. Unions, along with employers, must ensure that the provisions of collective agreements do not discriminate. Where collective agreement provisions must be modified to allow an employee to be accommodated, unions are required to assist employers in this endeavour.
Many unions have been active in ensuring a discrimination-free workplace for their members. For example, in several cases, unions have negotiated ground-breaking collective agreement provisions on harassment and discrimination in the workplace and have been of great assistance to individual employees in pursuing their human rights through the grievance and arbitration process. However, in some cases, unions may be part of the problem in a workplace, not part of the solution. In such cases, unions may be found responsible with the employer for workplace discrimination.

**Q: When will a union be considered a party to a discriminatory rule or practice?**

**Answer**

A trade union will be considered to be a party to a discriminatory rule or practice if either of the following situations occurs:

- The union has participated in the formulation of a work rule that has a discriminatory effect on an employee. The union’s participation in the formulation of the work rule will be assumed if the rule is a provision in a collective agreement negotiated by the union, since all provisions in a collective agreement are formulated jointly by the parties; employers and unions must therefore bear equal responsibility.

- The accommodation of an employee who is differentially affected by a workplace rule requires the co-operation of the union, but the union impedes the efforts of the employer to provide accommodation.

**Q: What are a union’s obligations with respect to the accommodation of employees?**

**Answer**

Unions will have a duty to participate in the effort to accommodate an employee in the workplace only if they have been party to discrimination against that employee in the first place, either by participating in the creation of a discriminatory work rule, or by impeding efforts at accommodation. A union’s responsibilities with respect to accommodation will vary depending on how the union’s responsibility arose.

If a union has co-discriminated with an employer by participating in the formation of a discriminatory work rule, then the union has a joint responsibility with the
employer for the accommodation of the employee in question. If no action is taken to accommodate the employee, both the union and the employer will be held equally responsible for the resultant discrimination. However, the Supreme Court of Canada has noted that the employer is normally in a better position to formulate appropriate accommodation measures than is the union, because it is the employer that has control over the workplace. As a result, in most cases employers will be expected to initiate the process.

It should be noted that where the union has participated in the formulation of the discriminatory work rule, the employer is not limited in the forms of accommodation that it may explore. It may explore all measures, even those that may impact the collective agreement, prior to seeking co-operation from the union. The employer is entitled to, and is obligated to, choose the most sensible solution for resolving the difficulty, even if it involves changes to the collective agreement.

On the other hand, if the union has not participated in the formulation of the discriminatory work rule, the employer will be expected to canvass other methods of accommodation before approaching the union and suggesting methods of accommodation that involve alterations to the operation of the collective agreement. The union’s duty to accommodate arises when its involvement is required to make accommodation possible.

Q: What if an employee chooses not to report an incident of discrimination or harassment?

Answer

An employee can choose to not report an incident of discrimination or harassment in the workplace; in some cases this occurs because the employee feels threatened and unable to act (e.g., where the person responsible for the discrimination or harassment is the direct supervisor). However, as is often the case, if an employee fails to report discrimination or harassment, the situation often worsens. In some cases, other employees in the workplace may report the discrimination or harassment even though they are not the direct victims themselves. They have the right to do so and their allegations should be taken as seriously as would reports from an employee who experienced discrimination or harassment firsthand.

Employers should not discourage employees from reporting experiences of discrimination or harassment in the workplace; in doing so, an employer may be found to have condoned the behaviour or failed to take reasonable actions to prevent
it, thereby making themselves responsible for the discriminatory or harassing behaviour.

Where it comes to the attention of an employer that an employee is experiencing discrimination or harassment, it is the employer’s responsibility to act on this information and to inform the employee of his or her rights and options for addressing the situation.

**Q:** What if an employee is retaliated against for filing a human rights complaint?

**Answer**

Employees are protected under human rights legislation from retaliation for filing a human rights complaint. If an employer treats an employee differently (e.g., demotes, limits responsibilities, excludes from workplace activities, etc.) after becoming aware of a human rights complaint, this behaviour could be considered retaliation (also known as reprisal). Employers are required to refrain from retaliation against employees who bring forth human rights complaints as well as employees who oppose discriminatory practices in the workplace. Employers also have a responsibility to protect employees from retaliation by co-workers. If an employee does experience retaliation, or if an employer does not take steps to protect employees from retaliation, this can be the subject of a human rights complaint.

Sometimes co-workers associated with the employee who filed a complaint (e.g., a coworker who co-operated with a human rights investigation) can also be the subject of retaliation. These employees also have a right to file a human rights complaint on the basis of the reprisal.

Complaints of retaliation can be made to the local human rights body and can be added to the original human rights complaint. Employees are generally asked to keep detailed records of their experiences in the workplace following the filing of a human rights complaint to ensure that the human rights investigators are aware of any retaliatory behaviour that they may experience.

Even if the original complaint is dismissed, an employer may still be found responsible for the retaliation. Employers should ensure that their management team and their general staff are aware that such behaviour is contrary to human rights legislation.
Q: What if someone at work tries to retaliate for the filing of a harassment complaint?

Answer
Retaliation against an employee for complaining about a human rights violation is itself a violation of human rights laws. Employers are required to protect complainants from retaliation by the harasser and are also to refrain from retaliating against the complainant themselves. If an employee does experience retaliation, this can be the subject of a human rights complaint.

Q: Are there any instances when discriminatory practices are permitted?

Answer
Sometimes there are good reasons for distinguishing between various groups when making employment decisions. Human rights statutes recognize this and each of them contain a number of exceptions to the general prohibition on discrimination. Some of the more common examples are listed below.

- **Age:** Protections under human rights legislation are often defined by age limits; the right to be free from discrimination and harassment in the workplace corresponds with these limits. For instance, in British Columbia, the right to be free from workplace age discrimination and harassment is limited to those between the ages of 19 and 65. Therefore, a person who is younger than 19 or older than 65 cannot make a complaint on the basis of age under British Columbia’s *Human Rights Code* (note: British Columbia will remove the upper age limit of 65 on January 1, 2008). The ages under protection vary across the provinces/territories. It is important to note that most jurisdictions have specifically exempted retirement plans from employment discrimination.

- **Special interest organizations:** It may be legitimate for religious, philanthropic, educational, or other similar organizations primarily engaged in serving the interests of a particular group to give preference in employment to persons from that group. For example, it may be reasonable for a community centre devoted to the needs of Vietnamese youth to give preference to Vietnamese applicants for counselling positions, or for a religious school to give preference to teachers who share the religious faith of the school.

- **Affirmative action programs:** Most jurisdictions throughout Canada specifically permit organizations to develop programs or plans to relieve the conditions
of disadvantage for certain individuals or groups. These programs are often
referred to as affirmative action programs or special programs. In addition to
relieving conditions of disadvantage, such programs can have the effect of
helping certain disadvantaged individuals or groups achieve equality of opportu-
nity and can lead to the elimination of the discriminatory or harassing behaviour
or practices that led to the disadvantage in the first place. Employers who wish
to implement voluntary employment equity programs may be permitted to do so
under these provisions.

- **Bona fide occupational requirement:** A key principle behind human rights
  legislation in Canada is to ensure that employees are hired and retained on the
  merit principle and not on the basis of unfounded stereotypes or prejudices.
  Where a person is unable to perform the essential duties of the job, an employer
  is permitted, under human rights legislation, to refuse to hire or retain the
  person. Human rights laws across Canada provide that it is not discriminatory to
  refuse employment on the basis of a *bona fide* ("good faith") occupational
  requirement or qualification (i.e., an essential duty of the job). If a requirement
  of the employment discriminates on a prohibited ground in the particular jurisdic-
  tion, the employer has an obligation to show that the requirement is a *bona fide*
  occupational requirement. Furthermore, an employer must consider and
take steps to provide reasonable accommodation, to the point of undue hardship,
in an effort to allow the employee to perform the essential duties of the job. For
a more detailed description of "a *bona fide* occupational requirement", please
see the question "What if a member of a protected group is unable to perform
the duties of the job?"

- **Exemptions:** Some jurisdictions allow organizations to apply for exemptions in
  special circumstances. For example, in Saskatchewan, nursing homes have
  applied for and received exemptions to allow them to specifically recruit and
  hire male attendants in order to allow male residents a choice of personal care
  providers. It should be noted that in applying these exceptions, human rights
  bodies interpret them very narrowly in order to avoid undermining the purposes
  of human rights legislation. Employers should therefore invoke such exceptions
  with great care.
Q: What does “accommodation” mean in the context of human rights in the workplace?

Answer

It is not discrimination to refuse employment to a person who is unable to perform the essential duties of the job (also referred to as bona fide occupational requirements or qualifications). However, human rights legislation does require that before determining that a person is unable to perform the essential duties of a job, the employer must assess whether the person could perform those duties if reasonable accommodation, to the point of undue hardship, was provided.

Accommodation can be provided in many ways to resolve work barriers related to many of the prohibited grounds of discrimination (e.g., disabilities, religious requirements, or familial needs). Employers may modify the duties, responsibilities, or physical demands of a job by reassigning the non-essential duties that are causing the employment barrier, or by altering the way in which tasks are completed. Employers may also provide physical or technological assistance such as redesigning workstations, adapting equipment, or providing special devices. Another form of support that an employer may offer is the provision of an employee assistance program. Flexible employment arrangements may also be used to accommodate employee needs. In determining the form of accommodation, it is important that the employer and the employee work together to design the most appropriate accommodation for the employee.

Although the employer is obligated to provide reasonable accommodation under human rights legislation, the onus is on the individual requiring the accommodation to make the employer aware of the need for the accommodation. If the employer is not aware that the accommodation is required, the employer will not be responsible for failure to provide it.

Q: What is undue hardship?

Answer

Generally speaking, undue hardship is determined by looking at cost issues and health and safety issues for the employer.

A human rights body would look at the following cost considerations:

- the size and financial resources of the employer;
whether costs are immediate or can be phased-in over time; and
whether costs may be recovered through grants, subsidies, or tax deductions.

A human rights body would look at the following health and safety considerations:

whether the risk is greater than those normally tolerated on the job;
whether the risk will be borne by the employee requiring accommodation, by
the co-workers, or by the general public; and

the willingness of the employee requiring accommodation to assume the risk, if
the risk is to be borne by the employee.

Some human rights boards of inquiry have also taken into account factors such
as disruption to the workplace, including disruption to administration, payroll, and
work scheduling systems.

Q: How should an employer approach the accommodation process?

Answer

To determine the appropriate reasonable accommodation, it might be necessary for
an employer to initiate an informal, interactive process with the employee or qualified job applicant in need of the accommodation.

Generally, the employer, using a problem-solving approach, should do the
following:

Analyze the particular job involved and determine its purpose and essential
functions.

Accept that the employee is genuine in his or her request for accommodation
(unless there is a justifiable reason not to) and discuss with the employee the
precise job-related limitations imposed by the individual’s special needs and
how those limitations could be overcome with reasonable accommodation.

Identify with the employee the potential accommodations and assess the effec-
tiveness each would have in enabling the individual to perform the essential
duties of the position. Where expert opinion is necessary to determine the most
appropriate accommodation, the employer should obtain such assistance.
Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

Provide the accommodation to the employee as soon as possible.

Document all efforts undertaken in the interactive process of determining an accommodation.

Maintain confidentiality throughout the accommodation process.

Maintain an ongoing dialogue. The interactive process requires communication; any failure to communicate may be interpreted as a sign of bad faith.

Please note that at certain stages of the employment relationship, an employer can only ask for certain information related to the need for accommodation.

In many instances, the appropriate reasonable accommodation may be so obvious to the employer and employee that it may not be necessary to proceed in this step-by-step fashion. For example, an employee who uses a wheelchair requests that his or her desk be placed on blocks to elevate the desktop above the arms of the wheelchair. When the employer complies, an appropriate accommodation has been requested, identified, and provided without either the employee or employer being aware of having engaged in any sort of formal accommodation process. In other instances, however, the reasonable accommodation may entail a multistep approach as discussed above. The key is to find a right combination that will work to accommodate the need of the employee as well as that of the employer’s business operation.

If the interactive process breaks down and an employee makes a human rights complaint claiming the employer failed to provide reasonable accommodation, the human rights tribunal or court may look to the cause of the breakdown. It is widely recognized that both the employer and the employee (and the union where applicable) have a role and a responsibility to provide the necessary information, to be involved in the process, and to consider fairly the available accommodation options in order to make the accommodation process a successful one.

The accommodation process is complex and requires sensitivity and attention to the requirements of the applicable human rights legislation. Most human rights bodies across Canada have developed guidelines on the accommodation process that can be helpful to an employer seeking assistance in this area.
Q: Are there questions that an employer can and cannot ask at certain stages of the accommodation process?

Answer

Questions about the need for accommodation must be limited at certain points of the employment process. For instance, at the employment interview stage, all that the employer needs to know is whether a candidate requires an accommodation for the interview. Where an employer does not ask candidates whether they require an accommodation or not at the interview, this could be the basis for a human rights complaint. When arranging an employment interview, the use of a simple question such as, “Do you require accommodation for the purposes of the interview?” is an easy way to uphold an employer’s obligation.

If at the interview the candidate reveals the need for accommodation in the workplace, further discussion about this can ensue. However, the conversation should be contained to questions directly related to the essential duties of the job and the required accommodation. Questions such as “How long have you had this disability?” or other intrusive questions are not allowed and could open an employer up to a human rights complaint.

Where other information related to a disability is required, questions should be asked after an offer of employment has been made. For instance, where information is required for insurance purposes, questions about the disability related to the insurance program may be asked only after an offer of employment has been made.

Q: What role does the employee play in the accommodation process?

Answer

While the obligation to accommodate an employee’s work-related needs based on a prohibited ground of discrimination falls on the employer, employees are not without responsibilities. Generally, employees have obligations in these areas:

- Employees must notify (preferably in writing) their employers of the need for accommodation. The obligation to provide accommodation is generally only for needs that are known, so it is essential that employees notify employers of their needs.
Employees generally must be flexible and co-operative in the accommodation process to the point that they can, given their specific needs. Given the complexity of the accommodation process, employees must also allow the employer reasonable time to address the accommodation request.

**Q:** What if a member of a protected group is unable to perform the duties of the job?

**Answer**

A key principle behind human rights legislation in Canada is to ensure that employees are hired and retained on the merit principle and not on the basis of unfounded stereotypes or prejudices. Where a person is unable to perform the essential duties of the job, an employer is permitted, under human rights legislation, to refuse to hire or retain the person. Human rights laws across Canada provide that it is not discriminatory to refuse employment on the basis of a *bona fide* ("good faith") occupational requirement or qualification (i.e., an essential duty of the job). If a requirement of the employment discriminates on a prohibited ground in the particular jurisdiction, the employer has an obligation to show that the requirement is a *bona fide* occupational requirement.

The Canadian Human Rights Commission has defined a *bona fide* occupational requirement as "a condition of employment which is imposed in the sincere belief that it is reasonable and necessary for the safe, efficient and reliable performance of the job, and which is objectively, reasonably necessary for such performance". There are three steps in determining the existence of a *bona fide* occupational requirement:

1. What are the essential components of the job in question? The essential components of the job are those job duties that are fundamental to the purpose of the job, as determined in the context of the business. For example, a receptionist must greet guests; a proofreader must check written materials for errors.

2. What are the capacities necessary for the safe, efficient, and reliable performance of the essential components? For example, the receptionist must speak the language of the guests he or she is greeting.

3. Does the individual in question have the capacities necessary for the safe, efficient, and reliable performance of the essential components? This assessment must be individual; for example, rather than screening out all recent immigrants for receptionist positions on the basis that their English skills will be inadequate, the employer should check each individual’s communication skills.
As you can see from the list above, no blanket statement can be made about what is and what is not a bona fide occupational requirement. It can be determined only in the context of the needs of the particular organization.

It must be emphasized that an employer who is relying on the existence of a bona fide occupational requirement in making an employment decision must ensure that there is objective evidence to back up the need for the requirement. In determining the existence of a bona fide occupational requirement, the employer should:

- gather scientific, empirical, or expert information on the necessity for the requirement;
- gather detailed information on the nature of the duties involved in the job;
- consider the conditions in the workplace; and
- consider the effect of the conditions on employees.

**Q:** What if a person could perform the essential duties of the job if some accommodation were provided?

**Answer**

Before determining that an employee is unable to perform the essential duties of a job, an employer should consider whether the employee could perform the duties if reasonable accommodation were provided. Employers will be excused from accommodating an employee only if providing such accommodation would create an undue hardship for the employer.

Accommodation may take a variety of forms. The employer may modify the duties, responsibilities, or physical demands of a job, such as by reassigning non-essential duties that form a barrier, or by altering the way in which tasks are accomplished. An employer may also provide physical or technological assistance, such as redesigning workstations, adapting equipment, or providing special devices or supports. An employer may also accommodate by providing support to an employee, such as by the provision of an employee assistance program.

It should be noted that the onus is on the employee requiring accommodation to make his or her needs known to the employer. If the employer is not aware that accommodation is required, the employer will not be liable for failure to provide it.
Q: Is an employer responsible for accommodating an employee who has not made his or her needs known?

Answer

The responsibility to provide accommodation to the point of undue hardship exists for needs that are known.

However, sometimes undisclosed needs exist; if and when these needs are later revealed, they must also be dealt with in the same fashion (i.e., accommodation must be provided to the point of undue hardship).

For example, an employee may be hiding a mental disability, which in turn may be causing a job performance issue. If, in the course of job performance discussions, the disability is discovered, the employer must seek out the most appropriate accommodation for the employee. If the employer fails to do so and terminates the employee for poor job performance, the employer could be open to a complaint on the basis that the termination was due to a lack of accommodation.

Q: What if the employee has provided information in the accommodation process that is questionable?

Answer

Generally, the rule is that an employer should accept an employee’s request for accommodation as genuine.

However, in some cases an employer may have reason to question the employee’s request for accommodation or the information that the employee has provided related to the request. An employer who is attempting to provide the most appropriate accommodation can ask for information or confirmation of the employee’s information from a qualified health professional. Please note, however, that this does not mean that an employer can require an employee to submit to an independent medical exam.

Employees have a responsibility within the accommodation process to provide relevant and accurate information so that the accommodation process can be successful. Where an employee does not provide such information, they risk delaying the accommodation process.
Q: What are some types of accommodations that can be made for persons with disabilities?

Answer

The process of determining which job accommodation is appropriate in a particular situation should involve a dialogue between the employer, the employee, and any external experts who may be required to assist the process. The precise limitations imposed by the disability should be identified. The parties should then explore potential accommodations that will allow the employee to perform the essential duties of the job.

The following list provides an overview of some common types of accommodation that an employer may be required to provide an employee (please note that the list is not intended to be exhaustive of every type of accommodation):

- **Make workplace facilities accessible:** Existing workplace facilities used by employees should be readily accessible to and usable by all employees, including those with disabilities. Workstations should be made accessible so that employees with disabilities can perform essential job functions. Access should be provided to all safety protections or procedures. Human rights requirements regarding access to public facilities should be complied with.

- **Modify the job or how the job is performed:** An employer may restructure a job by reallocating or redistributing non-essential job functions. Restructuring a job may also be accomplished by altering when or how an essential job function is performed. The employer and employee may explore whether work schedules may be altered, or whether the manner in which a job is completed can be changed without altering the basic operation of the business.

- **Use part-time or modified work schedules:** Persons with disabilities may need medical treatment that requires them to miss work on a regular basis. In other cases, a disability may mean that the employee must use public transportation that limits the hours the person can be at work. In such cases, part-time work or flexible hours may be an appropriate option as part of the accommodation process.

- **Reassign the employee to a temporary or permanent vacant position:** Reassignment often arises in cases of employees who are returning to work from an injury, but it can arise in other cases as well. It is generally understood that reassignment should only occur where it is impossible to accommodate the employee in his or her original position (for reasons of undue hardship). In such
cases, assignment to a different position may eliminate the barriers to performing the essential duties of the job, allow the employee to contribute to the organization, and make the costs associated with accommodation reasonable for the employer. An employer is not required, however, to “bump” another employee to create a vacant position for reassignment of a worker with a disability.

- **Acquire devices or modify equipment:** During accommodation discussions, the employer may explore acquiring specific equipment or modifying existing equipment to allow a person with a disability to perform essential job functions. In some jurisdictions across Canada, there are government programs that provide assistance to employers for such purposes.

Where an employee cannot perform the essential duties of the position, the employer is obligated to provide accommodation, to the point of undue hardship, to the employee to allow the person to do his or her job. Where the employee still cannot perform the essential duties, or where the employer can prove that providing the accommodation would cause undue hardship, the employer may have a defence for determining that the employee is unable to perform the essential duties of the job.

**Q:** Where can I get help with disability accommodation solutions?

**Answer**

Your most direct route to assistance with the accommodation process is through your local human rights body. Most human rights bodies have developed extensive guidelines regarding the duty to accommodate and the accommodation process. Additionally, most human rights bodies provide human rights training sessions that often include an overview of the accommodation process.

Some universities and non-profit organizations across Canada also have expertise in human rights and may be able to provide training regarding accommodation. There are also consultants across Canada that specialize in human rights training in the workplace that may be able to address your company’s accommodation related needs.

The following checklist may also assist you in the accommodation process.
Finding the Right Accommodation for Employees with Disabilities Checklist

Decide if the employee with the disability is qualified to perform the essential functions of the job with or without an accommodation by:

- using a job description and a job analysis to detail essential functions of the job; and
- identifying, along with the employee, his or her functional limitations and the potential accommodations.

Identify the employee’s workplace accommodation needs by:

- using a job description and a job analysis to detail essential functions of the job;
- identifying, along with the employee, his or her functional limitations and the potential accommodations;
- consulting with rehabilitation professionals or other experts, if needed;
- involving the employee in every step of the process; and
- adhering to confidentiality principles while exploring ways to provide workplace accommodations.

Select the most appropriate accommodation for the employee and employer by:

- choosing an accommodation that is effective, reliable, easy to use, and readily available;
- having the employee try the product or piece of equipment prior to purchase to ensure that it truly is the most appropriate accommodation; and
- providing the accommodation as soon as possible.

Check results by:

- monitoring the accommodation to see if it consistently enables the employee to complete the essential duties of the job; and
- evaluating, periodically, the accommodation to ensure continued effectiveness.
Provide follow-up, if needed, by:

- modifying the accommodation if necessary; and
- repeating these steps if appropriate.

Q:  Can an employee be displaced to accommodate for another employee who is returning from disability leave?

Answer

A person returning to work following a disability-related absence is protected by the human rights legislation in his or her jurisdiction. Under such legislation, the employee generally has the right to return to his or her pre-disability position. The right to return to the pre-disability job only exists, however, where the person can fulfill the essential duties of the job. If this is not possible, the employer must accommodate the employee by restructuring the job so that the person can perform the essential duties of the job, or by providing alternative work arrangements, whether temporary or permanent.

Generally, when alternative work is discussed, it means the employer reassigns the employee to a vacant position, offers retraining for a new job, creates a new position, or bundles the responsibilities and tasks in a way that does not cause the employer undue hardship. This means that there could be some workplace shifts necessary to accommodate a returning employee. Past labour arbitration decisions have found that workplace reorganization may be necessary to accommodate a returning employee. In such a case, it is wise for an employer to be aware of the impact of accommodation on other employees (i.e., does the alternative work arrangement put the employers in breach of an existing collective agreement?). However, human rights legislation is paramount (i.e., human rights legislation prevails over collective agreements), and emphasis must be placed on ensuring that the returning employee is provided the most appropriate accommodation.

Various human rights agencies throughout Canada have provided guidance on the issue of the duty to accommodate and alternative work. It is advisable for an employer to refer to such guidelines while making accommodation arrangements.
Q: What are some ways that an employer can accommodate religious observances?

Answer

The process of determining which job accommodation is appropriate should involve a dialogue between the employer and employee when it comes to accommodating religious observances. The precise limitations imposed by the religious observances should be identified. The parties should then explore potential accommodations that will allow the employee to perform the essential duties of the job.

The following list provides an overview of some common types of accommodation that an employer may be required to provide an employee who has religious needs (please note that the list is not intended to be exhaustive of every type of accommodation that may be provided):

- **Offer accommodation at the interview stage:** An employer should make it general practice to offer accommodation to potential candidates when they are contacted for an interview. The simple question “Do you require accommodation for the purposes of the interview?” is one effort that an employer may make to address its accommodation obligations under human rights legislation at this stage of the employment relationship. For example, a candidate may be asked to attend an interview on a Friday that happens to fall on a religious holiday for the candidate. An employer could offer an alternate day to hold the interview as a form of accommodation.

- **Ensure that only appropriate questions are asked about religion at the interview stage:** At the interview stage, it is generally recognized that there are not any permissible questions that should be asked about a person’s religion or creed, unless the employer is a special interest organization. Special interest organizations include those whose primary purpose is to serve people of a certain religion or creed. It may be appropriate for such an organization to ask about the religious affiliation of a candidate due to the nature of the job (e.g., the hiring of teachers within religious schools). Questions should be directly related to the essential duties of the job and any accommodation that may be required to fulfill such duties.

- **Offer flexible scheduling:** Areas in which flexibility could be introduced include:
  - flexible arrival and departure times;
— floating or optional holidays;
— flexible work breaks;
— working lunch time in exchange for early departure;
— staggered work hours; and
— permitting the make-up of time lost due to observance of religious practices (beyond the permissible 2–3 days of paid religious leave).

- **Allow compensation time**: Consider allowing employees who elect to work overtime to receive compensatory time off from work for religious observances that require abstention from work during certain times.

- **Allow religious leave**: In Canada, a 1994 Supreme Court of Canada decision set out some principles regarding religious leave. They include the following:
  - Where an employee requests leave for religious reasons, an employer has an obligation to consider and grant that request, including a request for paid leave. The only defence to not providing such leave is undue hardship for the employer in providing such leave.
  - At a minimum, employees should be provided with the same number of paid religious days off as the paid Christian holidays that have also been designated as statutory holidays. This means that employees of all religions have the right to at least two paid religious days off (because Christmas and Good Friday are also statutory holidays). If a collective agreement also designates Easter Monday as a statutory holiday, then the number of paid religious days increases to three.
  - Employees may request religious accommodation for days off beyond the 3 days set out above.
  - The only defence for failing to provide such accommodation is undue hardship (considering costs and health and safety).

- **Change job assignments (lateral transfer)**: This option depends upon the availability of another employee with substantially similar job-related qualifications. It should be considered when an employee cannot be accommodated either as to the entire job or an assignment within the job. The size, costs, and other intangible factors regarding a particular business may be of pivotal concern in whether a transfer or change in job assignments can be used to facilitate a religious accommodation.
• **Excuse job duties:** When a particular job duty presents a conflict with religious observances, it may be possible to accommodate by excusing the employee from performing that job duty. If the work is an essential duty of the job, the onus is on the employer to accommodate the employee’s needs to the point of undue hardship so that the employee can continue to perform the essential duties of the job.

• **Modify workwear rules:** Where a workplace rule designates that employees must dress a certain way or wear their hair a certain way, such rules may conflict with religious observances. In many cases, religious observances regarding hair length or clothing can be accommodated where health and safety are not issues in the workplace. Where there are health and safety concerns, the employer is obliged to accommodate the employee’s religious requirements (e.g., by offering a modified uniform or dress that would accommodate the religious practice of the employee).

A number of the human rights bodies across Canada have developed guidelines regarding human rights in the workplace, and some specifically address the accommodation of religious observances. Such guidelines can assist an employer in their efforts at addressing such needs when they arise.

**Q:** What role does an employee play in the accommodation of religious observances?

**Answer**

While the obligation to accommodate employees’ religious observances falls on the employer, employees are not without responsibilities. Generally, employees have obligations in these areas:

• Employees must notify (preferably in writing) their employers of a conflict between job duties and religious observances. The obligation for employers to provide accommodation is only for those needs that are known. Therefore it is essential for employees to notify employers of their accommodation needs.

• Employees generally must be flexible and co-operative in the accommodation process to the point that they can, given requirements of their religion or creed. Given the complexity of the accommodation process, employees must allow the employer reasonable time to address the accommodation request.
Q: What are some forms of accommodations that are appropriate for employees with pregnancy or childbirth-related needs?

Answer

The process of determining which job accommodation is appropriate in a particular situation should involve a dialogue between the employer and employee when it comes to accommodating pregnancy or childbirth-related needs. The precise limitations imposed by the pregnancy or childbirth should be identified. The parties should then explore potential accommodations that will allow the employee to perform the essential duties of the job.

The following list provides an overview of some common types of accommodation that an employer may be required to provide an employee who has pregnancy or childbirth-related needs (please note that the list is not intended to be exhaustive of every type of accommodation that may be provided):

- **Offer flexible scheduling:** Pregnant women may require scheduling flexibility to ensure they can attend medical appointments or manage other pregnancy-related needs. Flexible arrival and departure times and flexible work breaks may provide a woman with the time sufficient to attend necessary appointments while still allowing her to perform the essential duties of the position.

- **Modify the work environment:** Where a pregnant employee cannot be exposed to certain work environments because of her pregnancy, it may be necessary for the employer to modify the employee’s work environment to ensure that she can continue to perform her job duties. This may include temporarily reassigning the employee to alternate duties or providing her with an alternate workstation.

- **Support the employee following the birth of the baby:** For example, where an employee returns to work and is nursing, it may be necessary for an employer to provide a private and appropriate space in which the employee can feed the baby or pump milk to feed the baby at a later time.

A number of the human rights bodies across Canada have developed guidelines regarding human rights in the workplace, and some specifically address the accommodation of pregnancy and childbirth-related needs. Such guidelines can assist an employer in their efforts at addressing such needs when they arise.
Q: What role does an employee play in the accommodation of pregnancy or childbirth-related needs?

Answer

While the obligation to accommodate the pregnancy or childbirth-related needs of an employee falls on the employer, employees are not without responsibilities. Generally, employees have obligations in these areas:

- Employees must notify (preferably in writing) their employers of the need for accommodation due to pregnancy or childbirth. The obligation for employers to provide accommodation is only for those needs that are known, so it essential that employees notify employers of their needs.

- Employees generally must be flexible and co-operative in the accommodation process to the point that they can given their pregnancy or childbirth-related needs. Given the complexity of the accommodation process, employees must allow the employer reasonable time to address the accommodation request.

Q: What are some types of accommodations that can be made for family status?

Answer

The process of determining which job accommodation is appropriate in a particular situation should involve a dialogue between the employer and employee when it comes to accommodating family status needs. The precise limitations imposed by an employee’s family status should be identified. The parties should then explore potential accommodations that will allow the employee to perform the essential duties of the job.

The following list provides an overview of some common types of accommodation that an employer may be required to provide an employee who has needs related to family status (please note that the list is not intended to be exhaustive of every type of accommodation that may be provided):

- Offer flexible scheduling: Employees with family-related needs may require flexibility due to child care arrangements, school drop off and pick up times, or other needs related to their children. An employer can accommodate such needs by providing flexible arrival and departure times and flexible work breaks.

- Provide alternate work arrangements where possible: Some jobs can be altered so as to more readily accommodate family-related needs. For example,
Discrimination

providing an employee with a workstation at home and allowing the employee to work from home a certain percentage of the time. Other options include part-time work or job sharing.

- **Provide leave where such is required:** For example, an employee may require time off to care for his or her ailing parent. In some jurisdictions, there is legislation providing a certain number of days’ leave for such care. However where such provisions do not exist or where an employee requires more time off than allowed by law, an employer has a duty to engage the accommodation process to the point of undue hardship to address such needs.

A number of the human rights bodies across Canada have developed guidelines regarding human rights in the workplace and some specifically address the accommodation of family status needs. Such guidelines can assist an employer in their efforts at addressing such needs when they arise.

**Q: What role does an employee play in family status accommodation?**

**Answer**

While the obligation to accommodate the family needs of an employee falls on the employer, employees are not without responsibilities. Generally, employees have obligations in these areas:

- Employees must notify (preferably in writing) their employers of the need for accommodation due to family status. The obligation for employers to provide accommodation is only for those needs that are known, so it essential that an employee notify the employer of their needs.

- Employees generally must be flexible and co-operative in the accommodation process to the point that they can, given their family-related needs. Given the complexity of the accommodation process, employees must allow the employer reasonable time to address the accommodation request.
Q: If an employee requests time off or flexible work arrangements to care for an ailing family member, is an employer obligated to accommodate such requests?

Answer

Under human rights legislation throughout Canada (except for in New Brunswick and Newfoundland and Labrador), employers are required to ensure that, where needed, reasonable accommodation to the point of undue hardship is provided to an employee where work requirements conflict with family-status-related needs. For example, an employee may require a flexible arrival and departure time in order to ensure his or her children arrive at and are picked up from school. Furthermore, an employee may require flexible work arrangements to accommodate caregiving to an ailing parent. An employer has an obligation to canvass solutions that would accommodate the employee’s needs, while at the same time allowing the employee to continue to perform the essential duties of his or her position.

In addition to the human rights protections afforded to employees on the basis of family status and/or marital status throughout Canada, the following jurisdictions have either introduced or passed legislation regarding family medical leaves: federal, Manitoba, New Brunswick, Nova Scotia, Nunavut, Prince Edward Island, Ontario, and the Yukon.

Compassionate care benefits fall under the federal Employment Insurance (EI) system. Provincially, family medical leave provisions often fall under employment standards legislation.

It is advisable for any employer who receives such requests to contact both their local human rights body and employment standards body to ensure they address the needs of employees in accordance with the applicable legislation.

Q: What are the human rights implications of firing an employee who elects to take maternity leave?

Answer

In all jurisdictions across Canada, employees are protected from discrimination and harassment on the basis of sex or gender. Pregnancy and childbirth are protected under the ground of sex or gender in the following jurisdictions: federal, British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Newfoundland, Nova Scotia, PEI, and the Yukon.
If an employer fires an employee simply for the reason that the employee elects to take a maternity leave, this would constitute a violation of the employee’s right to freedom from discrimination on the basis of pregnancy or childbirth. Such action would open the employer up to the various penalties that are generally applied where discrimination or harassment are found to exist.

Additionally, this would likely be a violation of the employment standards legislation applicable to jurisdiction in which the employer exists. For example, in Ontario, the Employment Standards Act, 2000, section 74(1) provides that an employer is prohibited from penalizing, intimidating or dismissing an employee because she is eligible for a maternity leave, intends to take a maternity leave, or actually takes a maternity leave as provided for under section XIV of the Act.

The penalties for discrimination and harassment in the workplace are varied. If the local human rights body has been asked to investigate, this process can end in several outcomes including, but not limited to, any of the following:

- The employer may be responsible for monetary damages for losses sustained as a result of the discrimination or harassment. For example, if an employee was dismissed or forced to resign from employment because of harassment, compensation for loss of wages may be awarded.

- The employer may be responsible for monetary damages for the injury to self-respect and the loss of enjoyment of human rights resulting from the discrimination or harassment.

- The employer may be required to reinstate the employee who was the victim of discrimination or harassment in the workplace.

- The employer may be required to institute an anti-discrimination and harassment policy.

- The employer may be required to institute regular human rights training or educational workshops for employees.

- The employer may be required to institute a human rights complaint process for their organization.

- The employer may be required to post copies of human rights laws in the workplace.

- The employer may be required to report to the human rights body on a regular basis.
Furthermore, penalties may be assigned through the grievance process if an employee has the option to file a grievance with a union in relation to a human rights complaint. An employee may also file a civil suit, with the potential for more costly outcomes for the employer.

**Q: What about privacy and human rights in the workplace?**

**Answer**

Privacy legislation addresses the collection, use, and disclosure of employees’ personal information. Privacy legislation has been passed federally and provincially across Canada. Federally, the *Personal Information Protection and Electronic Documents Act* (PIPEDA) applies only to organizations that are involved in federal works, undertakings, or businesses (i.e., telecommunications; broadcasting; inter-provincial or international trucking, shipping, railways, or other transportation; aviation; banking; nuclear energy; activities related to maritime navigation and shipping; and local businesses in the Yukon, Nunavut, and the Northwest Territories). The key principles of the Act are that (1) individuals have a right to privacy regarding their personal information; and (2) organizations must collect, utilize, and disclose such information only where appropriate.

Human rights legislation throughout Canada also requires that personal information about an employee be collected, used, and disclosed only when and where it is absolutely necessary (e.g., in relation to a *bona fide* occupational requirement, or to provide an appropriate accommodation). Otherwise, such actions could be perceived as harassing or discriminatory in nature. For example, where an employer requests medical information on an application, such information could be used to screen out applicants on the basis of disability. In most circumstances, such information should only be collected after a conditional offer of employment and only where such information is directly linked to a *bona fide* occupational requirement.

It is critical for employers to make themselves aware of applicable privacy legislation and human rights legislation to ensure compliance with requirements under both pieces of legislation.
Q: Does human rights law protect employees against psychological harassment in the workplace?

Answer

In jurisdictions across Canada, human rights law does not specifically identify psychological harassment as a specific form of harassment against which employees are protected. However, in Quebec, the province’s An Act Respecting Labour Standards (the “Act”) does address psychological harassment.

In addition to the rights afforded to employees within Quebec under the province’s Charter of Human Rights and Freedoms, effective June 1, 2004, the Act provides that Quebec employees have the right to work in an environment free from psychological harassment. Quebec employers are obligated to take reasonable action to prevent such harassment in the workplace and to put an end to it whenever they become aware of such behaviour.

Psychological harassment is defined in the Act as any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee’s dignity or psychological or physical integrity and that results in a harmful work environment for the employee. A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.

Any employee who believes he or she is a victim of harassment may file a complaint with the Commission des normes du travail.

Q: In which provinces is mandatory retirement still in effect?

Answer

For employers in the federal jurisdiction, mandatory retirement is allowable in some circumstances. The federal legislation does not specify the age of 65; instead, the legislation states that an individual may be compelled to retire when he or she reaches the “normal age of retirement for employees working in positions similar to the position of that individual”.

In New Brunswick, mandatory retirement is permissible if required by a bona fide retirement or pension plan.

Mandatory retirement has been eliminated in Alberta, British Columbia, Manitoba, New Brunswick (see exception above), Newfoundland and Labrador, the
Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Quebec, Saskatchewan, and the Yukon. Employers in these jurisdictions are prohibited from requiring employees to retire at age 65, unless there is a *bona fide* occupational requirement.

**Q: What are the human rights implications for disciplining an employee for abusing casual illness leave?**

**Answer**

Casual illness leave is generally provided where an employee is sick, injured, or disabled, and requires a leave for a short period of time (e.g., three consecutive days or less). An employer needs to be cautious in making assumptions regarding the reasons for and severity of the illness, injury, or disability. Across Canada, human rights legislation is very broad in terms of its definition of what a disability is. Disability can include a minor illness if it can be shown that the person was treated unfairly or in a discriminatory manner because of that illness. Additionally, in some jurisdictions (e.g., Ontario), it is considered discrimination if a person is treated unfairly because of the *perception* of a disability (including the perception of illness).

It is an employer’s legal duty under human rights legislation across the country to accommodate the disability-related needs of its employees to the point of undue hardship. However, in the accommodation process, both employers and employees have responsibilities to make sure that it is successful. For example, the Ontario Human Rights Commission publication “Human Rights at Work” notes that employees who request an accommodation must explain the need for the accommodation and provide appropriate documentation or information from a doctor or other health care provider where appropriate. Furthermore, the employee is still required to meet the performance standards for his or her position once the accommodation is in place. Employers, on the other hand, must accept that the employee is honestly requesting the accommodation for good reason (unless there is solid reasoning for believing otherwise), and actively seek an accommodation that will best allow the employee to perform the essential duties of the job.¹

Where an employee appears to be “abusing” casual illness allowances, an employer would be wise to first ensure that they have provided all of the support possible to accommodate the employee, thereby enabling the employee to perform the essential duties of the job. Beyond this, an employer should utilize sound and

progressive performance management processes to address their concerns with the employee’s workplace performance.

Q: **What are the rules regarding drug and alcohol testing in the workplace?**

**Answer**


1. Drug and alcohol testing are different because a breathalyzer test for alcohol impairment can determine actual impairment at the time of testing, while a drug test might not.

2. Random drug testing is considered discriminatory because drug testing cannot determine actual impairment or future impairment on the job. Because traces of the tested substance can remain in an employee’s blood for several days following ingestion, testing does not necessarily prove that an employee is impaired at the time of testing.

3. Drug testing may be appropriate only where the test is objectively related to performance of the job (that is, it is a *bona fide* occupational requirement) and in the following situations:

   (a) Random alcohol testing for employees occupying safety-sensitive positions. Where random alcohol testing is to occur, employers should inform potential employees of such requirements at the pre-employment stage.

   (b) Drug or alcohol testing in (1) a post-incident situation (e.g., where an accident has occurred on the job) where the employer has reasonable cause to believe that the accident was a result of drug or alcohol impairment; or (2) where the employer has reason to believe that there is an underlying drug or alcohol dependency. Such testing should only occur in the context of medical assessment, monitoring, and the provision of appropriate support. The employer has the responsibility of accommodating an employee who has been found to have a drug or alcohol dependency, to the point of undue hardship.
(c) Periodic or random testing for alcohol or drug use once an employee has disclosed his or her current dependency to the employer, but only if it occurs in the context of medical assessment, monitoring, and the provision of appropriate support to the employee. An employer should leave such assessments to medical professionals or other experts in the area of addictions to determine the need for monitoring and follow-up.

(d) Mandatory disclosure of a drug or alcohol dependency (whether current or in the past 5 to 6 years) for those employees who occupy safety-sensitive positions. Such a requirement should be made known to a potential employee at the pre-employment stage. Once an employer is aware of a dependency, the employer has the responsibility of accommodating the employee to the point of undue hardship. Furthermore, the Canadian Human Rights Commission’s “Policy on Alcohol and Drug Testing” notes that an employer should not immediately dismiss an employee or an applicant if they fail to disclose a current or past drug or alcohol dependency, because denial of a dependency is often a symptom of a dependency.

Generally, the following types of drug and alcohol testing are not permissible under human rights legislation in Canada because of the difficulty in establishing that such testing is a bona fide occupational requirement:

- pre-employment drug testing;
- pre-employment alcohol testing;
- random drug testing; and
- random alcohol testing of employees in positions that do not have special safety requirements.

**Special case: Cross-border trucking and bus companies:** At the federal level, cross-border trucking companies and bus companies present a special case. For those companies that predominantly run their businesses between Canada and the U.S., it may be considered a bona fide occupational requirement that an employee or applicant not be banned from driving in the U.S. Such companies often have to comply with U.S. regulations and, in doing so, some have developed and implemented drug and alcohol testing programs to test and monitor use and dependency. Such programs are still required to comply with Canadian human rights law, and therefore must still provide accommodation to the point of undue hardship. Furthermore, if a driver is
treated differently in employment based on U.S. regulations, they still have a right to 
file a complaint under Canadian human rights law.

Many human rights agencies across Canada have developed policies and guide-
lines with respect to alcohol and drug testing in the workplace and it is wise for an 
employer, prior to considering such workplace programs, to become fully aware of 
the applicable human rights requirements for the particular jurisdiction that the 
organization operates in.

Q: Do the laws regarding same-sex marriage affect the 
workplace?

Answer
The opinions of the Supreme Court of Canada and the provincial courts in some key 
cases have helped the provinces define how employers should address same-sex 
marriage in a way that balances the equality rights of same-sex partners and the 
accommodation of religious objections.

The duty of employers to accommodate religious practices, including the reli-
gious objections of employees and customers or clients, is a key principle of human 
rights case law. As in all cases of accommodation, this duty is limited to the point at 
which an employer would incur hardship as a result of the accommodation.

In 2003, the Ontario Court of Appeal in Halpern v. Canada (Attorney General) 
found that the province’s refusal to register and issue licences for same-sex marriages 
was a violation of the Canadian Charter of Rights and Freedoms. Later, the Quebec 
Court of Appeal in the Catholic Civil Rights League v. Hendricks noted that the 
decision in Halpern was binding throughout Canada. In 2004, the Supreme Court of 
Canada in Reference re Same-Sex Marriage found that same-sex marriage is consti-
tutional, and that the Charter guarantees the freedom of religious officials to perform 
mariages and use their sacred places in accordance with their religious beliefs.

These various legal opinions have allowed the provinces to take different 
approaches to addressing the balance between the equality rights of same-sex part-
ners and that of employers whose roles include the solemnization of marriage (i.e., 
religious institutions or an authorized public servant such as a registered cleric or a 
registered clerk of the court):

- Newfoundland and Labrador, Manitoba, British Columbia, and Saskatchewan 
require that all marriage commissioners perform same-sex marriages.
New Brunswick’s current human rights legislation allows for guaranteed equal access to the solemnization of same-sex marriages, while also accommodating the rights of individuals with religious objections.

Ontario’s Human Rights Code has been amended to clarify that religious officials are not required to solemnize a marriage; however, the Ontario Human Rights Commission has suggested that public officials be exempted in this regard. In the Commission’s view, there is a distinction between religious officials who perform marriage ceremonies and public officials who do so on behalf of the province: public officials are expected to “check their personal views at the door” when providing a public service. The Commission has also noted that secular service providers cannot claim that the performance of their job functions is an expression of their religious beliefs.

Where an employer is unsure of the legislative requirements and the jurisdictional approach to same-sex marriage and accommodation in the workplace, it is wise to contact the appropriate human rights agency (federal or provincial, depending on jurisdiction) for assistance.

Q: Can workplace dress codes violate human rights laws?

Answer

Dress codes (such as those that require “business casual” wear) can be a sensitive topic in the workplace. Generally, however, dress codes do not violate human rights laws except in a number of specific cases. For example, rules that disallow an employee from wearing certain clothing or jewelry in the practice of a certain religion could be considered a violation of the employee’s right to freedom from discrimination on the basis of religion. Additionally, where a person with a disability cannot conform to a certain dress code because of his or her disability, the dress code may have to be altered to provide accommodation for the employee. If an employer does not do so, this could be considered a violation of the employee’s right to freedom from discrimination on the basis of handicap or disability. In situations where women are required to wear revealing clothing as a condition of their employment, the dress code may be considered a violation of their right to freedom from discrimination on the basis of sex.

Clearly, it is wise for an employer to ensure that the company dress code conforms with the applicable human rights legislation and is sensitive to the various human rights-related needs of its employees. In deciding what to include in a dress code, one must ask, “Does the dress code directly or indirectly infringe the human
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rights of any employee on the basis of sex, religion, or any other protected human rights ground? The best defence against a human rights complaint is to ensure that any dress code and its enforcement is in concert with all applicable human rights legislation, and that the dress code has a rational basis — that is, it is clearly based on bona fide occupation requirements. Note that where specific human rights-related requests for accommodation arise, an employer has a responsibility, to the point of undue hardship, to provide an employee with such accommodation.

Where a human rights complaint is filed, the employer’s role in any discrimination or harassment is not concluded until a thorough investigation into the facts of the complaint is conducted, and a decision based on the facts of the case is reached by a human rights tribunal.

Q: How does the Accessibility for Ontarians with Disabilities Act, 2005 affect Ontario employers?

Answer

On June 13, 2005, the Accessibility for Ontarians with Disabilities Act, 2005, an Act with the intent of “achieving accessibility for people with disabilities”, became effective in Ontario (this Act replaced the Ontarians with Disabilities Act, 2001). The new Act is significant in that it includes the private sector and issues related to employment.

The Accessibility for Ontarians with Disabilities Act, 2005 requires the government to develop accessibility standards that will apply to a number of areas, including employment, buildings, and services. Common standards will be developed to apply across sectors, and some sector-specific standards will be developed where necessary (e.g., in the area of transportation). These standards will outline what steps must be taken to ensure that barriers are prevented; and where barriers exist, the steps necessary to remove them, and when this should happen.

From a human rights perspective, the Accessibility for Ontarians with Disabilities Act, 2005 does not change the current obligations that employers have under the Ontario Human Rights Code. Currently, under the Ontario Human Rights Code, employers must provide accommodations for employees with disabilities where the need is known. Employers remain obligated to provide accommodations to the point of undue hardship so that an employee with a disability can perform the essential duties of his or her position. The Accessibility for Ontarians with Disabilities Act, 2005 does not change these obligations; rather it will provide standards of accessibility that will help employers ensure that their workplaces are accessible.
Human Rights Education in the Workplace

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Q: What message regarding human rights in the workplace do employers need to send to employees?

Answer

Employers who take seriously the job of implementing anti-discrimination and harassment efforts within their organization should illustrate not just in word but in deed their commitment to a workplace free from discrimination and harassment. These efforts will ring loudly not just for employees but for potential applicants and external industry partners as well. Effective communication of the company’s commitment to complying with human rights legislation and internal anti-discrimination and harassment policies is essential.

Here are some ways that an employer can send a strong message to the workforce:

- Establish an anti-discrimination policy that respects the human rights, dignity, and worth of all people and states the organization’s commitment to a workplace free from discrimination and harassment. The policy should cover all aspects of the employment relationship. It should also contain a complaint procedure and an affirmation of the organization’s commitment to investigate complaints and take appropriate action against employees or managers who violate the policy.

- Communicate your organization’s human rights policies to all employees and job applicants through, for example, recruitment literature, application forms, and employee orientation and training. Make sure that each employee, new and existing, receives a copy of the policies. If your organization has an employee handbook, include the company’s human rights policies in the handbook. Furthermore, display the policies in a high traffic area so that it has presence within the organization.

- Train managers and supervisors about employer obligations under the human rights legislation that applies to the jurisdiction in which the company exists. Training should not be a one-time event. Rather, it should occur periodically so that managers and supervisors refresh their knowledge and receive updates regarding changes to requirements or processes under the applicable human rights legislation.

- Ensure that managers and supervisors understand that the organization is responsible for any hiring and other employment decisions they make that
violate human rights laws in Canada, and that the consequences can be expensive (monetarily and otherwise).

- Review and retrain periodically any employees with hiring authority on the human rights requirements regarding employment advertisements, application forms, the interview process, the use of employment agencies, the development of hiring criteria, and the accommodation process. For instance, a manager responsible for conducting an interview must be aware that he or she cannot ask questions like: “Do you have children or are you planning on having children in the near future?” They must also be aware that where a person requires accommodations for an interview, the employer has an obligation to provide that accommodation to the point of undue hardship.

- Provide your managers, supervisors, and staff with the procedures to follow when confronted with complaints of discrimination from job applicants or employees. If possible, provide them with tools to make the procedures easier to follow.

- Monitor all employment actions for compliance with human rights laws and internal company human rights policies.

- Consult provincial/territorial or federal human rights legislation or bodies for requirements that may apply.

- Stay up to date with new developments in human rights law.

Q: **What should a human rights training session include?**

**Answer**

Where an employer has decided to implement a human rights training component for its workforce, some basic elements should be included:

- an overview of the human rights legislation that applies to the jurisdiction in which the workplace is situated;

- an overview of the company’s human rights policies;

- a comprehensive overview of human rights in the workplace, including clear definitions of discrimination and harassment, examples of situations in which discrimination and harassment might occur (e.g., on an application form, in an interview, at termination), various types of discrimination (direct, adverse effect, etc.), and a discussion of sexual harassment;
a discussion of the concept of accommodation, including clear examples of how accommodation would work for employees with disabilities, employees with needs for religious accommodations, employees with needs for family status accommodation, and employees who are pregnant or breastfeeding;

an overview of what employees should do if they find themselves the victims of discrimination or harassment in the workplace; and

da discussion of the various complaints processes that employees are able to access, including the company’s internal complaints process, the local human rights body’s complaints process, the union’s grievance process (where applicable), filing health and safety complaints (where applicable), filing civil suits, and contacting the police.

Depending on who the audience is (i.e., employees or managers), it may be necessary to provide additional content. For example, senior management will need more in-depth knowledge of human rights in the workplace under the applicable human rights legislation. Managers and supervisors should be educated in the following areas:

the importance of ensuring a discrimination- and harassment-free workplace and the organization’s commitment to this type of environment;

how to recognize discrimination and harassment issues when they arise, including detailed examples of unacceptable behaviour (this may include in-depth information on how to document and appropriately address incidences of discrimination and harassment); and

the organization’s internal complaints and investigations process.

Employers should be flexible in their approach to human rights training and understand that various parts of the workforce will require different training to ensure that the workplace is free of discrimination and harassment. Furthermore, human rights training should not be a one-time event. It should occur periodically to ensure that employees are kept up to date on their knowledge and skills in this area.
Q: Where can I get assistance with human rights training?

Answer

Your most direct route to assistance with human rights training is through your local human rights body. Most human rights bodies provide human rights training sessions for companies of all sizes.

Additionally, there are non-profit organizations as well as universities that have expertise in human rights and may be able to provide training appropriate to your workplace.

Finally, there are consultants across Canada that specialize in human rights training in the workplace.
Remedying Discrimination

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Q: What should an employee who is being harassed do?

Answer

The first thing an employee who is being harassed should do is to tell the harasser to stop. It is essential to make it clear that the behaviour is unwelcome and objectionable. If the employee feels unable to approach the harasser, the employee should approach a member of management with whom he or she feels comfortable for help in communicating the problem to the harasser.

If the behaviour doesn’t stop, the employee should seek assistance through the organization’s harassment policy procedures, if they exist, or through any member of management with whom the employee feels comfortable. Where the harassment includes threatening or violent behaviour, the employee also has the recourse to contact the police for intervention.

Dealing with Harassment Checklist

- Let the harasser know that the behaviour is unwelcome. Make it clear that the behaviour must stop, whether by approaching the harasser in person or through an intermediary. Note: If the employee is in a particularly vulnerable position, this step may not be necessary, depending on your jurisdiction’s human rights legislation.

- Document the incidents related to the harassment, and maintain a written record that includes the who, where, when, and how of the harassment, as well as the names of any witnesses. Note: In some cases, the nature of the harassment is such that repeated incidences are not necessary in order for it to be considered a violation of human rights legislation.

- Bring the harassment to the attention of the employer if it does not stop, either through the procedure set out in the company harassment policy, if one exists, or by contacting a member of the management.

- Consider other courses of action if these steps do not get appropriate results, such as filing a grievance, contacting the police (particularly if the harassment is threatening or violent in nature), filing a civil suit, or complaining to the appropriate human rights body.
Q: Does the request to stop the upsetting behaviour have to be verbal?

Answer

No. The indication that the behaviour is unwelcome can take any form, so long as it is such that a reasonable person would understand. For example, the fact that touching is unwelcome may be communicated if the person being touched stiffens up and moves away when it occurs. In some jurisdictions, and in some situations where the victim is made particularly vulnerable, it may not be necessary at all to inform the person that the behaviour is harassing in nature in order for the provincial/territorial human rights legislation to apply.

Q: If the employer won’t help stop the harassment, what other options are available?

Answer

There are a number of avenues of assistance open to an employee if the employer is unwilling to provide assistance:

- The employee may approach a union representative if he or she is a member of a union. The union may be able to file a grievance on the employee’s behalf.

- The employee may approach the police. If the employee has been the victim of a physical assault in the course of the harassment, sexual or otherwise, it may be appropriate to approach the police. The employee has been the victim of a crime, and a charge can be filed.

- The employee may contact the local human rights body. The human rights body can provide advice and assistance. If the employee wishes, a complaint of a human rights violation may be filed.

- The employee may be able to file a civil suit in the courts.

Q: What are the penalties to employers for discrimination and harassment in the workplace?

Answer

The penalties for discrimination and harassment in the workplace are varied. If the local human rights body has been asked to investigate, employers can face several outcomes including, but not limited to, any of the following:
The employer may be responsible for monetary damages for losses sustained as a result of the discrimination or harassment (e.g., if an employee was dismissed or forced to resign from employment because of harassment, compensation for loss of wages may be awarded).

The employer may be responsible for monetary damages for the injury to self-respect and the loss of enjoyment of human rights that resulted from the discrimination or harassment.

The employer may be required to reinstate the employee who was the victim of discrimination or harassment in the workplace.

The employer may be required to institute an anti-discrimination and harassment policy.

The employer may be required to institute regular human rights training or educational workshops for employees.

The employer may be required to institute a human rights complaint process for their organization.

The employer may be required to post copies of human rights laws in the workplace.

The employer may be required to report to the human rights body on a regular basis.

Furthermore, where an employee has the option to file a grievance in relation to a human rights complaint, penalties may be assigned. An employee may also file a civil suit, which may result in more costly outcomes for the employer. Finally, an incident of discrimination or harassment where the employee feels threatened or in danger may require the involvement of the police. Employees have the option to address their complaints with the police, and the penalties in this regard include potential criminal charges and convictions.

Beyond these penalties, the occurrence of discrimination and harassment in the workplace penalizes both employers and employees by creating a work environment where morale is low and workforce stress is high; potential new employees may also be discouraged from applying. These penalties should be incentive enough for an employer to ensure a workplace free from discrimination and harassment.
Q: What should an employer do if a complaint of harassment arises in the workplace?

Answer

Complaints should be investigated promptly. A thorough investigation usually includes:

- interviews with the complainant, the witnesses, and the alleged harasser to obtain all of the relevant facts;
- a written report of the investigation; and
- a timely report to the complainant of the results of the investigation.

An employee has the right to file a complaint with the human rights body responsible for the jurisdiction in which he or she works. An employer should not act in any way to interfere with the complaint process or retaliate against the employee for filing a formal complaint. If an employee does experience retaliation, this occurrence can also be the subject of a human rights complaint.

The following investigation checklist may provide assistance.

**Harassment Investigation Checklist**

- **Detail the claim:**
  - Get the employee to describe the claim. Listen to the charge. Don’t make comments like, “You’re overreacting.”
  - Acknowledge that bringing a harassment complaint is a difficult thing to do.
  - Maintain a professional attitude.
  - Gather the facts. Don’t be judgmental.
  - Ask who, what, when, where, why, and how.
  - Find out if the employee is afraid of retaliation and assure the employee that he or she will be protected from retaliation.
  - Find out how the employee wants the problem resolved.

- **Conduct an investigation of the claim (general rules):**
  - Investigate immediately. Delaying or extending an investigation can make witness testimony increasingly unreliable.
Remember that the manner in which the investigation is handled can itself furnish grounds for a hostile environment claim, so carefully document every step.

Treat all claims seriously until you have reason to believe otherwise.

Keep the investigation confidential. Emphasize to those involved that your discussions are not to be shared with unconcerned parties. Warn of possible disciplinary action, if necessary.

Limit the number of persons that have access to the information. Communicate strictly on a need-to-know basis.

Ask questions so that information is not unnecessarily disclosed. For example, instead of asking, “Did you see Paul touch Joan?” ask, “Have you seen anyone touch Joan at work in a way that made her uncomfortable?” Remember, the purpose of the investigation is to gather facts, not disseminate allegations.

Treat each allegation separately, if there is more than one.

Never use the facts or results of a given situation as an example or training tool for others.

Interview the complainant (can be done when the employee first reports the charge):

- Get specific details.
- Find out whether there was a pattern of previous episodes or similar behavior towards another employee.
- Get the specific context in which the conduct occurred. Where? What time?
- Determine the effect of the conduct on the complainant. Was it economic, non-economic, physical, and/or psychological?
- Determine the time relationship between the occurrence of the conduct, its effect on the complainant, and when the complainant made the report.
- Prepare a detailed chronology.
- Analyze whether there might have been certain events that triggered the complaint (i.e., promotion, pay raise, or transfer denial).
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- Determine whether there are any possible motives on the part of the complainant.
- Find out what the complainant wants.
- Explain to the complainant that the charges are serious, that you will conduct a thorough investigation before reaching any conclusion, and that he or she will not be retaliated against for making the complaint.
- Don’t make any statements about the accused employee’s character, job performance, or family life.

☐ Interview the accused:

- Obtain a statement from the accused.
- Identify the relationship of the accused to the complainant.
- Find out if there was any prior consensual relationship between the parties. How long have they known each other? Is there a history of group or individual socializing?
- If the individual is a supervisor, indicate the individual’s job title, obtain a copy of the individual’s job description, and determine the individual’s specific duties at the time of the alleged harassment.
- Determine whether the accused directs or has responsibility for the work of other employees or the complainant, whether the accused has authority to recommend employment decisions affecting others, and whether the accused is responsible for the maintenance or administration of the records of others.
- Observe the reaction of the accused when the complaint is laid out. Note whether there is surprise, anger, or disbelief. Describe the details of the allegation and note the areas of disagreement between the testimonies of both parties. If the accused denies the allegations, probe further to determine with the accused the background, reasons, and motivation that could have possibly triggered the complaint.

☐ Interview witnesses:

- Obtain statements from any witnesses who support or deny any of the complainant’s allegations. Be aware that witnesses are often reluctant to come forward out of fear of reprisal.
Remedying Discrimination

- Assure all witnesses that their co-operation is important, that their testimony is confidential, and that they will not be retaliated against for testifying.

Resolve the complaint:

- Apologize for the incident occurring, if this is appropriate.

- When attempting to remedy the conduct, avoid requiring the claimant to work less desirable hours or in a less desirable location. If you offer to transfer the complainant, obtain the complainant’s consent and make sure the transfer position is substantially similar to the complainant’s prior position. This helps ensure that the complainant is not being illegally punished for reporting discrimination or harassment.

- Consider the severity, frequency, and pervasiveness of the conduct when imposing discipline on the harasser. There are several disciplinary options available, including oral and written warning, reprimand, suspension, probation, transfer, demotion, and discharge.

- Accompany all disciplinary actions with a warning that similar misconduct in the future may result in an immediate discharge. If no discipline is imposed, document the reasons why.

- Provide remedial counselling and training on sexual harassment, if appropriate. Also take the opportunity to re-communicate your harassment policy.

- Document the investigation carefully and fully, as well as the discipline imposed and any remedial steps taken.

- Conduct follow-up interviews with the parties to inform them of the company’s actions.

- Refer the case to the local human rights body or to the police where the severity of the incident requires such.
Q: What should an employer do if a human rights complaint is filed against it?

Answer

The investigation and resolution of a complaint of workplace discrimination can be a lengthy, costly, stressful experience. Following are some suggestions for employers who find themselves the subject of an investigation by a human rights body:

- **Prevent complaints:** The best means of dealing with a complaint is preventing it. Employers should be proactive in dealing with human rights issues, and ensure that their organization respects human rights. This means keeping up to date on human rights issues and developments; providing human rights training to management, supervisory personnel, and employees in general; developing anti-discrimination and anti-harassment policies; and putting into place appropriate internal complaints processes. Not only will these actions help to avoid complaints, but they will increase the likelihood that any complaints filed will be resolved favourably.

- **Take the complaint seriously:** A human rights complaint can have a major impact on an organization’s finances, employee morale, and public image. Damage awards can be large, and some employers have been required to implement affirmative action programs, carry out diversity training, rehire dismissed employees, or report to a human rights body on a regular basis.

- **Get advice early on:** Seek out a lawyer or a person knowledgeable in human rights issues for guidance, particularly if the case is complex. Many organizations obtain no legal advice until the hearing stage, by which time the evidence has been gathered and substantial amounts of the employer’s time and resources have been consumed. An employer’s best opportunity to favourably influence the outcome of the case is early on. The early information provided to the human rights body will have a substantial impact on the investigation, the investigator’s recommendation, the decision as to whether a hearing is necessary, and the outcome of the hearing itself (if necessary). As well, the hearing process can be very costly, and it is often more prudent to invest resources at the beginning of the process if there is any possibility of bringing the matter to an early conclusion and avoiding a hearing altogether.

- **Ensure that the employee who has made the complaint is not subject to reprisal:** Such employees, if still employed, should be treated fairly and with
Respect, as any reprisal can itself be grounds for another human rights complaint.

- **Gather all relevant information and document all circumstances:** From the time an employer is made aware of a complaint, a written record should be made of the employer’s version of events. Important documents should be preserved, and a record should be kept of all conversations with witnesses or human rights staff. Ensure that contact is maintained with important witnesses so that they can be found if necessary. During the processing of a complaint, memories may fade, witnesses may move away, and documents may get lost. The human rights body or the hearings tribunal will not be overly sympathetic if an employer claims to have misplaced the documents or evidence that would have exonerated it. Generally speaking, the onus is on the respondent in a human rights case to preserve the materials necessary for its defence.

- **Co-operate with the investigating office and any other human rights staff:** The role of the investigator is not to find evidence to support the complaint, but to simply find out what happened. Antagonizing human rights staff is unlikely to prove productive, and will only prolong the process and make things worse.

- **Consider settling the complaint:** Some employers have a policy of never settling a human rights complaint. While this is a matter of individual judgment, it should be remembered that a settlement is not an admission of fault, and that a settlement can save an employer substantial amounts of time and money while avoiding the internal turmoil and public embarrassment associated with a complaint. In most parts of the country, the human rights staff is required to make a real effort to resolve the matter informally, and it can be to an employer’s benefit to take advantage of this.

- **Don’t imagine that the complaint will go away if it is ignored:** It won’t. Due to the heavy caseloads at many human rights bodies, the complaint process can be very lengthy, and an employer may not hear from the human rights body for months. This doesn’t mean that the complaint has been forgotten or abandoned. Every complaint must eventually be settled or resolved.

- **Try to learn from the experience:** Even if a complaint is unfounded, it may indicate other problems within the organization that require attention, such as poor management, lack of communication, poor morale, an unprofessional work atmosphere, or lack of supervisory training. Even if the complaint does not uncover human rights issues within the organization, there may still be valuable lessons to be learned from the experience.
Q: What can an employer do to prevent harassment from occurring in the workplace?

Answer

An employer should take steps before a harassment complaint occurs to ensure that it meets its obligation to provide employees with a non-discriminatory work environment. The following is a list of important steps for employers to help them prevent discrimination and harassment from occurring within the workplace:

- have a plain-language anti-harassment policy in place that covers the entirety of the employment process from recruiting to termination;
- make employees aware of company harassment policies by printing them in employee newsletters and including them in regular employment training;
- make sure employees are aware of the human rights legislation that applies to the jurisdiction in which the company operates;
- ensure that the company has an internal complaints process in place;
- work with union representatives (where they are involved) to ensure that they are aware of company policies;
- implement employee education on human rights in the workplace. Such knowledge aids employee understanding of what harassment and discrimination are and keeps the workplace free from such behaviour; and
- discipline employees where discrimination and harassment occur (in doing so, the company sends a strong message to employees that discrimination and harassment are not acceptable workplace behaviours).

Q: What can an employer do to prevent discrimination in the workplace?

Answer

Prevention is the best method for dealing with human rights complaints. A discrimination-free workplace can be a key competitive advantage for an employer. Below are some suggestions for ensuring a discrimination-free workplace:

1. **Make an organizational commitment to a discrimination-free workplace:** Unless employees see that senior members of the organization are serious about creating a discrimination-free workplace and that it is an organizational priority,
they themselves will not take the commitment seriously, and it will be difficult to achieve the goal. Ways in which senior level commitment to a discrimination-free workplace can be demonstrated include:

- having a member of senior management announce the anti-discrimination initiative, or sign a letter accompanying the unveiling of the anti-discrimination policy;
- formally including the development of a workplace free of discrimination and harassment in the organization’s goals; and
- committing to equality by actions as well as by words. For example, members of senior management may wish to become involved in equality issues outside the workplace or to play an active role in the anti-discrimination initiative. At the minimum, senior management should illustrate their commitment to a discrimination-free workplace by modeling behaviour that fits with both the employer’s human rights policies and the human rights legislation of the jurisdiction in which the employer exists.

2. **Develop and implement an anti-discrimination policy:** This is a crucial component of any anti-discrimination initiative. An anti-discrimination policy not only demonstrates organizational commitment to a workplace environment that is free of discrimination, but it also educates employees on types of discrimination, the organization’s commitment in dealing with discrimination, and the ways in which issues of discrimination will be dealt with.

3. **Train supervisors and managers to recognize and deal with issues of discrimination:** Supervisors and managers deal with employees on a daily basis. They are the employer representatives who are in the best position to recognize and stop discrimination when it occurs in the workplace. Unfortunately, they are also the employees in the best position for causing the organization to be the subject of a discrimination complaint. Human rights law is complex and constantly evolving; without education for supervisors and managers, they may inadvertently be the source of problems for the organization if they fail to deal with issues appropriately when they arise. It is therefore imperative that all supervisors and managers be educated about discrimination. Training should include:

- the importance of ensuring a discrimination-free workplace, and the organization’s commitment to this;
DISCRIMINATION

- the recognition of discrimination issues when they arise, including detailed examples of unacceptable behaviour; and

- the organization’s procedures for employees to make complaints, and for the organization to investigate and resolve them.

After training is completed, supervisors and managers should be kept up to date as new issues and developments arise. As well, refresher courses should be given on a periodic basis.

In unionized environments, anti-discrimination training is often done in conjunction with the union. Many unions have valuable experience and extensive resources in dealing with issues of workplace equality.

Further information on what a human rights training session should include can be found in the “Human Rights Education” section.

4. **Provide information to employees**: All employees should be made aware of what discrimination is, what the organization’s policy is regarding discrimination, and what employees can and should do when faced with workplace discrimination. For example, the organization’s anti-discrimination policy should be distributed to every employee and should contain the name of a person who can be contacted for further information.

5. **Deal promptly with discrimination issues when they arise**: It is counterproductive to have an elaborate anti-discrimination policy if it is not effectively implemented. In order for employees to feel comfortable in coming forward with issues of discrimination, they must see that the organization’s anti-discrimination policy is implemented in an efficient, consistent, and fair manner.

6. **Create a work environment respectful of the dignity of all employees**: Workplace policies, practices, and procedures should be reviewed on a regular basis to ensure that they are not systemically discriminating against employees and creating barriers to workplace equality. Some employers may wish to take a proactive approach and implement voluntary employment equity and human rights initiatives in their workplaces.
Q: What types of human rights policies should an employer have in place?

Answer
It is advisable for an employer to include the following human rights policies within their organizations:

- an anti-discrimination and harassment policy;
- a sexual harassment policy;
- a policy on the duty to accommodate;
- a policy detailing the internal complaints procedure; and
- a statement regarding protection from retaliation for making a human rights complaint or for participating in a human rights investigation.

In addition, displaying and/or distributing copies of the applicable human rights legislation throughout your organization sends a message to employees that the employer is committed to a workplace free from discrimination and harassment.

Q: What should be included in a sexual harassment policy?

Answer
A basic sexual harassment policy should include the following:

- **A definition of sexual harassment**: The policy can refer to the definition of sexual harassment that is provided by the applicable human rights body. In addition to the formal definition, the policy should explain, in easy-to-understand terms, the types of conduct that will and will not be tolerated.

- **A prohibition clause**: Make a clear statement that sexual harassment will not be tolerated.

- **An overview of the internal complaints procedure**: Complaints should be made in writing (although they can occur verbally to begin with). The avenues for an employee to make a complaint should be outlined. For instance, it may be helpful to designate within your policy several individuals to whom an employee may bring a complaint, preferably including an individual who has authority but is outside the direct line of supervision of the harassed employee. Make sure to state that alternative complaint recipients will ensure that the
employee will not have to complain to the alleged harasser. Also provide details of external complaints processes that are available to employees (e.g., the processes of human rights bodies). Finally, give employees an idea of how long the investigation should take and when an answer can be expected.

- **A list of penalties**: State that anyone violating the policy will be subject to discipline, ranging from a warning to discharge, if appropriate. Also inform potential perpetrators of external human rights penalties, union-related penalties, the potential for a civil lawsuit, and the potential for police involvement in cases of sexual harassment.

- **A confidentiality provision**: Explain that the identity of both complaining employee and the alleged harasser will be protected, but announce that action will be taken.

- **A reassurance of protection against retaliation**: Provide that anyone making a complaint will not be retaliated against, even if a complaint made in good faith is not founded. Also explain that any witnesses will be protected.

- **A reference to the applicable human rights legislation**: Include a reference to or a copy of the applicable human rights legislation.

The following two sample sexual harassment policies include key elements that indicate the seriousness of your organization’s stance against sexual harassment and the consequences to employees who engage in such behavior. You can edit or combine the policies to quickly customize one for your company.

**Sample Sexual Harassment Policy #1**

[Company name]'s position is that sexual harassment is a form of misconduct that undermines the integrity of the employment relationship. All employees have the right to work in an environment free from all forms of discrimination and conduct that can be considered harassing, coercive, or disruptive, including sexual harassment. Anyone engaging in harassing conduct will be subject to discipline, ranging from a warning to termination. Additionally, a human rights complaint or involvement of the police may occur in incidences of sexual harassment.

**What is sexual harassment?** Sexual harassment is any conduct or comment of a sexual or gender-related nature that is likely to cause offence or humiliation to an employee, or that might be perceived as placing a condition of a sexual nature on employment or on an employment opportunity. It often exploits an employee’s sexual or gender-related differences in a way that degrades and humiliates. It is usually an attempt by one person to exercise power over another. Sexual harassment includes, but is not limited to, epithets, slurs, gestures, derogatory or suggestive comments, and offensive posters, cartoons, pictures, or drawings.
**When is conduct unwelcome or harassing?** Unwelcome sexual advances (either verbal or physical) and other verbal or physical conduct of a sexual or gender-related nature constitute sexual harassment when:

- submission to the conduct is either an explicit or implicit term or condition of employment (e.g., promotion, training, timekeeping, or overtime assignments);
- submission to or rejection of the conduct is used as a basis for making employment decisions (e.g., hiring, promotion, termination);
- submission to or rejection of the conduct is used as the basis for punishing an employee or retaliating against an employee; or
- the conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

**What is not sexual harassment?** Sexual harassment does not refer to occasional compliments of a socially acceptable nature. It refers to behavior that is not welcome, that is personally offensive, that debilitates morale, and that therefore interferes with work effectiveness and a person's dignity and integrity.

**What should you do if you are sexually harassed?** If you feel that you have been the recipient of sexually harassing behavior, report it immediately to your supervisor. If your supervisor is the source of the harassing conduct, report the behaviour to that person's supervisor or to the owner of [company name]. It is preferable to make a complaint in writing, but you can accompany or follow up your written complaint with a verbal complaint. Your identity will be protected and you will not be retaliated against for making a complaint.

**What happens after a complaint is made?** Within [number] days after a written complaint is made, a supervisor or other person designated by the owner will investigate the complaint. The person will speak with possible witnesses, as well as with the person named in your complaint. Your anonymity will be protected.

Depending on the complexity of the investigation, you should be contacted within [number plus measure of time (e.g., 4 days, 2 weeks, 1 month)] about the status of your complaint and whether action is being taken.

**Sample Sexual Harassment Policy #2**

[Company name] believes that employees should be afforded the opportunity to work in an environment free of sexual harassment. Sexual harassment is a form of misconduct that undermines the employment relationship. No employee, male or female, should be subjected verbally or physically to unsolicited and unwelcome sexual overtures or conduct.

Sexual harassment is any conduct or comment of a sexual or gender-related nature that is likely to cause offence or humiliation to an employee, or that might be perceived as placing a condition of a sexual nature on employment or on an employment opportunity. It often exploits an employee's sexual or gender-related differences in a way that degrades and...
Discrimination

humiliates. It is usually an attempt by one person to exercise power over another. Sexual harassment includes, but is not limited to, epithets, slurs, gestures, derogatory or suggestive

Behaviour that amounts to sexual harassment may result in disciplinary action, up to and including dismissal. Additionally, a human rights complaint or involvement of the police may occur in incidences of sexual harassment.

Definition

[Company name] has adopted the definition of sexual harassment set forth by the [local human rights body, e.g., Canadian Human Rights Commission, provincial or territorial human rights body]. The [local human rights body] defines sexual harassment as [insert chosen definition here].

Employer’s Responsibility

[Company name] wants you to have a work environment free of sexual harassment by management personnel, by your coworkers, and by others with whom you must interact in the course of your work as a [company name] employee. Sexual harassment is specifically prohibited as unlawful and as a violation of [company name]’s policy. [Company name] is responsible for preventing sexual harassment in the workplace, for taking immediate corrective action to stop sexual harassment in the workplace, and for promptly investigating any allegation of work related sexual harassment.

Complaint Procedure

If you experience or witness sexual harassment in the workplace, report it immediately to __________. You may also report harassment to any other member of [company name]’s management or ownership. All allegations of sexual harassment will be quickly investigated. To the extent possible, your confidentiality and that of any witnesses and the alleged harasser will be protected against unnecessary disclosure. When the investigation is completed, you will be informed of the outcome of that investigation.

Retaliation Prohibited

[Company name] will not permit employment based retaliation against anyone who brings a complaint of sexual harassment or who speaks as a witness in the investigation of a complaint of sexual harassment.

Written Policy

You will receive a copy of [company name]’s sexual harassment policy when you begin working for [company name]. If at any time you would like another copy of that policy, please contact __________. If [company name] should amend or modify its sexual harassment policy, you will receive an individual copy of the amended or modified policy.
Remedying Discrimination

Penalties

Sexual harassment will not be tolerated at [company name]. If an investigation of any allegation of sexual harassment shows that harassing behaviour has taken place, the harasser will be subject to disciplinary action, up to and including dismissal. A human rights complaint and/or involvement of the police may also result.

Q: What should be included in an anti-harassment policy?

Answer

The federal government, as well as some provincial governments such as Prince Edward Island, require all employers to have an anti-harassment policy. The purpose of an anti-harassment policy is to demonstrate the employer’s commitment to ensuring that the workplace is free of harassment, and to educate employees on the nature of harassment and how the issue will be dealt with.

Anti-Harassment Policy Checklist

An effective workplace anti-harassment policy should include the following:

- A definition of harassment that complies with the human rights laws governing your jurisdiction
- A statement that every employee is entitled to a work environment free of harassment
- A commitment by the employer to make every reasonable effort to ensure that no employee is subject to harassment
- A commitment to take disciplinary measures against employees who harass other employees, and a description of the types of discipline that may be imposed
- An explanation of how harassment complaints may be brought to the employer’s attention
- A detailed description of the procedures for investigating and resolving a complaint
- A commitment to protect the identity of the parties wherever possible
- An explanation of an employee’s right to file a complaint under human rights law
Q: What should an employer do if harassment is found to have occurred in the workplace?

Answer
If a complaint of harassment is proven, remedies may include a verbal or written reprimand, mandatory counselling, transfer of the harasser, dismissal, or other alternate forms of discipline of the harasser. The complaint must be handled in a manner that is fair and respectful of the rights of both the complainant and the harasser. The employer should also take steps to ensure that the complainant is not penalized in any way for making the complaint, whether the complaint is made to the employer or to the local human rights body.

Q: What could happen if an employer doesn’t deal properly with the issue of harassment in the workplace?

Answer
An employer can be held responsible for harassment in the workplace, even if he or she is unaware that the harassment is occurring. Penalties may include requirements to make monetary compensation for financial losses resulting from the harassment and for injury to self-respect. Additionally, an employer may be required to change workplace policies and procedures by putting into practice an educational program on discrimination and harassment, implementing a human rights complaint process, or introducing anti-discrimination policies.

Q: What can a human rights body do to help?

Answer
Once a complaint has been filed, the human rights body will contact the employer. The complaint will be investigated by the human rights body, and a settlement will be attempted. If no settlement is reached, and there is sufficient evidence, the case will be referred to a tribunal for a hearing. At the hearing, both the employee and the alleged harasser will have the chance to tell their stories. The human rights body can assist the employee in presenting his or her case. If the employee’s case is proved, the tribunal will make an order to redress the wrong done.
Q: What kinds of remedies can be obtained from a human rights body or tribunal?

Answer

The remedies available through a settlement or a tribunal order include:

- monetary damages for losses sustained as a result of the harassment (e.g., if an employee was dismissed or forced to resign from employment because of harassment, compensation for loss of wages may be awarded);
- monetary damages for the injury to self-respect and the loss of enjoyment of human rights that resulted from the harassment;
- reinstatement of employment if the harassment resulted in job loss;
- requiring the employer to institute an anti-discrimination and harassment policy;
- requiring the employer to provide training or educational workshops for employees;
- requiring the employer to institute a human rights complaint process for their organization;
- requiring the employer to post copies of human rights laws in the workplace; and
- requiring the employer to report to the human rights body on a regular basis.

Q: If an employee is let go and signs a release after being asked to, can the employee still file a human rights complaint?

Answer

When an employee is let go, sometimes employers require employees to sign a release (with or without a severance agreement) that, in essence, releases the employer of any responsibility or obligation to the employee. If an employee signs a release, he or she may still have the right to file a human rights complaint.

For instance, in Alberta, if an employee feels that he or she has been discriminated against by the employer according to the Alberta Human Rights, Citizenship and Multiculturalism Act, and the employee feels that the release is not valid, the employee can file a complaint. Both elements must be present for a complaint to be filed in Alberta.
The manner in which provincial human rights bodies address such situations varies and, therefore, it is important for employees and employers to be aware of the approach that their local human rights body will take in such cases. Most importantly, it is critical for an employer to ensure that in situations where an employee is let go, any agreement involved in the release is free of coercion and is in no way harassing or discriminatory in nature.

Q: How long does an employee have to make a human rights complaint following an incident?

Answer

Following an alleged incident of harassment or discrimination, most human rights legislation dictates a set period of time within which an employee must file a complaint. For example, in Alberta, a complaint must be filed with the Alberta Human Rights and Citizenship Commission within 1 year following the alleged harassment or discrimination. In Ontario, the period of time is 6 months. Beyond these limits, the filing of a complaint may not be allowed, so it is important that both employees and employers are aware of such time limits for their particular jurisdiction.

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<th>Jurisdiction</th>
<th>Time Limit</th>
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<td>Federal</td>
<td>Within 1 year of alleged incident</td>
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<tr>
<td>Alberta</td>
<td>Within 1 year of alleged incident</td>
</tr>
<tr>
<td>British Columbia</td>
<td>Within 6 months of alleged incident or last experience of discrimination or harassment</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Within 6 months of alleged incident</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Within 1 year of alleged incident (may be extended where the Commission finds it is warranted)</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Within 6 months of alleged incident</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Within 2 years of alleged incident or last experience of discrimination or harassment</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Within 1 year of alleged incident (may be extended where the Director finds it is warranted)</td>
</tr>
<tr>
<td>Nunavut</td>
<td>Within 2 years of alleged incident or last experience of discrimination or harassment</td>
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<tr>
<td>Jurisdiction</td>
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<tr>
<td>Ontario</td>
<td>Within 1 year of alleged incident</td>
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<tr>
<td>Prince Edward Island</td>
<td>Within 1 year of alleged incident</td>
</tr>
<tr>
<td>Quebec</td>
<td>If complaint is against a colleague at work, within 2 years of alleged incident (may be extended to 3 years in certain circumstances). If complaint is against an individual (e.g., an insult occurring outside of work), within 1 year of alleged incident. If complaint is against a city, within 6 months of alleged incident. If complaint is against a private company or the provincial government, within 2 years of alleged incident (may be extended to 3 years in certain circumstances).</td>
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<tr>
<td>Saskatchewan</td>
<td>Within 2 years of alleged incident</td>
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<tr>
<td>Yukon</td>
<td>Within 6 months of alleged incident</td>
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# PRIVACY


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Q: Why is privacy so important?

Answer

In today’s world of e-mail, Internet, digital data storage, and expanding e-commerce, all of us have increased concerns regarding how much personal data is being collected, how it is stored, and who has access to it. However, in the case of the workplace, these concerns can be even stronger, given the amount of personal data collected and its concentration in one place.

Employers need certain information in order to conduct and protect their business, but they must comply with government legislation that requires the collection of this data. As well, many employers provide benefits such as dental, medical, and pension plans that require the collection of even more personal data.

As most of the personal data relating to employees will be handled by the HR and/or payroll department, these departments, along with the controller, chief financial officer, VP of finance and administration, or practitioner accountant responsible for the payroll function of an organization, have the ultimate responsibility for this data. Failure to properly safeguard employee data and the use thereof can be costly to the entire organization in a number of ways: poor employee morale and performance, increased employee turnover, damage to public reputation and future recruitment, and the potential for costly legal action.

Q: What are the current legal requirements with respect to privacy?

Answer

Privacy is a relatively new issue and as such there is very little legislation or case law in the area. Most jurisdictions in Canada have public-sector privacy legislation that protects the confidentiality of and limits the use of personal information held in the control of the government.

Some provinces, such as Saskatchewan, Manitoba, and Newfoundland and Labrador, have enacted very general privacy legislation that basically enables the common law right to sue for invasion of privacy. Actions such as eavesdropping, surveillance, and the unauthorized use of personal information would be considered violations of an individual’s privacy and might give rise to legal action for damages.

Provincial privacy legislation does not apply directly to the workplace and therefore has extremely limited application to workplace issues surrounding
employee records, disclosure of information to third parties, and employee monitoring and surveillance.

With the exceptions of Alberta, British Columbia, Quebec, and the federal jurisdiction, a private-sector employee’s privacy and an employer’s obligations with respect to an employee’s privacy are very much dependent on the policies and practices adopted by individual employers.

Q: What are the private-sector privacy rules in Alberta?

Answer


Bill 54, the Personal Information Protection Amendment Act, 2009, now S.A. 2009, c. 50, adds significant new rules to Alberta’s private sector privacy legislation and clarifies others. Both Bill 54 and amendments to the Personal Information Protection Act Regulation came into force on May 1, 2010.

Definitions

“Business contact information” is defined as an individual’s name, position name or title, business telephone number, business address, business e-mail, business fax number, and other similar business information; such information is excluded from the protection of PIPA if the collection, use, or disclosure of the business contact information is for the purposes of contacting the individual in his or her capacity as an employee or official of an organization and for no other purpose.

“Personal information” is generally defined in PIPA as information about an identifiable individual. Examples of personal information include SIN number, family status, driver’s licence, medical status, height, weight, sexual orientation, religion, etc.

“Personal employee information” applies to employees and potential employees, and means personal information that is reasonably required for the purpose of (i) establishing, managing, or terminating an employment or volunteer work relationship; or (ii) managing a post-employment or post-volunteer work relationship between the organization and the individual, but does not include personal information about the individual that is unrelated to that relationship. (Managing a post-employment or post-volunteer work relationship refers to the carrying out of
those limited activities that arise out of the employment or volunteer work relationship that occur after termination, such as payment of a pension or other post-employment benefits or income tax reporting.) Personal employee information can include all manner of personal information only when it is reasonably required for the employment or volunteer work relationship. Examples of personal employee information include the information listed above under personal information, as well as:

- personal contact information;
- date of birth;
- employee number;
- salary or wages;
- taxation or superannuation details;
- hours worked, absences, vacation dates;
- terms and conditions of employment;
- performance assessments;
- resumés and references;
- work history; and
- disciplinary matters.

“Employee” includes someone employed by the organization, or someone who performs a service for the organization (e.g., a contractor or consultant engaged to perform a specific function), whether or not the individual is paid, and includes:

- an apprentice;
- a volunteer;
- a participant;
- a work experience or co-op student;
- an individual acting as a contractor to perform a service for an organization or an individual acting as an agent for an organization (but not a company that is under a subcontract to such a contractor); and
- a partner or a director, officer, or other office-holder of the organization.
Rules for Collection, Use, Disclosure of Personal Employee Information

There are specific rules relating to the collection, use, and disclosure of personal employee information. Sections 15, 18, and 21 of PIPA allow the collection, use, and disclosure of personal employee information without consent of the employee or potential employee if the collection is reasonable for the purposes for which the information is being collected; if the information consists only of information that is related to the employment or volunteer work relationship of the individual; and, in the case of an employee of an organization, if the organization has, before collecting, using, or disclosing the information, provided the individual with reasonable notification that the information is going to be collected, used, and or disclosed, and the purposes for which the information is going to be collected, used, and/or disclosed.

As well, an organization may collect information about an individual who is a potential employee of the organization; it may also disclose personal information about an individual who is a current or former employee of the organization to a potential or current employer of the individual without the consent of the individual if (a) the personal information that is being disclosed was collected by the organization as personal employee information, and (b) the disclosure is reasonable for the purpose of assisting that employer to determine the individual’s eligibility or suitability for a position with that employer. In other words, PIPA specifically permits employers to receive and request employment references. For example, in providing a reference, an organization could provide information about an employee’s position, title, job responsibilities, attendance, etc., as such information would be reasonable for the purpose of helping the potential employer determine the employee’s suitability for the position. However, disclosure of an employee’s SIN number or benefits history would not be reasonable.

If the information is used or disclosed for any new purpose, a new employee notification is required. For example, a shipping company uses a global positioning system (GPS) to track the locations of its vehicles in order to create its shipping schedule and as a security measure to prevent robberies; should the employer then want to use the GPS to track the work flow/times of its employees, the company would have to give new notification to its employees of the new use of the information.

The use of the term “reasonably required for the purpose of establishing, managing, or terminating an employment or volunteer relationship” would appear to be rather broad. While an employer may argue that almost any intrusion on employee privacy is “reasonable” in the sense that it is potentially helpful for establishing,
managing, or terminating an employment relationship, this is likely to be challenged through the complaint process and/or a court action, and thus a clearer sense of “what is reasonable to establish, manage or terminate an employment relationship” will emerge over time.

The following are examples of what might seem reasonable:

- performing security checks on employees working on a nuclear site;
- collecting references and the previous work history from a job candidate, but not the applicant’s SIN or age;
- collecting an individual’s SIN, age, family/marital status after an applicant has been hired;
- checking the educational credentials of someone hired for a professional position (e.g., doctor, accountant, lawyer);
- obtaining medical records pertaining to fitness to fly with respect to commercial pilots; or
- performing a driver’s licence check/highway traffic record check on a school bus driver (but not a receptionist).

There are also situations where an employer must obtain consent to collect, use, and disclose personal employee information, such as:

- when the employer wishes to collect, use, or disclose personal information about an employee for a purpose other than establishing, managing, or terminating the employment relationship between itself and the employee; and
- when none of the provisions in PIPA allow for the particular collection, use, and disclosure of personal information without consent.

Examples of information collected, used, or disclosed in an employment setting that would not fall into the category of “establishing, managing or terminating the employment relationship” would include personal information required to participate in a workplace charitable fund-raising program, and personal information required to purchase/sign up for Canada Savings Bonds through the workplace.

Consent is also required where an employer, while collecting employment information relating to an employee, also collects personal information about other individuals. For example, an employer may collect the name and telephone number of another individual as the employee’s emergency contact information, or personal
information about the employee’s spouse and children for medical/dental/insurance benefits. The personal information about the spouse/children is not personal employee information because it is personal information about individuals who are not in the employment relationship with the employer. The information would have to be collected, used, and disclosed by the employer either with the consent of the individual the information is about, or without consent if one of the general “without consent” provisions in PIPA applies. In this case, the “without consent” provisions of section 14 would apply. The collection of information about the spouse and children for the benefits program is clearly in the interests of those individuals, and they would not reasonably be expected to withhold consent.

**Notification Respecting Service Provider Outside Canada**

An organization that uses a service provider outside Canada to collect personal information about an individual or that transfers personal information about an individual to a service provider outside Canada, must, before or at the time of collecting or transferring the information, notify the individual in writing or orally as to how the individual may obtain access to written information about the organization’s policies and practices with respect to service providers outside Canada, and the name or position name or title of a person who is able to answer on behalf of the organization the individual’s questions about the collection, use, disclosure, or storage of personal information by service providers outside Canada for or on behalf of the organization.

Notification is required under PIPA only when personal information is collected with the individual’s consent. For example, information about “clients” of the organization would require the individual’s consent and therefore if transferred to a service provider outside Canada would require the above notification. However, consent does not apply to personal employee information that is collected, used, or disclosed without consent in accordance with PIPA’s provisions for employee information.

Therefore, an organization can outsource functions such as payroll and pension administration. However, an organization must still consider PIPA when it outsources its human resource functions to another organization (e.g., payroll, pension plan administration). The transfer of personal employee information by the employer organization to the service provider is considered a “use” rather than a “disclosure” under PIPA. The transfer of information would be permitted without consent, as it is a use for the management of the employment relationship. The employer organization is responsible for ensuring that the service provider complies with the provisions
of PIPA in the same manner as the employer is required to. This should be addressed in the contract or agreement between the parties.

Access to and Correction of Information

An individual, including an employee or volunteer, has the right to ask for access to his or her own personal information contained in a record that is in the custody or under the control of an organization. A request for access to information must provide enough detail for the organization, using reasonable effort to find the information. Normally requests would be made in writing. An individual who makes a request is called an applicant. An applicant may ask to see the information or receive a copy of it. Applicants do not have to say why they are asking for the information.

The organization must respond to a request for access within 45 calendar days of receiving the request. Organizations may designate an office to receive requests, and the time limit for processing a request would not begin until the request arrives at a designated office.

Unless it has no such record, or it can refuse access under PIPA, an organization must:

- give the individual access to his or her personal information;
- tell the individual what the information has been or is being used for; and
- tell him or her to whom, and in what situations, the information is being or has been disclosed by the organization.

An organization may refuse to provide access to personal information if any of the following apply:

- the information is protected by legal privilege;
- disclosure of the information would reveal confidential information that is of a commercial nature and is not unreasonable to withhold;
- the information was collected for an investigation or legal proceeding;
- disclosure of the information might result in that type of information no longer being provided to the organization when it is reasonable that that type of information would be provided;
- the information was collected in relation to a mediation or arbitration;
• the disclosure of the information could reasonably be expected to threaten the life or security of another individual;

• the information would reveal personal information about another individual; and

• the information would reveal the identity of an individual who has, in confidence, provided an opinion about another individual, and the individual providing the opinion does not consent to disclosure of his or her identity.

However, in many of the above situations, if the organization is reasonably able to sever the information that is not accessible from the record that contains personal information about the individual who requested it, the organization must provide the individual with access to the record once the non-discloseable information is removed from the record.

While an organization may charge an applicant a reasonable fee for access to the individual’s personal information or to information about the use or disclosure of that information, organizations may not charge a fee for an access request made by an employee.

Employees may also request that their employers correct an error or omission in the personal employee information that is under the control of the employer. The employer organization will make the correction if it determines an error or omission has occurred. The employer organization must also notify all other organizations to whom it may have disclosed the incorrect information of the correction, if it is reasonable to do so.

Notification of Loss or Unauthorized Access or Disclosure

An organization having personal information under its control must, without unreasonable delay, provide notice to the Commissioner of any incident involving the loss of, or unauthorized access to, or disclosure of, personal information where a reasonable person would consider that a real risk exists of significant harm to an individual as a result of the loss or unauthorized access or disclosure.

A significant harm is a material harm with real consequences or effects. Examples include possible financial loss, identity theft, physical harm, humiliation, or damage to one’s professional or personal reputation. For example, if employees’ social insurance numbers are accessed, there is a real risk that an employee could be exposed to identity theft.
A notice to the Commissioner of a security breach that meets the harm threshold must include the information prescribed in the PIPA Regulation. The notice must be in writing and include the following:

- a description of the circumstances of the loss or unauthorized access or disclosure (e.g., a network vulnerability left personal information accessible, an unencrypted laptop containing client files was lost or stolen, a former employee stole client files);

- the date or time period during which the loss or unauthorized access or disclosure occurred (e.g., the laptop was stolen on this day, the network was vulnerable between these approximate dates);

- a description of the personal information involved in the loss or unauthorized access or disclosure (e.g., client credit and debit card numbers, personnel files including performance evaluations, information related to disability claims);

- an assessment of the risk of harm to individuals as a result of the loss or unauthorized access or disclosure (e.g., possible credit card fraud, humiliation, loss of reputation);

- an estimate of the number of individuals to whom there is a real risk of significant harm as a result of the loss or unauthorized access or disclosure;

- a description of any steps the organization has taken to reduce the risk of harm to individuals (e.g., network vulnerability was patched, a “kill switch” on a lost laptop or smart phone was activated to delete information);

- a description of any steps the organization has taken to notify individuals of the loss or unauthorized access or disclosure (e.g., the organization posted information about the breach on its website or has contacted individuals directly); and

- the name of and contact information for a person who can answer, on behalf of the organization, the Commissioner’s questions about the loss or unauthorized access or disclosure (e.g., a privacy officer, an IT specialist knowledgeable about the network).

The Commissioner may require the organization to notify individuals to whom there is a real risk of significant harm as a result of the loss, unauthorized access, or disclosure. Note that an organization may, on its own initiative, notify individuals or employees affected. The notice must be given directly to the individual and include the following:
• a description of the circumstances of the loss or unauthorized access or disclosure;

• the date or time period during which the loss or unauthorized access or disclosure occurred;

• a description of the personal information involved in the loss or unauthorized access or disclosure;

• a description of any steps the organization has taken to reduce the risk of harm to individuals; and

• contact information for a person who can answer, on behalf of the organization, questions about the loss or unauthorized access or disclosure.

The Commissioner may permit an organization to notify individuals indirectly (e.g., by running an ad in a local newspaper) if direct notification would be unreasonable in the circumstances. The notice must be given within the time period determined by the Commissioner.

**Accuracy, Retention, and Destruction of Personal Information**

An organization must make a reasonable effort to ensure that any personal information collected, used, or disclosed by or on behalf of an organization is accurate and complete to the extent that is reasonable for the organization’s purposes in collecting, using, or disclosing the information. For example, if an organization requires a list of family members for employee benefit purposes, only that information needs to be updated. If personal information is not currently being used (e.g., when the information is being retained only because there is a legal requirement to retain it for a specified period, such as employment standards information), the information should not need to be updated at all.

An organization may retain personal information only for as long as the organization reasonably requires the personal information for legal or business purposes. Within a reasonable period of time after an organization no longer reasonably requires personal information for legal or business purposes, the organization must (a) destroy the records containing the personal information, or (b) render the personal information non-identifying so that it can no longer be used to identify an individual. When personal information is de-identified, it must not be possible to re-identify the remaining information (e.g., personal information in a database or spreadsheet cannot simply be “hidden”).
Offences and Penalties

A person commits an offence if the person:

- collects, uses, or discloses personal information in contravention of PIPA;
- attempts to gain or gains access to personal information in contravention of PIPA;
- disposes of or alters, falsifies, conceals or destroys, or directs another person to dispose of, alter, falsify, conceal or destroy, a record containing personal information or a record containing information about the use or disclosure of personal information after receiving a request for access/provision of information or in circumstances in which a reasonable person would consider that it was likely that such a request would be made;
- obstructs the Commissioner or an authorized delegate of the Commissioner in the performance of the Commissioner’s duties, powers or functions under PIPA, including but not limited to obstructing the Commissioner or authorized delegate by disposing of, altering, falsifying, concealing or destroying evidence relevant to an investigation or inquiry by the Commissioner;
- makes a false statement to the Commissioner or an authorized delegate of the Commissioner, or misleads or attempts to mislead the Commissioner or authorized delegate, in the course of the performance of the Commissioner’s duties;
- obstructs the Commissioner by disposing of, altering, falsifying, concealing, or destroying evidence relevant to an investigation or inquiry by the Commissioner;
- fails to provide notice to the Commissioner of the loss of, unauthorized access to, or disclosure of personal information (discussed above); and
- contravenes the existing prohibition of adverse employment action against a “whistle-blower”.

The offences against the improper collection, use, or disclosure of personal information are strict liability offences. That is, it no longer necessary to prove an intent to commit the offence. The time limit for prosecuting an offence is 2 years after the commission of the alleged offence.

A person who commits an offence is liable, in the case of an individual, to a fine of not more than $10,000, and in the case of a person other than an individual, to a fine of not more than $100,000.
Q: **What are the private-sector privacy rules in British Columbia?**

**Answer**

In British Columbia, the *Personal Information Protection Act* ("PIPA"), S.B.C. 2003, c. 63, became law on January 1, 2004.

PIPA applies to all organizations, profit and non-profit. It does not apply to the collection of personal information, including employee personal information that was collected prior to January 1, 2004. However, the exception does not apply to the use and disclosure of such information.

**Definitions**

"Personal information" is generally defined in PIPA as information about an identifiable individual. Specifically excluded from the definition of personal information, and therefore excluded from protection under PIPA, are "contact information" and "work product information". Examples of personal information include name, age, height, weight, sexual orientation, religion, ethnic background, medical condition, driver’s licence, address, phone number, marital status, family status, education, etc.

"Contact information" includes the name, position name or title, business telephone number, business address, business e-mail, or business fax number of the individual.

"Work product information" includes information prepared or collected as a part of the employee’s responsibilities or activities related to that employee’s employment or business, but does not include personal information about an individual who did not prepare or collect the personal information.

"Employee personal information" is defined as personal information that is reasonably required for the purpose of establishing, managing, or terminating an employment relationship, so long as the organization uses the information for these purposes. Organizations are not required to obtain consent to gather, use, or disclose such information.

**Rules for Collection, Use, Disclosure of Personal Employee Information**

There are specific rules relating to the collection, use and disclosure of "employee personal information".
Sections 13, 16, and 19 of PIPA specifically allow the collection, use, and disclosure of employee personal information without consent if the information is reasonably required for the purpose of establishing, managing, or terminating an employment relationship. Employment includes working under an unpaid volunteer work relationship.

PIPA requires that an organization tell the individual that it will be collecting, using, and/or disclosing employee personal information, and the purposes for the collection, use, and/or disclosure before doing so without the consent of the individual.

Use of the term "reasonably required for the purpose of establishing, managing, or terminating an employment relationship" would appear to be rather broad. However, the results over time may not be that dramatic, as employees will know what personal information is being collected, and therefore will be in a better position to challenge the reasonableness of such collection, use, or disclosure. As such, a clearer sense of "what is reasonable to establish, manage or terminate an employment relationship" will emerge over time.

The following are examples of what might seem reasonable:

- performing security checks on employees working on a nuclear site;
- collecting references and the previous work history from a job candidate, but not the applicant’s SIN or age;
- collecting an individual’s SIN, age, family/marital status after an applicant has been hired;
- checking the educational credentials of someone hired for a professional position (e.g., doctor, accountant, lawyer);
- obtaining medical records pertaining to fitness to fly with respect to commercial pilots; or
- performing a driver’s licence check/highway traffic record check on a school bus driver (but not a receptionist).

There are also situations where an employer must obtain consent to collect, use, and disclose personal employee information, such as:

- when the employer wishes to collect, use, or disclose personal information about an employee for a purpose other than establishing, managing, or terminating the employment relationship between itself and the employee; and
• when none of the provisions in PIPA allow for the particular collection, use, and
disclosure of personal information without consent.

Examples of information collected, used, or disclosed in an employment setting
that would not fall into the category of “establishing, managing or terminating the
employment relationship” would include personal information required to participate
in a workplace charitable fund-raising program, and personal information required to
purchase/sign up for Canada Savings Bonds through the workplace.

Consent is also required where an employer, while collecting employment
information relating to an employee, also collects personal information about other
individuals. For example, an employer may collect the name and telephone number
of another individual as the employee’s emergency contact information, or personal
information about the employee’s spouse and children for medical/dental/insurance
benefits. The personal information about the spouse/children is not personal
employee information because it is personal information about individuals who are
not in the employment relationship with the employer. The information would have
to be collected, used, and disclosed by the employer either with the consent of the
individual the information is about, or without consent if one of the “deemed con-
sent” or general “without consent” provisions in PIPA applies. Using the example of
the emergency contact person, the employer should obtain the consent of the contact
person, since there is no specific “without consent” section in PIPA. However, in the
case of the personal information about the employee’s spouse and children for
medical/dental/insurance benefits, the “deemed consent” provisions of subsection
8(2) of PIPA would apply. The collection of information about the spouse and
children for the benefits programs is for the enrollment in/coverage under the bene-
fits plan; the spouse and children are beneficiaries of the plan, they are not the
applicant for the plan.

Access to Information

An individual, including an employee or volunteer, has the right to ask for
access to his or her own personal information contained in a record that is in the
custody or under the control of an organization. A request for access to information
must be in writing, and must provide enough detail for the organization, using
reasonable effort, to identify the individual and find the information. An individual
who makes a request is called an applicant. An applicant may ask to see the
information or receive a copy of it. Applicants do not have to say why they are
asking for the information. An organization must respond to an applicant no later
than 30 days after receiving the applicant’s request.
An organization must make a reasonable effort:

- to assist each applicant;
- to respond to each applicant as accurately and completely as reasonably possible; and
- to provide each applicant with the requested personal information, or if the requested personal information cannot be reasonably provided, to provide each applicant with a reasonable opportunity to examine the personal information.

An organization may refuse to provide access to personal information if any of the following apply:

- the personal information is protected by solicitor–client privilege;
- disclosure of the personal information would reveal confidential commercial information;
- the personal information was collected for the purposes of an investigation, and the investigation and associated proceedings and appeals have not been completed;
- the organization is a credit reporting agency and the personal information was last disclosed by the agency in a credit report more than 12 months before the request was made;
- the personal information was collected or created by a mediator or arbitrator;
- the disclosure could reasonably be expected to threaten the safety or physical or mental health of an individual other than the individual who made the request;
- the disclosure can reasonably be expected to cause immediate or grave harm to the safety or physical or mental health of the individual who made the request;
- the disclosure would reveal personal information about another individual; and
- the disclosure would reveal the identity of an individual who has provided personal information about another individual, and the individual providing the personal information does not consent to disclosure of his or her identity.

However, in many of the above situations, if the organization is reasonably able to sever the information that is not accessible from the record that contains personal information about the individual who requested it, the organization must provide the individual with access to the record once the non-discloseable information is removed from the record.
While an organization may charge an applicant a reasonable fee for access to the individual’s personal information or to information about the use or disclosure of that information, organizations may not charge a fee for an access request made by an employee.

Q: What are the private-sector privacy laws in Quebec?

Answer

The personal information of an employee in the private sector in Quebec is thoroughly protected by the Civil Code of Quebec (Book One — Persons; Title Two — Certain Personality Rights; Chapter III — Respect of Reputation and Privacy; Articles 35, 37, and 41) and the companion An Act Respecting the Protection of Personal Information in the Private Sector.

These two Acts deal with the establishment and administration of files on another person. Although these enactments are only of general application, employers are the one group most affected by them. The legislation applies to all information that identifies a person, through whatever medium and whatever form (e.g., written, graphic, taped, filmed, computerized), and sets out specific rules for any person who collects, holds, uses, or communicates personal information to third parties in the course of carrying on any enterprise. It even applies to charitable organizations.

Where an employee feels that a provision of the Act has been violated, recourse can be had through the Access to Information Commission. A decision of the Commission is appealable to the Court of Quebec. In addition, anyone who handles personal information in a manner contrary to the Act is liable for certain fines thereunder.

In applying the Act, Quebec’s Access to Information Commission has gone so far as to recommend where a company’s fax machine should be placed in an office and what faxing procedures should be followed in order to ensure the confidentiality of an individual’s personal information. It should be noted that the Act applies not only to Quebec companies but also to other provincial companies that conduct business in Quebec.

Personnel Records

Under Quebec legislation, a business must have a serious and legitimate reason for opening a personal information file. The ongoing evaluation of an employee’s
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work performance would qualify as a serious and legitimate purpose. The object of the file must be identified in the file, and the employee must be informed of the existence of the file, its purpose, who will be allowed access to the file, and where the file is kept. The file must only contain information relevant to the object of the file. For example, an employer could not keep a record of an employee’s personal associations or relationships, sexual practices, religion, marital status, or even criminal activity, unless it can show that the nature of the specific job justified the collection of such information. Legitimate information would be information regarding the employee’s work performance. The information must be collected from the person concerned, unless there is consent, authorization by law, or serious and legitimate reason not to do so and the information cannot be collected by the person in due time, or collection from a third person is necessary to ensure the information’s accuracy.

Under Quebec’s An Act Respecting the Protection of Personal Information in the Private Sector, an employer cannot refuse to employ a person based on that person’s refusal to supply personal information, unless the collection of the information is necessary for the conclusion of the contract, or the collection of the information is authorized by law, or there are reasonable grounds to believe that the request relating to employment is not lawful (e.g., a request for employment by an illegal alien).

For employers, problems can occur if an employee or employment candidate refuses to furnish references, information about dependants, or medical information to support claims for employer-supplied benefits. In order to avoid what could be a costly hiring mistake or court action, employers should clearly indicate on application forms and benefit forms that providing such information is a required condition under the employment contract.

The Civil Code of Quebec deals with the maintenance of a personal information file. Article 39 of the Code states that a person keeping a file on another may not deny him or her access to the information contained therein without a serious and legitimate reason for doing so, or unless doing so would cause harm to a third party. Article 40 states that every person may have inaccurate, incomplete, or equivocal information contained in a file about him or her to be corrected. A person may also have obsolete information or information not justified by the purpose of the file deleted. The individual may also add his or her own written comments to the file.
Disclosure to Third Parties

Quebec’s privacy legislation has clear implications for all private-sector businesses: Communication of a Quebec employee’s personal information to third parties outside of the company without the employee’s specific consent is prohibited.

The exceptions to the rule against non-disclosure are specified in the Act and include disclosure by the employer to the employer’s attorney; a person responsible, by law, for the prevention, detection, or repression of a crime; and a person who, under the law or a collective agreement, requires it in the performance of his or her duties.

Within the company, an employee’s personal information can be disclosed to a third party without the employee’s consent only if the information is needed for the performance of the third party’s duties. Personal information may no longer be used when the object of the file is completed. Although the Act does not require a consent to disclosure of information to be in writing, the Quebec Access to Information Commission recommends that all consents be in writing and provides forms for that purpose.

In Quebec, the prohibition against disclosure of information to third parties effects even the act of paying the employee. The envelope containing the employee’s cheque or pay statement must not have the employee’s address on it in order to ensure that no one gains access to the employee’s home address.

Q: What are the federal private-sector privacy rules?

Answer

The federal Personal Information Protection and Electronic Documents Act (PIPEDA) applies to the collection, use, and disclosure of personal information by organizations during commercial activities. Personal information is any information about an identifiable individual, whether recorded or not. Organizations include associations, partnerships, persons, and trade unions. Both “bricks-and-mortar” and e-commerce businesses are covered by the Act. The term “commercial activity” includes the selling, bartering, or leasing of donor, membership, or other fund-raising lists.

Organizations can only collect personal information that is appropriate for the specific transaction. They must explain why they need the information, what it will be used for, and whether they plan to disclose it to anyone else; they must obtain
consent for this use and disclosure. There are exceptions to the consent provision for law enforcement, scholarly research, and emergencies.

Individuals have the right to obtain information about themselves held by an organization and can request that inaccurate or incomplete information be corrected. Exceptions include such matters as national security, solicitor-client privilege, and threats to the safety of others.

Under the Act, individuals may complain to the privacy commissioner about how organizations handle their personal information. The privacy commissioner is an officer of Parliament who reports directly to Parliament. He or she functions as an ombudsman and receives, initiates, investigates, and resolves complaints; conducts audits; and educates the public about privacy issues. The commissioner has two sets of powers: (1) the power of disclosure, which is the right to make information public; and (2) the power to take matters to the Federal Court of Canada, which can in turn order organizations to stop a particular practice, and can award substantial damages for contravention of the law.

An individual dissatisfied with the results of an investigation by the privacy commissioner or the commissioner herself can apply to the Federal Court for a hearing. The Court can award damages to an individual (including damages for humiliation) and can order an organization to correct its practices.

The Act also provides for “whistleblowing protection”, whereby anyone who reports a contravention of the Act may go to the privacy commissioner who may in turn request that the whistleblower’s identity be kept confidential.

It is an offence to obstruct an investigation or audit, destroy personal information that is the subject of an access request, or discipline a whistleblower. A person is liable to a fine of up to $10,000 on summary conviction or up to $100,000 for an indictable offence.

The Act requires all private sector organizations to follow a code for the protection of personal information, which is included as Schedule 1 of the Act. The principles set out in the code are rooted in international data protection standards and are based on the Canadian Standards Association’s “Model Code for the Protection of Personal Information”. The code was developed with input from businesses, governments, consumer associations, and other privacy stakeholders.
Q: What are the elements of the federal privacy code?

Answer

The federal privacy code (Schedule 1 of the Personal Information Protection and Electronic Documents Act called the Model Code for the Protection of Personal Information) deals with 10 principles. A summary of each of the principles follows:

1. **Accountability**: An organization is responsible for personal information under its control and shall designate an individual or individuals who are accountable for the organization’s compliance with the following principles.

2. **Identifying purposes**: The purposes for which personal information is collected shall be identified by the organization at or before the time the information is collected.

3. **Consent**: The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate. Note: In certain circumstances personal information can be collected, used, or disclosed without the knowledge and consent of the individual. For example, legal, medical, or security reasons may make it impossible or impractical to seek consent.

4. **Limiting collection**: The collection of personal information shall be limited to that which is necessary for the purposes identified by the organization. Information shall be collected by fair and lawful means.

5. **Limiting use, disclosure, and retention**: Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfillment of those purposes.

6. **Accuracy**: Personal information shall be as accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used.

7. **Safeguards**: Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.

8. **Openness**: An organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.

9. **Individual access**: Upon request, an individual shall be informed of the existence, use, and disclosure of his or her personal information and shall be given
access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate. In certain situations, an organization may not be able to provide access to all the personal information it holds about an individual. Exceptions to the access requirement should be limited and specific. The reasons for denying access should be provided to the individual upon request. Exceptions may include information that is prohibitively costly to provide; information that contains references to other individuals; information that cannot be disclosed for legal, security, or commercial proprietary reasons; and information that is subject to solicitor-client or litigation privilege.

10. **Challenging compliance:** An individual shall be able to address a challenge concerning compliance with the above principles to the designated individual or individuals accountable for the organization’s compliance.

**Q:** What is the purpose of the federal privacy legislation?

**Answer**

In 1984, Canada committed itself to following the guidelines of the Organisation for Economic Co-operation and Development. The organization was created to promote economic growth and development and the expansion of world trade. The guidelines encourage private-sector corporations to develop and implement voluntary privacy protection codes to safeguard the transborder passage of personal data. According to the guidelines, personal information should only be collected with informed consent, and limits should be imposed on the collection, use, and retention of the information.

In 1999, the federal Government introduced Bill C-6, *The Personal Information Protection and Electronic Documents Act*. The Act received Royal Assent on April 13, 2000 and became law in three stages.

**Q:** When did the federal private-sector privacy rules become law?

**Answer**

Beginning January 1, 2001, the federal privacy provisions applied to:

- federal works, undertakings, or businesses (FWUBs), such as banks, telecommunications companies, airlines, railways and interprovincial trucking companies, and to the employee records in those organizations (note: section 4 of the
Act specifically states that this includes personal information relating to
employees of such organizations); and

- personal information disclosed across borders for consideration (e.g., the sale or
lease of lists).

Beginning January 1, 2002, the privacy provisions applied to:

- personal health information collected, used, or disclosed by organizations
described under phase one of the law.

Beginning January 1, 2004, the privacy provisions applied to:

- the collection, use, and disclosure of personal information by any organization
in the course of commercial activity within a province (note: the Act does not
apply to the personal information of employees in the private sector and this is
specified in the Guide for Businesses and Organizations prepared by the Office
of the Privacy Commissioner); and

- all personal information in all interprovincial and international transactions by
all organizations subject to the Act in the course of commercial activities.

The federal government may exempt organizations and/or activities in provinces
that have adopted “substantially similar” legislation. To date, Alberta, British
Columbia, and Quebec have passed provincial private-sector privacy legislation and
have had their legislation ruled “substantially similar”. Therefore, with respect to
provincial matters, these provinces are exempt from the federal legislation.
# Application of Privacy Laws

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Q: Does the federal private-sector privacy law apply to the personal information of employees in the provincial private sector?

Answer

No it does not. The power to pass laws regulating the employment relationship (including personal employee information) within a province or territory lies with the respective province or territory.

The federal privacy law applies to the personal information of employees who are employed in federal works, undertakings, or businesses (e.g., banks, telecommunications companies, airlines, railways, interprovincial trucking companies). The federal privacy law also applies to the collection, use, and disclosure of personal information by any organization in the course of commercial activity within a province.

However, the personal information of employees in the provincial private sector is regulated by provincial rules.

For further information, see the definition for jurisdiction.

Q: How does the federal privacy law affect HR and payroll departments?

Answer

While the federal Personal Information Protection and Electronic Documents Act (PIPEDA) is concerned with the protection of personal information in the context of trade and commerce and does not apply to the personal information of private sector employees, (i.e., the workplace), there are some aspects of the law that affect HR and payroll professionals.

As of January 1, 2001, PIPEDA applied to the sale of personal information across provincial or national borders by credit reporting agencies and other organizations that lease, sell, or exchange mailing lists or other personal information. The information itself must be the subject of the sale or lease, etc., and the fee paid must be for the information. Therefore, if an organization or its payroll or HR division sells employee lists or employee information, they will be subject to provisions of the Act.

As of January 1, 2004, PIPEDA applied to the collection, use, or disclosure of personal information in the course of any commercial activity within a province, and
to all personal information in all interprovincial and international transactions by all organizations subject to the Act in the course of their commercial activities. Therefore, organizations such as HR/payroll service bureaus that collect, use, and engage in interprovincial or international transfers of vast amounts of personal information in the course of conducting their commercial activity are subject to the provisions of the Act.

Q: How do the federal, Alberta, British Columbia, and Quebec privacy laws apply?

Answer

The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) sets national standards for privacy practices in the private sector. Alberta and British Columbia have both passed similar laws known in each province as the *Personal Information Protection Act* (PIPA).

The federal government may exempt organizations and/or activities in provinces that have adopted “substantially similar” legislation. To date, Alberta, British Columbia, and Quebec have passed provincial private-sector privacy legislation and have had their legislation ruled “substantially similar”. Therefore, with respect to provincial matters, these provinces are exempt from the federal legislation.

However, this does not mean that PIPEDA has no relevance in Alberta, British Columbia, or Quebec.

PIPEDA applies to federal works, undertakings, or businesses (FWUBs).

PIPEDA applies to the collection, use, and disclosure of personal information in the course of a commercial activity and across borders. PIPEDA also applies within provinces that do not have substantially similar private-sector privacy legislation.

PIPEDA applies to employee information only in connection with a FWUB.

The Alberta, British Columbia, and Quebec legislation apply to provincially regulated private-sector organizations.

Employee information held by provincially regulated organizations in Alberta, British Columbia, and Quebec is covered by the provincial legislation.

For further information regarding the application of PIPEDA and Alberta and British Columbia’s PIPA, contact the Alberta Office of the Information and Privacy Commissioner.
Q: What do the federal, Alberta, and British Columbia private-sector privacy laws have in common?

Answer

The federal \textit{Personal Information Protection and Electronic Documents Act} (PIPEDA), the Alberta \textit{Personal Information Protection Act} (PIPA) and the British Columbia \textit{Personal Information Protection Act} (PIPA) all share the same explicitly stated purpose: To govern the collection, use, and disclosure of personal information by private-sector organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use, and disclose personal information for purposes that a reasonable person would consider appropriate.

The three laws apply to organizations and incorporate the following principles:

- Organizations are accountable for the protection of personal information under their control.
- The purposes for which the personal information is being collected must be identified during or prior to the collection.
- Personal information may only be collected, used, or disclosed by an organization with the knowledge and consent of the individual, with limited exceptions as specified in the legislation.
- The collection of personal information is limited to what is necessary for the identified purposes and will be collected by fair and lawful means.
- Personal information must only be used and disclosed for the purposes for which it was collected, except with consent or as required by law. It can be retained only as long as it is necessary to fulfill those purposes.
- Personal information must be as accurate, complete, and up-to-date as is necessary.
- Personal information must be protected by adequate safeguards.
- Information about an organization’s privacy policies and practices must be readily available to individuals upon request.
- An individual has the right of access to personal information about himself or herself and has the right to seek correction. Both of these rights are subject to some exceptions as specified in each statute.
Organizations must provide the means for an individual to challenge an organization’s compliance of the above principles.

Q: How is “personal information” defined in privacy law?

Answer

With regard to the federal, Alberta, and British Columbia privacy laws, “personal information” means information about an identifiable individual, and includes any factual or subjective information about that individual. Following are some examples:

- name;
- address;
- gender;
- birth date;
- physical description;
- medical history;
- religion;
- political affiliations and beliefs;
- employment;
- income;
- education;
- opinions about the individual; and
- visual images such as photographs and videotape where individuals may be identified.

Q: How is “organization” defined in privacy law?

Answer

The federal Personal Information Protection and Electronic Documents Act (PIPEDA), the Alberta Personal Information Protection Act (PIPA) and the British Columbia Personal Information Protection Act (PIPA) are privacy laws that govern the private sector in those jurisdictions.
“Organization” is defined a little differently in each law. An organization may or may not be incorporated. It may be an individual acting in a business capacity. It may be a non-profit association. Alberta’s PIPA specifically includes professional regulatory organizations, whereas in British Columbia, these organizations are covered by the British Columbia Freedom of Information and Protection of Privacy Act.

In the federal PIPEDA (s. 2(1)), the definition of “organization” includes:

- an association;
- a partnership;
- a person; and
- a trade union.

In Alberta’s PIPA (s. 1(i)), the definition of “organization” includes:

- a corporation;
- an unincorporated association;
- a trade union as defined in the Labour Relations Code;
- a partnership as defined in the Partnership Act; and
- an individual acting in a commercial capacity.

The definition does not include an individual acting in a personal or domestic capacity.

In British Columbia’s PIPA (s. 1), the definition of “organization” includes:

- a person;
- an unincorporated association;
- a trade union; and
- a trust or a not-for-profit organization.

The definition does not include:

- an individual acting in a personal or domestic capacity or acting as an employee;
- a public body;
- the Provincial Court, the Supreme Court, or the Court of Appeal;
• the Nisga’a Government, as defined in the Nisga’a Final Agreement; and
• a private trust for the benefit of one or more designated individuals who are friends or members of the family of the settler.

Q: How is “individual” defined in privacy law?

Answer

The federal Personal Information Protection and Electronic Documents Act (PIPEDA), the Alberta Personal Information Protection Act (PIPA) and the British Columbia Personal Information Protection Act (PIPA) are privacy laws that govern the private sector in those jurisdictions.

“Individual” is not defined. However, it means a natural person. An individual does not have to be a Canadian citizen or a resident of a specific province, nor does he or she have to be an adult. In some cases, a legal guardian or an authorized representative may act on behalf of an individual. Such representatives are outlined in Alberta’s PIPA, section 61(1); British Columbia’s PIPA Regulation, sections 2 to 4; and the federal PIPEDA, Schedule 1, section 4.3.6.

Examples of representatives common to all three laws include legal guardians for incapable minors, personal representatives in the administration of a deceased person’s estate, and an attorney with relevant power of attorney.

Such representatives will be asked to provide evidence of their authority.

Q: How is a “commercial activity” defined in privacy law?

Answer

The federal Personal Information Protection and Electronic Documents Act (PIPEDA), the Alberta Personal Information Protection Act (PIPA) and the British Columbia Personal Information Protection Act (PIPA) are privacy laws that govern the private sector in those jurisdictions.

“Commercial activity” is defined in PIPEDA. It is also defined in Alberta’s PIPA, but only as it pertains to certain non-profit organizations. Commercial activity is not defined in British Columbia’s PIPA because the distinction between commercial and non-profit activity is not relevant under that law.

Organizations generally thought of as non-profit may have some commercial activities. Commercial activities include, for example, the selling, bartering, or
leasing of donor, membership, or other fundraising lists. Money does not have to change hands for an activity to be commercial in nature. It is possible that a non-profit organization may, in part of its activities or even a single transaction, engage in a commercial activity.

Q: Does the federal privacy law apply throughout Canada?

Answer

The federal privacy law is called the Personal Information Protection and Electronic Documents Act (PIPEDA).

Organizations in the Northwest Territories, the Yukon, and Nunavut are considered federal works, undertakings, or businesses (FWUBs), and therefore are covered by PIPEDA.

The federal government may exempt organizations and/or activities from PIPEDA in provinces that have adopted “substantially similar” legislation. To date, Alberta, British Columbia, and Quebec have passed provincial private-sector privacy legislation and have had their legislation ruled “substantially similar”. Therefore, with respect to provincial matters, these provinces are exempt from the federal legislation. Thus, PIPEDA does not apply to provincially regulated organizations within the provinces of Alberta, British Columbia, and Quebec.

However, FWUBs operating in Alberta, British Columbia, and Quebec continue to be subject to PIPEDA. PIPEDA also applies to inter-provincial and international transactions involving personal information in the course of commercial activities.

Q: What are some indications that my organization is subject to the federal privacy law?

Answer

The federal privacy law is called the Personal Information Protection and Electronic Documents Act (PIPEDA).

If your organization is a federal work, undertaking, or business (FWUB), it would have to comply only with PIPEDA. FWUBs include:

- banks;
- radio and television stations;
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- inter-provincial trucking;
- airports and airlines;
- navigation and shipping by water;
- telecommunication companies such as Internet service providers, phone (cellular or land line companies), cable, or telemarketing companies; and
- railways, canals, pipelines, ferries, etc. that cross borders.

If your organization is not a FWUB but engages in commercial activities that involve inter-provincial or international personal information flows, it would have to comply with PIPEDA for those transactions. For example, an import and export business or credit bureau would have to comply with PIPEDA regarding cross-border personal information collection, use, or disclosure.

If your organization is not a FWUB and operates wholly within a province without a substantially similar private-sector privacy law (i.e., provinces other than Alberta, British Columbia, or Quebec), it would have to comply with PIPEDA, but only for commercial transactions.

Q: **How do I know which private-sector privacy law applies to my organization?**

**Answer**

The current private-sector privacy laws are the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA), the *Alberta Personal Information Protection Act* (PIPA), and the *British Columbia Personal Information Protection Act* (PIPA). Quebec also has its own private-sector privacy laws.

Firstly, what province do you operate in? If your organization is not a federal work, undertaking, or business (FWUB) and it operates internally in a province with private-sector privacy legislation deemed to be substantially similar (i.e., Alberta, British Columbia, or Quebec), you will have to comply with that province’s law. If your province does not have private-sector privacy legislation (i.e., not Alberta, British Columbia, or Quebec), PIPEDA is the only statute that might apply. PIPEDA does not apply to employee information in provincially regulated organizations. If you operate in more than one province, you may have to comply with more than one statute, depending on the jurisdiction.
Secondly, look at the definition of “organization” in the statutes you think might apply. Does the definition describe your organization?

Thirdly, look at the “application” section of the statute. Does the statute apply to you? Personal information that is subject to British Columbia’s or Alberta’s Freedom of Information and Protection of Privacy Act is excluded from that province’s PIPA.

Q: Does the federal privacy law apply in the same way to all organizations?

Answer

The federal privacy law is called the Personal Information Protection and Electronic Documents Act (PIPEDA).

If your organization is a federal work, undertaking, or business (FWUB), PIPEDA applies to all commercial personal information flows and to employee personal information.

If your organization operates in a province not subject to substantially similar provincial legislation (i.e., not Alberta, British Columbia, or Quebec) and your organization is not a FWUB, PIPEDA applies to all commercial activities; however, it does not apply to employee information in your organization.

If your organization operates in a province with substantially similar provincial legislation (i.e., Alberta, British Columbia, or Quebec) and has to follow that law, PIPEDA only applies to inter-provincial and international transactions.

Q: Does Alberta’s privacy law apply in the same way to all organizations?

Answer

Alberta’s privacy law is called the Personal Information Protection Act (PIPA). Not all Alberta organizations are covered by PIPA in the same way.

PIPA applies to all organizations, with an exception provided for certain non-profit organizations.

With respect to non-profit organizations incorporated under the Societies Act or Agricultural Societies Act or registered under Part 9 of the Companies Act, PIPA only applies in relation to personal information collected, used, or disclosed in connection with commercial activities carried out by the organization. PIPA does not
apply to the personal information of employees or volunteers of such a non-profit organization, nor does it apply to personal information collected during a transaction that is not a commercial activity of such a non-profit organization.

Other organizations may operate on a not-for-profit basis and not be registered or incorporated under one of the Acts listed above. For other non-profit organizations not registered under one of the Acts listed above, PIPA applies to the personal information of their employees, volunteers, clients, and donors.

There are special provisions for professional regulatory organizations in Alberta to follow an approved privacy code in place of certain sections of PIPA.

When Alberta organizations subject to PIPA engage in transborder personal information flows for commercial reasons, they must follow the federal Personal Information Protection and Electronic Documents Act (PIPEDA) for those specific transactions.

Q: Does British Columbia’s privacy law apply in the same way to all organizations?

Answer

British Columbia’s privacy law is called the Personal Information Protection Act (PIPA).

All British Columbian organizations that are subject to PIPA have the law applied in the same way. However, when British Columbian organizations subject to PIPA engage in commercial transborder personal information flows, they also have to follow the federal Personal Information Protection and Electronic Documents Act (PIPEDA) for those specific transactions.

Q: What is a transborder data flow and how does it affect the application of private-sector privacy laws?

Answer

The federal privacy law is called the Personal Information Protection and Electronic Documents Act (PIPEDA).

The transborder flow of personal information in a commercial context is covered by PIPEDA due to the federal government’s constitutional power over
inter-provincial and international trade and commerce. Examples of transborder personal information flows include:

- selling a mailing list from one province to another;
- using a national credit reporting bureau based in another province to run a credit check on a credit applicant; and
- sending customer data to a loyalty program in another country.

If your organization collects, uses, or discloses personal information such that it flows outside of provincial or territorial borders in commercial activities, PIPEDA will apply to that practice. PIPEDA may not apply to all of your organization’s operations if:

- you operate in a province with a private-sector privacy law (i.e., Alberta, British Columbia, or Quebec);
- your other operations are not commercial; and
- your organization is not a federal work, undertaking, or business (FWUB) and the personal information relates to employees.

Note: If the transborder data flow does not involve commercial activity, then PIPEDA does not apply. Commercial activity is defined in PIPEDA and in Alberta’s Personal Information Protection Act.

Q: Is it possible for more than one privacy law to apply to the same data flow?

Answer

It may be possible that more than one privacy law applies to records (or data) created by an organization. This could be the case if you were on contract to another organization that had to follow a different privacy law than your company ordinarily would, and your company was contractually obliged to follow the other organization’s rules.

Example: An organization in British Columbia provides counselling services to employees of a railway company. The counselling organization may be obliged by contract to follow the federal privacy law (PIPEDA) regarding the railway employees’ personal information because the railway company is a FWUB (federal work, undertaking, or business), even though the counselling organization follows British Columbia’s Personal Information Protection Act for the rest of its operations.
This situation (i.e., more than one privacy law applying to the same data flow) could also occur if an organization in a province with a private-sector privacy law other than PIPEDA (i.e., Alberta, British Columbia, or Quebec) is involved in cross-border personal information flows.

Q: If personal information is transferred within one organization’s locations in different provinces, and one location is subject to provincial privacy law while the other location is subject to federal law, which law applies?

Answer

Example: A customer in Alberta makes a retail purchase at a local branch of a national chain and charges it to her charge account with that retailer. At the point of sale, the retailer asks for the customer’s telephone number. During the transaction, a brief electronic communication with the retailer’s credit department in Saskatchewan takes place to ensure that the purchase is within the customer’s credit limit. The customer objects to the retailer collecting and recording her phone number on the receipt.

In answering this question, the substance of the transaction and the subject of the complaint would be considered. From the customer’s perspective, the transaction took place in Alberta. The customer is likely not even aware of the transborder data flow that took place electronically. If the substance of the complaint is about the collection and use of the telephone number, then the Alberta privacy law applies to both the collection and the use. The fact that a transborder data flow took place (between Alberta, a province with its own privacy law, and Saskatchewan, a province under the federal privacy law) is incidental to the complaint.

Q: If an organization that is subject to federal privacy law is under contract with an organization that is subject to provincial privacy law, which law applies?

Answer

Example: Company X in British Columbia contracts out the administration of their customer awards program to Company Y, which is also in British Columbia but is subject to federal privacy law. If the contract specifies that Company X has control over the customer information, then the information flows are subject to the British Columbia privacy law. This is true even though Company Y (the contractor) has
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temporary physical custody of the records, because Company X continues to have informational control. The contractor is subject to Company X’s privacy rules for the purposes of this account. However, the contractor is subject to federal law for its own operations and maybe those of other clients.

Example: Company E in British Columbia contracts out the administration of their customer awards program to Company F, which is in Manitoba and therefore subject to federal privacy law. If the contracted activity (the administration of the awards program) is one normally conducted in-house (i.e., at Company E), and the contract makes it very clear that the information is in the control of Company E, then a transborder data flow may be considered incidental. British Columbia’s privacy law would apply to the collection, use, and disclosure of personal information.

Q: If a data flow is subject to provincial and federal privacy laws, how can I ensure compliance with both?

Answer

It is possible for one part of a data transaction (e.g., collection) to be subject to a provincial privacy law while another part of the transaction (e.g., disclosure) is subject to the federal Personal Information Protection and Electronic Documents Act (PIPEDA). Organizations faced with this kind of scenario may look at the differences between the laws. One may be more stringent or specific than the other in certain types of transactions. If the more stringent requirement is followed all of the time, most likely compliance with both laws will be reached.

Currently, the federal privacy commissioner and the commissioners in British Columbia and Alberta are working together to ensure a harmonized approach to private-sector privacy compliance.

Alberta’s and British Columbia’s privacy laws have “grandfathering clauses” that deem information collected before January 1, 2004 to have been collected with consent. PIPEDA however, may require that organizations obtain consent to use and disclose information collected before PIPEDA came into force.

If your organization has to comply with both pieces of legislation, you could ensure that you communicate with your customers to confirm their continued consent for the collection, use, and disclosure of that information. You would be going further than required by provincial law, but would not be contravening it.
Q: Who oversees compliance with the privacy laws?

Answer

Under each privacy law, a commissioner is designated for overseeing the application of the statute and investigating disputes between individuals and organizations. Each commissioner heads an organization devoted to overseeing that law (and sometimes other laws as well). Because these officials and their offices have different names, they are referred to here generically as a “privacy office”. “Privacy office” has no meaning in law.

- Federally, the privacy office is the Office of the Privacy Commissioner of Canada.
- In Alberta, the privacy office is the Office of the Information and Privacy Commissioner of Alberta.
- In British Columbia, the privacy office is the Office of the Information and Privacy Commissioner for British Columbia.
- In Quebec, the privacy office is the Commission d’accès à l’information du Québec.

Q: Is it possible that more than one privacy office could have jurisdiction in one complaint?

Answer

Yes. However, the privacy offices will coordinate their activities to reduce duplication of effort.

Currently, the privacy offices are working to develop a harmonized approach to dealing with privacy complaints in the private sector.

Q: How do I determine which privacy office to make a privacy complaint to?

Answer

There are two important factors:

- Which privacy law does the organization that is the subject of the complaint have to comply with?
What personal information practice is the subject of the complaint? (e.g., collection, use, disclosure, safeguarding, etc.)

Example: An Alberta company has disclosed personal information to a separate organization in Saskatchewan. (Alberta has its own privacy law; Saskatchewan does not and is thus under federal privacy law.) If an individual wishes to complain about the disclosure of the personal information from the Alberta company, he or she could direct the complaint to the Alberta Privacy Commissioner. If the individual is complaining about the collection in Saskatchewan of his or her personal information, the individual may wish to direct the complaint to the federal Privacy Commissioner of Canada. If the complaint concerns the use of the personal information in Saskatchewan, it too would be directed to the Privacy Commissioner of Canada.

If one of the organizations is working on contract for the other, the primary organization is probably the one responsible for the information practices of the other. The complainant may be best off to complain to the privacy office that oversees the primary organization.

Note: The province in which the individual who is filing a complaint resides is not a determining factor.

Q: What happens when a privacy office determines that they do not have jurisdiction over a complaint that was filed with it?

Answer

If a privacy office starts to look over a case, but then determines that their privacy law does not apply, then the office will return all the information that the complainant provided back to him or her. Or, with consent, the original privacy office will forward these materials to the appropriate privacy office on the individual’s behalf.

The privacy office will also do what it can to make the transition between offices as seamless as possible, subject to the legal authority they have and their legislated confidentiality provisions.
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Q: In the face of privacy legislation, what should an organization do?

Answer

In Alberta, British Columbia, and Quebec, employers and their HR or payroll departments should monitor new developments in their respective provincial privacy legislation (including any regulations) as well as watch for any employer guides, etc., that may be issued. Employers should also examine their current collection, use, and disclosure of employee personal information with an eye to establishing what is “reasonably required for the purpose of establishing, managing, or terminating an employment relationship”.

In the remaining provinces, employers should watch for any other legislation being introduced and, in particular, sections of legislation that deal with employee personal information. Employers should also examine their current collection, use, and disclosure of employee personal information, but perhaps in the broader terms of “best practices” as there are currently no legislative guidelines (in provinces other than Alberta, British Columbia, and Quebec).

As well, employers in all provinces and territories should begin documenting what information is collected, when the information is collected, how it is used, what is disclosed, and when consent is received for the preceding events in order to meet any future legislative developments or challenges as to what is reasonable or necessary employee data.

Type, Collection, and Use of Data

- Information required by government agencies under authority of legislation: The legislation gives the authority for the collection, use, and disclosure of information in these situations, and an employee’s permission is not required. Examples include Canada Revenue Agency (CRA) requirements to supply social insurance numbers (SIN) or employment and pay records.

- Social insurance number: Employers should be very cautious when using employee social insurance numbers. Unless the employee has specifically provided a social insurance number for a specific use and has consented to that use in writing, an employer could be subject to fines not exceeding $5,000 and/or imprisonment of 12 months for each improper use. As a general rule, unless a third party must report an employee’s SIN number to either the Canada Revenue Agency, Human Resources Development Canada, or Revenu Québec, an
employer may not communicate it to a third party. For example, neither the Ontario Family Support Plan nor the British Columbia Family Maintenance Enforcement Program has the right to request an employee’s SIN number from an employer. A bank or other financial institution also does not have the right to ask for a SIN number when doing a credit check. SIN numbers should also not be used on pay cheques, or communicated to life insurance companies, other benefit carriers, or unions.

- **Information required by the employer:** Only information that an employer really needs should be collected, i.e., information needed for various benefit plans. Many employers are moving away from collecting this type of data and moving into employee self-serve arrangements where the employee contacts and interacts directly with the third party benefit supplier and not through the employer. As well, while information needed for benefits would likely include age, sex, marital status, etc., it would be unlikely that an employer would need to collect information regarding an employee’s religion, disabilities, or sexual orientation.

- **Information required by other legislation:** The collection, use, and disclosure of information relating to an employee’s religion, disabilities, or sexual orientation may be reasonable in some circumstances. Sexual orientation information would be collected and used in situations where an employee provides the name of a same-sex partner when enrolling in an employer pension and benefit plan. As well, all human rights legislation requires employers to accommodate an employee’s needs around prohibited grounds of discrimination. Therefore, in order to accommodate special employee needs relating to religious beliefs or disabilities, an employer would need to collect and use that data. However, disclosure of such information for any purpose not related to such accommodation or benefits would not be permitted.

- **Length of information retainment:** Records for the CRA should usually be kept for 6–7 years; Employment standards information should be kept for 3 years due to audit requirements

- **Form of employee consent:** When an employee signs a job offer, employee consent for the information contained in the offer is basically implied. Such consent is probably sufficient for the collection, use, and disclosure of information by the employer for CRA requirements, employment standards records, and pension plans, but will not be sufficient for other types of information. In general, the more sensitive the information, the more written consent should be
obtained. For example, information concerning an employee’s financial state or health is considered highly sensitive, and therefore written consent should be used for the collection, use, and disclosure of such information.

Disclosure of Information to Third Parties

- **Government requests for information:** In general, information may be disclosed to the government agency that required the collection of the information. For example, the CRA, the Employment Insurance Commission, the CPP, and the various employment standards departments all administer legislation that requires employers to collect and retain various types of information. As well, all of the legislation specifically permits the agencies to request information and inspect such records. The legislation also requires employers to provide such information on an inspection or audit.

Organizations should take some precautions in how they store the records required by the various agencies and how they store employee data in general. Only information that the agency requires should be disclosed. For example, medical information about an employee would not be something that the CRA would need to see and should not be provided. In other words, do not just provide a general employee file that includes all information, but rather store data in a way that permits retrieval and disclosure of specific portions that might be required.

- **Reference checks:** Employers are often contacted to provide reference checks for former employees who are seeking new employment. Often the employer has been asked by the employee to provide such a reference. When such a request is made, the parties usually discuss and agree upon the detail and type of information that will be disclosed, and such a request would fall into the category of employee permission to disclose information to a specific person. An employer may also receive a “cold call” for a reference check without any prior arrangement being set up by the former employee. In such situations, the issue of employee privacy and disclosure to third parties can present problems. It should become a company policy that information will not be provided to third-party prospective employers about an employee or former employee without the express consent of that individual. Employees should be informed that the company will not provide references to prospective third-party employers without the express written permission of the employee. However, with respect to Alberta, an organization may collect information about an individual who is a potential employee of the organization, and may disclose
personal information about an individual who is a current or former employee of the organization to a potential or current employer of the individual without the consent of the individual if (a) the personal information that is being disclosed was collected by the organization as personal employee information, and (b) the disclosure is reasonable for the purpose of assisting that employer to determine the individual’s eligibility or suitability for a position with that employer. In other words, employers are permitted to receive and request employment references. For example, in providing a reference, an organization could provide information about an employee’s position, title, job responsibilities, attendance, etc., as such information would be reasonable for the purpose of helping the potential employer determine the employee’s suitability for the position. However, disclosure of an employee’s SIN number or benefits history would not be reasonable.

- Financial checks: Employers may receive “cold calls” from financial institutions calling to confirm salary, etc., for a mortgage or loan. Verbal consent is likely adequate; however, the HR staff obtaining the verbal consent should make a note of the name of the employee, the date and time of the consent, the information disclosed (e.g., salary) and to whom (e.g., bank).

Q: Is there help for producing a workplace privacy policy?

Answer

As of January 1, 2004, employers are subject to the federal Personal Information Protection and Electronic Documents Act (PIPEDA) with respect to their commercial activities. In Alberta, British Columbia, and Quebec, employers are subject to provincial legislation and a different set of standards with respect to employee personal information. Other provinces are expected to implement their own privacy legislation at later dates.

In order to avoid being subjected to a multitude of standards, employers may wish to be proactive and implement one overall workplace privacy policy based on the federal model. The Office of the Privacy Commissioner of Canada has produced a Guide for Businesses and Organizations to help them comply with the federal private-sector privacy legislation. The guide follows the 10 principles of the federal code for the protection of personal information, sets out organizational responsibilities, and provides an explanation, including helpful tips, on how to fulfill these responsibilities. A copy of the guide can be obtained from the Office of the Privacy Commissioner of Canada.
The following checklist also provides general guidelines on what an employer might include in a privacy policy.

**Workplace Privacy Policy Checklist**

- Define the philosophy and purpose of the policy.
- Define what constitutes private or personal employee information.
- Determine who has permitted internal access (e.g., the employee, managers, HR and payroll staff).
- Determine who has permitted external access (e.g., pension administrators, dental/medical plan administrators).
- Establish how and where information will be stored (e.g., format, segmentation, security measures).
- Decide how long the information will be kept and how it will be disposed of.
- Establish a policy for data retrieval and elimination when employees leave or when equipment is transferred.
- Establish a policy for dealing with outside requests for information (e.g., written requests only, phone or e-mail requests to be verified first, employee consent always required and for each separate request).
- Review and change internal procedures to limit unnecessary disclosure of information (e.g., addresses on pay envelopes, direct and secure Internet transmittal of employee benefit claims).
- Determine the need for employee monitoring, establish the business purpose for such activity, and limit its use to only what is necessary.
- Designate a privacy compliance officer and/or create a complaints and resolution procedure.
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Q: Are employee records protected?

Answer

In general, a private-sector employer is under little, if any, obligation to protect employee privacy and record confidentiality.

With the exceptions of Alberta, British Columbia, Quebec, and the federal jurisdiction, the only limits on the type of information that an employer may collect and the only legal duties imposed on employers with regard to the retention and disposal of employee records are those established under employment standards, human rights, income tax, and other similar legislation.

A private-sector employee’s right to access and view personal information is also not guaranteed, as the personal file may be viewed as the property of the employer.

Q: How should employee information be organized?

Answer

Organizations should take some precautions in how they store the records required by the various agencies and how they store employee data in general. Only information that the agency requires should be disclosed.

For example, medical information about an employee would not be something that the Canada Revenue Agency would need to see and should not be provided. In other words, do not just provide a general employee file that might include medical information, but rather store data in a form that permits retrieval and disclosure of only those portions that would be required.

Q: Can information about employees be disclosed to third parties?

Answer

With the exceptions of Alberta, British Columbia, Quebec, and the federal jurisdiction, the only limitation on employer disclosure of employee information to third parties is the threat of a lawsuit for invasion of the employee’s privacy. There are, however, some general rules and practices for disclosure of information to third parties.
Q: Can information about employees be disclosed to government agencies or departments?

Answer

In general, information may be disclosed to the government agency that required the collection of the information. Examples of this would be the Canada Revenue Agency (CRA), the Employment Insurance Commission, the Canada Pension Plan, and the various employment standards departments. All of the above agencies administer legislation that requires employers to collect and retain various types of information. As well, current legislation specifically permits the agencies to request information and inspect such records. The legislation also requires employers to provide such information on an inspection or audit.

As an example, employers gather information from an employee’s TD1 Personal Tax Credits Return as well as collect and store information such as pay rates, hours worked, and statutory deductions made. Should the CRA contact an employer seeking employee information with regard to such information, the information should be provided.

Q: Can information about employees be disclosed to benefits and/or insurance providers?

Answer

Information can be disclosed for the purpose for which it was collected. Within this context, employers who provide benefit plans are able to disclose necessary employee information to pension and medical plan administrators. For jurisdictions with private-sector privacy legislation, specifically Alberta, British Columbia, Quebec, and the federal jurisdiction, more detailed rules apply.

Q: How should reference checks be handled?

Answer

Employers are often contacted to provide reference checks for former employees who are seeking new employment. In many cases, the employer has been asked by the employee to provide such a reference. Frequently, the parties have discussed and agreed on the detail and type of information that is to be disclosed; such cases would fall into the category of employee permission to disclose information to a specific person.
At other times, an employer may receive a “cold call” for a reference check without any prior arrangement set up by the former employee. In such situations, the issue of employee privacy and disclosure to third parties can present problems.

Some organizations have instituted a policy under which only the confirmation of the fact of previous employment and the dates of that employment are disclosed to the third party.

If you or someone else in the organization decides that information will be given, you might want to decide to provide only information of a factual nature, such as the title of the position that was held or the job duties of that position as set out in the job description. You should ensure that any information given about the employee accurately represents that employee. For example, if, in the former employee’s last job review, the employee was given a good rating, information provided on the reference check should match the results of the job review and not differ in any substantial way.

It may be wise to prefer to take the call at another time, and contact the former employee for permission prior to disclosing any information.

However, with respect to Alberta, an organization may collect information about an individual who is a potential employee of the organization, and may disclose personal information about an individual who is a current or former employee of the organization to a potential or current employer of the individual without the consent of the individual if (a) the personal information that is being disclosed was collected by the organization as personal employee information, and (b) the disclosure is reasonable for the purpose of assisting that employer to determine the individual’s eligibility or suitability for a position with that employer. In other words, employers are permitted to receive and request employment references. For example, in providing a reference, an organization could provide information about an employee’s position, title, job responsibilities, attendance, etc., as such information would be reasonable for the purpose of helping the potential employer determine the employee’s suitability for the position. However, disclosure of an employee’s SIN number or benefits history would not be reasonable.
Q: Where the employee consents to disclosure of information, what should the employer do?

Answer

Obviously, where the employer has the employee’s permission, information may be disclosed to third parties. However, the employee consent should be in writing (paper or electronic) and be kept by the organization. Organizations often have employees sign a general consent to disclosure for company payroll deductions, benefit plans, etc. This is adequate for such general, ongoing items.

However, HR departments often receive other requests from third parties for information concerning an employee. For example, the request may involve the verification of salary following an employee application for a mortgage or loan. If received by phone, there is usually no means of verifying the legitimacy of the request or the identity of the caller. Information should not be provided prior to obtaining the employee’s consent for each and all such request.

Q: What are the rules around employee monitoring and surveillance?

Answer

Monitoring and surveillance of employees is not a common practice in Canada and there is little legislation or case law surrounding it. The majority of the case law dealing with this issue has been the result of arbitration decisions in unionized environments. Most issues arise around videotape/security cameras, monitoring/recording of telephone calls, and Internet/e-mail usage and monitoring.

That being said, employers who feel they must monitor employees should be aware of some of the basic principles that have developed from the arbitration decisions, other court decisions, and common practices, and the emerging private sector privacy legislation.

With respect to the jurisdictions that have passed private-sector privacy legislation (federal, Alberta, British Columbia, and Quebec), it is important to remember that the rules with respect to regarding the collection, use, and disclosure of personal employee information without consent also apply to monitoring and surveillance.

Firstly, it must be reasonable for the organization to collect, use, or disclose this information in order to establish, manage, or terminate the employment relationship
with that individual employee. The organization should consider whether the information is necessary to fulfill the stated need and whether the information could be obtained in a less privacy-intrusive manner. It may not be reasonable to collect the same type of personal information about all employees in the organization. For example, it may not be reasonable to require the same level of security screening for a researcher working on highly sensitive information and a receptionist who will have no access to sensitive information.

When determining whether monitoring is reasonable in a particular situation, an organization should consider the four-part test established by the Privacy Commissioner of Canada (Eastmond v. Canadian Pacific Railway, 2004 FC 852, considering PIPEDA Finding #114):

- Is the measure demonstrably necessary to meet a specific need?
- Is it likely to be effective in meeting that need?
- Is the loss of privacy proportional to the benefit gained?
- Is there a less privacy-invasive way of achieving the same end?

It may be reasonable for an employer to use video surveillance in the workplace where there are substantial security issues, but it will be more difficult to justify the use of surveillance for productivity issues. The Office of the Privacy Commissioner of Canada has stated that is unlikely a reasonable person would consider employee productivity an appropriate reason to use video and audio surveillance when the employer already had a comprehensive program in place for measuring productivity; when the privacy of all employees is being intruded on if only a few employees pose a problem for management; and when there are other less privacy-intrusive, cost-effective measures available. In that same decision, the Office of the Privacy Commissioner noted the following:

The Assistant Commissioner commented that the underlying purpose for the cameras really appeared to be one of deterrence — deterrence of theft, harassment, malingering, criticism, or other behaviour an employer may not like. She noted that privacy-intrusive measures can always fulfill such objectives at minimal financial cost. The Act, however, demands that the cost to human dignity form part of the equation. Continuous, indiscriminate surveillance of employees, she noted, was based on a lack of trust and treats all individuals with suspicion when the underlying problems may rest with a few individuals or with a management plan that may not be entirely sound. The effect, she commented, of such omnipresent observation was stifling. While it may prevent undesirable behaviour, it also forces the employee to call into question every potential action, every potential comment no
PRIVACY OF EMPLOYEE RECORDS AND INFORMATION

matter how benign. The goal of ensuring adherence to the company’s vision comes at too high a price to our individual autonomy and freedom.

(PIPEDA Finding #279).

Secondly, the organization must notify current employees that the information is going to be collected, used, or disclosed, as well as the purposes for the collection, use, or disclosure of the information. For example, the organization must notify employees of its policy of monitoring computer usage and the purposes for which the organization is collecting, using, or disclosing that information.

It may also be beneficial for the organization to state in its notification the purposes for which the information will not be collected, used, or disclosed. For example, if the information is being collected for security purposes, the notification should state that the information collected will not be used for productivity or disciplinary matters. The notification must occur before the collection, use, or disclosure takes place.

Thirdly, the information collected is subject to all provisions regarding accuracy, security, retention, access, and correction.

If videotape security cameras are to be used, be sure that there is a legitimate business requirement (e.g., a serious drug or theft problem) before installing the cameras. Be careful about the placement of such devices. Installing cameras over exit doors, loading docks and main corridors would most likely be held to be legitimate. Installing cameras over an employee’s work space or in washrooms would most likely be found to be an invasion of employee privacy. Finally, the cameras should not include audio, as it is a criminal offence under the Canadian Criminal Code to intentionally intercept a private communication. Cases decided under the Criminal Code have held that the offence does not apply to videotape without sound.

Employer monitoring of employee telephone calls would also bring the Criminal Code into play. However, an employer may have a legitimate business reason for wanting to monitor employee telephone conversions. It is common practice in many telemarketing departments or call centres to monitor employee–customer calls from time to time in order to assess employee performance and sales results. In such situations, the employer should inform employees that their business calls may be monitored and obtain the employee’s consent.

Finally, regarding the issue of Internet and e-mail monitoring, there is no legislation that deals with this issue. Employers may want to monitor e-mail and Internet use in the workplace to ensure that employees are not spending too much
time on personal matters, downloading inappropriate or offensive material, or sending threatening or offensive e-mail to co-workers. Such monitoring, however, can have a negative effect on workplace morale and productivity. Instead, employees should be informed that computer systems are not secure and that they should not expect complete privacy when using the system.

Employers should institute policies on personal use of all communication devices such as telephones and e-mail during business hours. Policies with respect to acceptable Internet and e-mail use should be incorporated into an organization’s HR policies, as well as the consequences for failing to adhere to the company’s policies. Employers should also implement policies and procedures around passwords, the number of saved e-mails, and the removal of information from computers when employees leave or when equipment is reassigned.
# HEALTH AND SAFETY

## Employer Duties

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Q: What are an employer’s responsibilities for the health and safety of its employees?

Answer

In general, legislation requires every employer to do the following:

- Take every reasonable precaution to ensure the health and safety of its workers.
- Comply with all applicable legislation.
- Ensure that workers comply with the legislation and any orders made under the legislation.
- Ensure the health and safety of persons at or near the workplace.
- Provide and maintain equipment, machines, or materials, and ensure they are properly equipped with safety devices.
- Provide such information, instruction, training, supervision, and facilities as are necessary for the health or safety of workers.
- Inform workers of known or foreseeable health and safety hazards.
- Inform workers of the measures and procedures that protect them.
- Ensure workers are made familiar with the proper use of all devices, equipment, and clothing required for their protection.
- Consult and co-operate with the health and safety committee or representative (where health and safety committee or representatives are required).
- Co-operate with persons exercising their duties under the legislation (such as government health and safety inspectors).

If the legislation does not specifically cover a particular workplace situation, the employer is still under the general duty to take every reasonable precaution under the circumstances to ensure worker safety. Potential hazards should be considered, and proactive steps should be taken to protect workers.

Employers are required to comply with occupational health and safety legislation and regulations. Different jurisdictions take different approaches to regulating workplace health and safety; some focus on the “internal responsibility system”, while other regulations are more prescriptive and dictate exactly what is required from the employer. Other applicable regulations deal with Workplace Hazardous
EMPLOYER DUTIES

Materials Information System (WHMIS), workers’ compensation, and transportation of dangerous goods and industry-specific regulations (e.g., mining laws).

When an employee is injured, the employer is required to administer first aid immediately or to transport the employee to the nearest medical facility for treatment. Employers are also required to provide suitable alternative employment to injured workers who are temporarily or permanently unable to return to their pre-injury duties as a result of their injuries or illness.

Depending on the applicable legislation and the size of the employer, the following requirements may also apply:

- There may be a requirement to have either a Worker Health and Safety Representative and/or a Joint Health and Safety Committee. The legislation will outline the responsibilities of the Joint Health and Safety Committee and/or Worker Representative, including how often they should meet and how often they should inspect the workplace.
- There may be a requirement to have a health and safety policy signed by the senior site manager, and a health and safety program that supports the policy.

Q: What potential liability does an organization face when an employee is injured?

Answer

Every jurisdiction has penalties for infractions under the applicable legislation and/or penalties for an employer’s failure to take every reasonable precaution in protecting the health and safety of its workers. Additionally, the federal Criminal Code imposes a legal duty on employers and anyone who has the authority to direct how another person performs a task to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task. If this duty is carelessly disregarded and bodily harm or death results, an organization could be charged with criminal negligence.
Penalties under the federal Criminal Code

Under the Criminal Code, organizations may be found guilty of negligence if a “representative”\(^1\) is a party to the offence, or if a “senior officer”\(^2\) (who is responsible for the aspect of the organization’s activities that is relevant to the offence) markedly departs from the standard of care expected to prevent a representative of the organization from being a party to the offence.

Organizations will be held criminally liable in the following situations:

- as a result of the actions of officers who oversee day-to-day operations, but who may not be directors or executives;
- when officers with executive or operational authority intentionally commit, or direct employees to commit, crimes to benefit the corporation;
- when officers with executive or operational authority become aware of offences being committed by other employees, but do not take action to stop them; and
- when the actions of those with authority and other employees, taken as a whole, demonstrate a lack of care that constitutes criminal negligence.

The fine for a summary conviction offence is $100,000. There is no ceiling for fines on indictable or more serious offences. In addition, an individual can face a penalty of up to life imprisonment when charged with criminal negligence causing death.

Penalties by Jurisdiction

In the federal jurisdiction, failure to exercise due diligence can result in fines up to $1 million for death or injury at the workplace.

In Alberta, first convictions can result in fines up to $500,000 (in the case of a continuing offence, to a further fine up to $30,000 for each day the offence continues) or imprisonment up to 6 months. Subsequent convictions can result in fines up to $1 million and/or imprisonment up to 12 months. Alberta has a statutory time limit for filing charges of 2 years from the time of the offence.

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\(^1\) The definition of “representative” includes a director, partner, employee, member, agent, or contractor of the organization.

\(^2\) “Senior officer” is defined as a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a corporation, includes a director, its chief executive officer, and its chief financial officer.
In British Columbia, first offences can result in fines up to $618,730, plus a maximum of $30,936 for each day the offence continues and/or 6 months’ imprisonment. On conviction for an offence, the court can order the offender to pay (in addition to any other fine levied) a fine in an amount equal to the estimation by the court of any monetary benefits accrued as a result of commission of the offence. Subsequent convictions are subject to a maximum fine of $1,237,461, plus a maximum of $61,873 for each day the offence continues and/or 12 months’ imprisonment. If a person is convicted of an offence, in addition to any other punishment imposed, the court can make an order:

- directing the person to perform community service;
- directing the person to pay to the Workers’ Compensation Board (the “Board”) an amount towards research or public education related to occupational health and safety;
- directing the person to post a bond or pay into court an amount of money to ensure compliance with any prohibition, direction, or requirement;
- directing the person to submit to the Board, within 3 years after the date of the conviction, any information respecting the activities of the person;
- directing that the facts relating to the commission of the offence be published by the Board at the expense of the person convicted, subject to any maximum amount or other restrictions established by the court;
- prohibiting the person from working in a supervisory capacity at any workplace for a maximum period of 6 months from the date of conviction; and
- requiring the person to comply with any other condition to secure the person’s good conduct, and to prevent the person from repeating the offence or committing other offences.

In Manitoba, first offences can result in maximum fines of $150,000, and $25,000 per day for continuing offences and 6 months’ imprisonment. Subsequent offences can result in maximum fines of $300,000, plus $50,000 for each day the offence continues and 6 months’ imprisonment. In addition, an individual convicted of an offence may be prohibited from working in a supervisory capacity at any workplace for 6 months. An offender may also pay an additional fine not exceeding the maximum allowed, which the government will use to educate the public on matters relating to workplace safety and health.
In New Brunswick, any person who violates or fails to comply with any provision of the Act, regulations, or an order made under the Act or the regulations will be ordered to pay a maximum fine of $50,000 and/or serve 6 months’ imprisonment. Continuing offences are deemed to be separate offences for each subsequent day they are committed.

In Newfoundland and Labrador, there is a maximum fine of $250,000, plus $25,000 for each day the offence continues and/or 12 months’ imprisonment. If a person is convicted of an offence, in addition to any other punishment that may be imposed, the court can make an order directing the offender to:

- publish the facts relating to the offence;
- pay to the Minister of Employment and Labour Relations an amount to educate the public in the safe conduct of the activity in relation to the offence committed, as well as in the duties and responsibilities of employers and workers;
- submit to the Minister within 3 years after the date of the conviction any information respecting the activities of the offender that the court considers appropriate in the circumstances;
- perform community service;
- provide a bond or pay an amount of money into court to ensure compliance with an order; and
- comply with any other reasonable condition to secure the offender’s good conduct, and to prevent the offender from repeating the same offence or committing other offences.

In Nova Scotia, any person who contravenes the Act or the regulations or fails to comply with an order, direction, or provision of a code of practice is guilty of an offence and liable on summary conviction to a maximum fine of $250,000, plus $25,000 for each day the offence continues and/or 2 years’ imprisonment. The court can order the offender to pay, in addition to the fine levied above, a fine in an amount equal to the estimation by the court of any monetary benefits accrued as a result of commission of the offence. If a person is convicted of an offence, in addition to any other punishment that may be imposed, the court can also make an order directing the offender to:

- publish the facts relating to the offence;
pay to the Minister of Labour an amount for the purpose of public education in the safe conduct of the activity in relation to the offence committed and principles of internal responsibility provided for in the Act;

submit to the Director of Occupational Health and Safety within 3 years after the date of the conviction any information respecting the activities of the offender that the court considers appropriate in the circumstances;

perform community service;

provide a bond or pay an amount of money into court to ensure compliance with an order; and

comply with any other reasonable condition to secure the offender’s good conduct, and to prevent the offender from repeating the same offence or committing other offences.

Ontario distinguishes between persons and corporations:

- A person who contravenes or fails to comply with a provision of the Act or the regulations, an order or requirement of an inspector or Director, or an order of the Minister of Labour is guilty of an offence and on conviction is liable to a maximum fine of $25,000 and/or 12 months’ imprisonment.

- A corporation that is convicted of contravening or failing to comply with a provision of the Act or the regulations, an order or requirement of an inspector or Director, or an order of the Minister of Labour is liable to a maximum fine of $500,000.

The statutory time limit for filing charges in Ontario is 1 year.

In Prince Edward Island, there is a maximum fine of $50,000, plus $5,000 for each day the offence continues, and/or 1 month of imprisonment to every person who contravenes or fails to comply with a provision of the Act or the regulations, an order or requirement of an occupational health and safety officer or the Director of Occupational Health and Safety, or an order or direction of the Workers’ Compensation Board.

Quebec distinguishes between individuals and corporations and makes a distinction between offences and serious offences:

- A person who contravenes the Act or regulations, refuses to conform to a decision or order, or incites a person to do so, is guilty of an offence and liable
to a first offence maximum fine of $500; a subsequent offence has a maximum fine of $1,000.

- A corporation that contravenes the Act or regulations, refuses to conform to a decision or order, or incites a person to do so is guilty of an offence and liable to a first offence maximum fine of $1,000; a subsequent offence has a maximum fine of $2,000.

- A person who does anything that directly and seriously compromises the health, safety, or physical well-being of a worker is liable to a first offence maximum fine of $1,000; a subsequent offence has a maximum fine of $2,000.

- A corporation that does anything that directly and seriously compromises the health, safety, or physical well-being of a worker, it is liable to a first offence maximum fine of $20,000; a subsequent offence has a maximum fine of $50,000.

In Saskatchewan, offences fall into two categories. Under the first category, it is an offence if:

- an employer, worker, self-employed person, contractor, owner, or supplier fails to meet general duties set out in the legislation;
- an employer, contractor, owner, or supplier fails to provide the information in section 9 of the legislation;
- an employer fails to provide an occupational health and safety service or occupational health and safety programs pursuant to the legislation;
- an employer fails to provide a policy statement on violence pursuant to section 14 of the legislation;
- an employer fails to meet the duties with respect to substances (WHMIS) and controlled products in section 40;
- an employer fails to provide information with respect to a controlled product to a physician or registered nurse who requests it pursuant to section 41 of the legislation;
- any person contravenes a regulation;
- any person fails to comply with any requirement or contravenes any prohibition imposed by a notice of contravention, including any requirement or prohibition contained in the notice of contravention as modified on appeal;
• any person takes discriminatory action against a worker contrary to section 27 of the legislation; and

• any person contravenes any other provision of the Act.

Every person who is guilty of an offence in this category that does not cause and is not likely to cause the death of or serious injury to a worker is liable on summary conviction to a first offence maximum fine of $10,000, plus $1,000 for each day the offence continues; a subsequent offence has a maximum fine of $20,000, plus $2,000 for each day the offence continues.

In Saskatchewan, under the second category, it is an offence if:

• any person intentionally obstructs an occupational health officer in the exercise of the officer’s powers or the performance of the officer’s duties;

• any person intentionally makes or causes to be made a false entry in any register, book, notice, or other document to be kept by the person pursuant to the Act or the regulations, or deletes or destroys any true or proper entry in any of those documents; and

• any person fails to comply with an order, decision, or direction made pursuant to the Act or the regulations.

Every person who is guilty of an offence listed in this category that does not cause and is not likely to cause the death of or serious injury to a worker is liable on summary conviction to a maximum fine of $2,000.

Every person who is found guilty of failing to comply with a decision or order of the Director of the Occupational Health and Safety Division or an adjudicator is liable on summary conviction (in addition to any other fine or penalty) to a maximum fine of $5,000 plus $500 for each day the offence continues.

Every person who is guilty of any offence listed in section 57 of the Act that does not cause but is likely to cause serious injury or death to a worker is liable on summary conviction to a first offence maximum fine of $50,000, plus $5,000 for each day the offence continues; a subsequent offence has a maximum fine of $100,000, plus $10,000 for each day the offence continues.

Every person who is guilty of any offence listed in section 57 of the Act that causes the death of or serious injury to a worker is liable on summary conviction to a maximum fine of $300,000 and 2 years’ imprisonment.
Q: What are a supervisor’s responsibilities for employee health and safety?

Answer

In addition to the general requirement to take every reasonable step practical to ensure the health and safety of their workers, supervisors are also specifically required to be “competent persons”.

A competent person is one who is qualified because of knowledge, training and experience to organize the work and its performance, and who is familiar with the relevant acts and regulations that apply to the workplace. A supervisor should have the requisite knowledge of any potential or actual danger to health or safety in the workplace. A competent worker is one who is adequately qualified to perform the job in a manner that does not endanger his or her health and safety. Thus, in some ways, the duty to ensure competence is expressed in the same provision that requires worker training. The obligation to provide the information, instruction, training and supervision that is necessary to ensure a worker’s health and safety probably contains within it the obligation to ensure that workers are adequately qualified to safely perform their jobs.

For obvious reasons, most jurisdictions emphasize that supervisors must be especially competent. (A supervisor is generally defined as a person in charge of a workplace, or with authority over a worker.) In some provinces, it is further established that supervisors must ensure the competence of persons working under their command by taking all reasonable measures to ensure that activities under their direction and control are performed by competent persons, or trainees under the supervision of a competent person. In this way, the duty to monitor worker competence is extended to persons other than the employer, but without relieving the employer of the same obligation.

Q: What are employees’ responsibilities for their own health and safety?

Answer

Employees have specific responsibilities in ensuring their own health and safety is protected. Employees must follow the instructions of the employer and perform their work in a safe manner. Employees must wear proper personal protective equipment when directed to do so.
Employees are specifically required to report any known hazards immediately to their supervisors. Employees also have the right to refuse to perform any work they believe poses an immediate danger to the health and safety of themselves or others. Work refusals can be controversial and are not always well understood by either employees or their supervisors. Generally speaking, there are two stages in a work refusal. Initially, an employee should refuse to perform work that he or she subjectively believes poses a potential danger to the employee or others. However, subsequently, when the employer looks into the matter, there must be some objective evidence that a danger exists. While work refusals are usually regarded as a right, arguably employees have a duty to report hazards and therefore to refuse to perform work that may be dangerous.

Employees are also required to report any accidental injury immediately.

Workers have legal duties and responsibilities under Canadian health and safety legislation. Most jurisdictions place specific and general legal duties on workers for their occupational health and safety. Specific legal duties deal with specific hazards in the workplace. That is, workers must comply with industry-specific requirements set out in occupational health and safety acts and regulations to protect themselves and others at their workplace (e.g., construction safety regulations which set out requirements for machine guarding).

General legal duties relate to the worker in the workplace. They are all-encompassing duties and cover situations that are not contemplated by the specific provisions in the acts and regulations. Examples of general duties include the following:

- taking reasonable care to protect health and safety of self and co-workers at the workplace;
- using personal protection and safety equipment as required by legislation or the employer;
- following safe work procedures;
- reporting any injury or illness immediately;
- reporting unsafe acts and unsafe conditions; and
- participating in joint health and safety committees.
Q: What is meant by strict liability in the health and safety context?

Answer

In law, an individual may be liable when another is harmed because of the negligence of that individual. The onus is on the complainant to proffer evidence of negligence. However, in health and safety matters employers bear a strict liability for any harm that comes to their employees. This means that once it has been established that an employee was hurt at work, the employer bears the reverse onus to demonstrate that it was not negligent in fulfilling its responsibilities to take every reasonable precaution to protect the employee from harm. The following is a brief description of the different types of legal liability:

- **Mens rea offences**: These require a guilty mind, and are usually found in the Criminal Code. They can, however, be found in any piece of legislation. The legislation which creates the offence will either explicitly or implicitly require that in order for a person to be found guilty that person must not only have committed the offence, but he or she must also have intended to commit the offence. A person who did not specifically intend to commit a prohibited act, but who was reckless as to the consequences of their actions, will also be found to have intended to commit the offence. Mens rea offences, therefore, always leave it open to the accused to prove that he or she did not intend to commit the offence.

- **Strict liability offences**: The vast majority of offences created by all levels of government fall into this category. With this type of offence, the prosecution only has to prove that the accused committed the act. It does not have to prove that the accused also intended to commit the act. It is then up to the accused to show why they shouldn’t be found guilty. There are two ways the accused can do this. The accused can try to prove that, due to some mistake of fact, they did not actually know that they were committing the offence. A more popular defence, however, is for the accused to show that they did everything reasonable in the circumstances to try to ensure that the offence would not be committed. This is known as the defence of due diligence. If the accused can establish either of the above two defences, they will not be found guilty.

- **Absolute liability offences**: This type of offence is rare. All that the prosecution needs to prove is that the accused actually committed the prohibited act. If that is proven, the accused then has no defence to the charge. The mental state
of the accused is completely irrelevant. An example of this type of offence is a parking ticket.

“Officially induced error” is available as a defence to an alleged violation of a regulatory statute. To succeed with this defence, an accused must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. Reasonableness will depend upon several factors, including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice and the clarity, definitiveness, and reasonableness of the advice given.

Q: What is meant by due diligence in the health and safety context?

Answer

The defence of due diligence allows a person or corporation accused of a health and safety offence to avoid guilt by showing that he/she acted in a sufficiently careful and reasonable manner, having taken all reasonable steps to prevent the prohibited act from occurring. If this defence is accepted by the court, the accused will be absolved of the charges.

The defence of due diligence is used when the violation is a “strict liability” offence. Under such cases, the Crown is required to prove beyond a reasonable doubt that the defendant committed the prohibited act of which he/she is accused. The physical elements of the offence are all that the prosecution need prove. It is not necessary to also establish the existence of mens rea — the intent to commit the offence.

It is only within the past few decades that the concept of strict liability has been applied. Previously, health and safety convictions were pursued as absolute liability offences, where, once it was shown the accused had committed the act, no defence was available. It was believed that this “hard line” approach to health and safety prosecution was the best way to ensure compliance. Currently, however, the strict liability approach is thought to better serve the interests of both parties: the Crown benefits from the judicial ease created by not being required to establish intent, while the accused benefits from having the opportunity to demonstrate that it took all reasonable steps to prevent the violation from occurring.
Some employers focus on meeting the due diligence standard in order to escape conviction and prove due diligence in Court. However, the main reason for complying with the due diligence standard is to prevent accidents and injuries. In case an injury or accident does occur, “all necessary steps” must have been taken before the accident or injury had occurred, not after the fact.

In strict liability offences, the Crown does not have to prove mental element of intent. Proving the occurrence of the prohibited act is sufficient proof. Unlike absolute liability offences, there is a defence of “due diligence”. There are two branches of defence:

- reasonable care was taken (i.e., the due diligence defence); and
- reasonable belief in a mistaken set of facts.

Due diligence is the level of judgment, care, prudence, determination and activity that a person would reasonably be expected to choose under particular circumstances. In the context of occupational health and safety, due diligence means that employers will take all reasonable precautions to prevent injuries or accidents in the workplace. This duty applies to situations that are not detailed elsewhere in the occupational health and safety legislation.

To exercise due diligence, it is recommended that an employer implements a plan to:

- identify possible workplace hazards;
- carry out the appropriate corrective action to prevent accidents or injuries arising from these hazards;
- document any action taken in response to breaches of safety rules;
- document accident investigation and reporting including “near misses”;
- develop a workplace health and safety program;
- maintain minutes of health and safety meetings;
- promote health and safety to all staff;
- identify health and safety duties and responsibilities for supervisors and managers;
- train supervisors or managers on health and safety duties and responsibilities in the workplace; and
EMPLOYER DUTIES

- review Joint Health and Safety Committee reports and recommendations.

Most jurisdictions stipulate that an employer’s general duty involves protecting the health and safety of its workers insofar as is reasonably practicable. The phrase “reasonably practicable”, however, is somewhat vague. A useful test for determining whether or not a measure is reasonably practicable is to weigh the risks to worker health and safety against the expenditure (in terms of time, cost and effort) of implementing controls to protect workers from these risks. If the expenditure grossly outweighs the risk to worker safety, then the measure is probably not reasonably practicable.

The definition of what is “reasonably practicable” is also influenced by such factors as the industry type, work conditions, characteristics of the employer and/or employee and legal precedent. Essentially, however, where an employer can prove that it has made duly diligent attempts to secure worker health and safety, it will usually be found to have upheld its general duty. It is highly recommended that employers stay informed about the current health and safety developments, and apply their knowledge toward implementing health and safety programs and preventive measures in their workplaces. This is the most effective and preventative way of avoiding costly accidents and human tragedies.

Q: Should employers ensure that independent contractors are covered by workers’ compensation?

Answer

Organizations dealing with contractors and subcontractors should always ensure that the contractors have certificates of compliance demonstrating that they are covered under the workers’ compensation scheme in their province. Organizations should also ensure that these groups have sufficient liability insurance to cover against any third-party claims that might arise out of their work through any potential negligence. The amount of liability insurance will depend on the nature of the work being performed and the inherent risk of loss.

Many organizations today use alternate employment relationships to complete short-term project work or to compliment their workforces. This creates a number of issues that are confusing to many employers. The definition of “employee” in employment law differs depending on the context. Under health and safety legislation and workers’ compensation claims, contractors and so-called independent contractors may be considered as employees unless very specific actions are taken to
ensure complete independence. In many cases, the reality is that the individual is hired in an exclusive capacity for a fixed term and is therefore more likely an employee than anything else. Workers’ compensation will treat these individuals as employees unless there is some evidence that they are operating as sole proprietors in their own business.

The organization can do several things to protect itself. The most obvious is to simply hire the individual as a fixed-term employee and have him or her covered under the organization’s WCB scheme. Not only is this simple, but it also insures the company against any potential lawsuits should the individual be injured at the workplace. The downside for the individual may be a loss of certain tax advantages, or the arrangement may restrict him or her from working for others during the period of employment. There may also be a perception that he or she would be paid less under such a scheme.

An alternative is to hire the individual through a third-party agent who then must demonstrate that they have WSIB/WCB coverage. This type of arrangement is common in clerical and administrative positions and in the IT field. Even if the individual is not hired through an agent, many agents will work with an organization to set up an appropriate arrangement. In the management consulting field, many interim executives work in loose collectives that can assist in making this kind of arrangement.

Finally, if these alternatives are not suitable to the organization or the individuals, the best approach is to treat them as any other contractor and insist that they supply a certificate of compliance. If the individual does not have such coverage, it is actually very easy to register online as a sole proprietor. Coverage is cheap and certainly the independent contractor should be expected to pass the cost through as part of their fee.

**Q:** What do the workplace violence and harassment provisions in Bill 168 mean for Ontario employers?

**Answer**

In Ontario, Bill 168 (S.O. 2009, c. 23) amended the province’s *Occupational Health and Safety Act* (OHSA) to add provisions concerning violence and harassment in the workplace. The changes came into effect on June 15, 2010.
Workplace violence is defined in the OHSA as a course of vexatious comment or conduct against a worker, in a workplace, that is known (or ought reasonably to be known) to be unwelcome.

Workplace harassment is defined in the OHSA as:

(a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker;

(b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker; and

(c) a statement or behaviour that is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

The OHSA now requires employers to:

- develop a workplace violence policy and a workplace harassment policy;
- review the two above policies at least annually;
- complete risk assessments of workplace violence;
- if aware of domestic violence that may occur in the workplace, take precautions to protect employees in the workplace;
- develop a workplace harassment program; and
- communicate the policies and programs to employees.

All companies, regardless of size, are required to comply. Those companies large enough to have a Joint Health and Safety Committee (JHSC) are to consult with the JHSC. The programs must include the procedure for summoning immediate assistance should violence occur.
Ergonomics and Musculoskeletal Programs

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Q: What is ergonomics?

Answer

Ergonomics is the study of the human body’s relationship with the environment. In the context of the workplace, ergonomics is the science of fitting the work to the physical capacities and needs of the individual. When there is a mismatch between the requirements of the job and the physical capacity of the individual, the result can be significant injuries. Poor ergonomic design typically leads to the gradual onset of injuries. And repeated activities performed in awkward or uncomfortable positions can ultimately lead to significant long-term health issues for many employees. Often the fixes required to correct the ergonomic issues are easy and inexpensive to implement.

In a sense, ergonomics looks at the human body as a component of a production process and determines the most effective design to optimize productivity while minimizing the risk of harm to the individual. The best approach to ergonomic design is to make it part of the original design for any equipment or job organization. While it remains necessary in some workplaces to change existing equipment to meet the needs of employees, it is obviously more effective (and usually less costly) to install machines and equipment that either meet the needs of the individual worker, or are adjustable in some fashion to meet the different needs of different workers who may operate that particular piece of equipment.

There are a number of factors ergonomic specialists look at to determine the right fit between humans and their work environments. Anthropometry is the science that deals with the measurement of the body parts. The measurements that ergonomists are most concerned with in the workplace include:

- weight;
- standing and sitting height;
- popliteal height (maximum seat height);
- arm length (reach);
- wrist–elbow, or forearm, length (reach);
- standing and sitting eye height; and
- hand size.
These measures are used to determine the design necessary to accommodate the specific physical demands placed on an individual operating a particular piece of equipment.

Examples of how anthropometric measures are applied as design considerations include:

- **Reach envelope**: The reach envelope is the volume in front of a person, above, below and to the sides, in which he or she can work with his or her arms and hands. The size of this envelope will vary with the individual, as do all physical dimensions. If reach is an important parameter in a particular workstation, it is better to use the physical dimensions of the smaller workers. This means that all people can use this workstation although the people with longer arms may be a little cramped. If, instead, it was designed for an average male, then smaller males and most females would not be able to use the workstation efficiently or without some accommodation that may lead to injury.

- **Bench top height**: The height of the bench top, or work surface, is related to the standing elbow height which will vary between people. If pressure (force) is to be used, as for cutting, screwing, tying and so on, then the bench level must be below the elbow height by 5–10 cm (2–4 in). This is so that the weight of the body can also be used in the task. However, for writing when seated, the desk should be about elbow height. For fine work, seated or standing, the bench height is related primarily to vision and only secondarily to stature (e.g., watchmakers, draughtspersons) and is usually well above elbow height.

Ergonomics also looks at the physical capacity of the individual. The science that deals with this is called work physiology. The important measurements here are:

- strength of the various muscle groups (back muscles, hand grip muscles, upper arm muscles, leg muscles);
- endurance; and
- aerobic capacity.

The trend has been to reduce the physical strength needed, but there are still many jobs that require the physical strength that only a relatively small proportion of the working population can match. Employers need to concern themselves with shifting demographics that are changing the type of workers being attracted to various industries.
More women are being employed in non-traditional roles. This leads to a need to ensure the physical design of the work matches the different physical needs women have versus men. Also, the physical demands of older workers may also have to be adjusted to meet their needs.

Employers’ greatest fear of ergonomics is the cost. However, this has to be balanced against the cost associated with lost time from work, the cost of workers’ compensation claims and related expenses. A cost/benefit analysis can make a business case for the development of an ergonomics program. Good ergonomic design will not only help an organization avoid injuries to its employees, but it will also enhance productivity and product quality by providing the best fit between workers and the production processes.

Q: What are MSI, MSD, and WMSD?

Answer

MSI, MSD, and WMSD are the terms used in various Canadian jurisdictions to refer to musculoskeletal injuries, musculoskeletal disorders, and work-related musculoskeletal disorders, respectively. The terms cover a number of injuries and disorders of the muscles, joints, tendons, ligaments, cartilage, and nerves. Other similar terms include:

- repetitive strain injury;
- repetitive motion injury;
- strain and sprain;
- soft tissue disorders; and
- cumulative trauma disorders.

Ergonomics is the science of adapting work processes and conditions to fit the physical capabilities of workers. Its goal is to reduce the incidence of musculoskeletal injuries by minimizing or eliminating the causes of musculoskeletal disorders.
Q: What are the risk factors for a musculoskeletal injury?

Answer

Certain risk factors in the work setting have been associated with musculoskeletal injuries. The risk factors are divided into two categories: physical characteristics and environmental characteristics.

The most common risk factors for musculoskeletal injury are physical characteristics, which include force, work posture, and repetitive motions:

- Force is the amount of effort required to perform a task or job. When more force is exerted, there is greater stress on the body. Lifting, pushing, pulling, and gripping a tool are examples of activities that require exerting force.

- Work posture is the body’s position while performing a task or job. To perform certain tasks, a person may need to assume a position in which his or her joints are not in the body’s natural position. The more a joint is extended to its fullest range of motion, the greater the stress that is placed on the soft tissue, such as muscles, nerves, and tendons, of that joint.

- Repetitive motions are motions or a series of motions repeatedly performed to complete a task or job. A repetitive motion can also be an unnatural posture held for long periods of time. This may cause risk because of the ongoing stress placed on one body part without sufficient muscle recovery time.

Secondary risk factors for musculoskeletal injury are environmental characteristics, which include contact pressure, vibration, and temperature:

- Contact pressure is any external pressure that is applied to soft tissues that puts stress on those tissues. For example, gripping a tool where the handles press into the hand.

- Vibration to the hand, arm, or whole body can cause damage to nerves and blood tissues as well as other soft tissues.

- Temperature can also have an effect on muscles. Cold temperatures increase the stress placed on soft tissues by reducing their range of motion and flexibility. Heat can affect the work–rest cycles required, due to the increase in fatigue and the need for muscle recovery.

It should be noted that the presence of any one risk factor may not in itself result in an injury. There is increased risk if more than one risk factor is present. Once a
risk factor has been identified, a determination should be made concerning the significance of the risk. Significance should be determined by conducting a formal risk assessment, which is part of a musculoskeletal injury prevention program. This risk assessment should consider the duration, magnitude, and frequency of the risk, and whether there is more than one risk factor present.

**Q:** What are some common musculoskeletal injuries?

**Answer**

Musculoskeletal injuries affect the muscles, tendons, tendon sheaths, nerves, bursa, blood vessels, joints, and ligaments. Common injuries include back pain, carpal tunnel syndrome, muscle strain, tendinitis, rotator cuff syndrome, shoulder pain, and tennis elbow.

**Q:** What is musculoskeletal injury prevention?

**Answer**

Musculoskeletal injury (MSI/WMSD) prevention is a program that follows the same steps recommended for other types of hazards in the workplace. It is a program that identifies the hazard, assesses the hazard, and controls the hazard.

Once a control program has been implemented, follow-up steps should be taken to ensure the control program is working as intended.

**Q:** What are the elements of an effective musculoskeletal injury prevention program?

**Answer**

The following summarizes the suggested steps for creating an effective musculoskeletal injury prevention program.

1. Incorporate the MSI program into the health and safety program. Musculoskeletal injury (MSI/WMSD) prevention should be part of a company’s health and safety program. A MSI/WMSD policy should set out its purpose, specific responsibilities, training requirements, and the procedures to be followed. The key to success begins with management support. Management should provide resources to ensure that managers, supervisors, JHSC members, and health and safety representatives receive the training to recognize potential MSI/WMSD.
hazards. Additionally, all employees must be familiar with their company’s MSI/WMSD program, which specifically outlines everyone’s responsibilities.

2. Identify hazards. Before identifying the hazards, it is recommended that those who are responsible for identifying the hazards (managers, supervisors, and JHSC members or health and safety representatives) have training related to conducting a risk assessment. Depending on the work that is being done, the training may be as simple as becoming familiar with a checklist and having some basic understanding of what increases the risk of musculoskeletal injuries. After conducting a risk assessment, including reviewing accident records and having discussions with employees, it may be determined that further expertise is required. Alternatively, it may be determined that adjustments to work stations or work procedures can be easily implemented in-house.

The procedures described above outline a program for identifying whether there are hazards that would cause musculoskeletal injury in the workplace. It is recommended that when new work processes are being developed or when new equipment/tools are being considered for purchase that an MSI/WMSD assessment be a factor in the process.

3. Control hazards. Identifying the root cause(s) of an MSI/WMSD hazard is the most important factor in finding an effective control for it. Ideally, a control should be designed to eliminate a worker’s exposure to the hazard. If this is not possible, the risk should be minimized to at least an acceptable level. There are a large number of options available to controlling hazards, including:

- engineering controls — modifying the work, the equipment, the layout, or the workplace (this is usually the best option, as it eliminates the problem at source and is less reliant on workers having to follow a procedure or wear specialized equipment);
- administrative controls — changing how work is organized; and
- personal protective equipment — this is not a common option for MSI/WMSD hazards, but exceptions include “anti-vibration” gloves and kneepads for continuous kneeling-type work.

It is very important that all appropriate employees are involved in both identifying and controlling the hazards.

4. Follow up to ensure MSI/WMSD controls are working. All workers and supervisors must be trained on the control measure(s). Follow-up steps must be taken to
ensure that the workers and supervisors understand the training they have received and are working as prescribed in the training. Also, a review must be made to ensure that no new hazards have been introduced as a result of the new control measures. A more formal review may be completed 3 to 6 months after the implementation of the control(s). This review should include reviewing any accident/incident reports and talking with the workers doing the work and any other employees who were earlier identified as being required to identify or control the hazard.
# Drug and Alcohol Issues

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Q: What risks do drug and alcohol use among employees pose for organizations?

Answer

Employees with addictions to alcohol and or drugs pose many risks to the organizations that employ them. Among the more common consequences are:

- increased absenteeism (pattern absenteeism);
- increased use of sick time and other employer-paid benefits;
- chronic tardiness;
- poor work performance and/or diminished productivity;
- inattentiveness;
- increased risk of accidents; and
- increased risk of workplace conflicts.

Employee use of drugs and alcohol while at work is a significant issue. Employees under the influence of an intoxicant are at high risk to have an industrial accident. While there are no Canadian statistics linking drug and alcohol use to industrial accident rates, many practitioners suspect substance abuse to be a contributing factor in a significant number of cases.

Employees who abstain from using intoxicants at work but are heavy users away from their places of work nevertheless pose risks to the business. They may be prone to excessive absenteeism either directly related to their use of alcohol and drugs, or due to related health concerns. In some instances, heavy use may also put a significant financial strain on an individual, resulting in an increased risk of employee theft.

Even casual or so-called social use can create risks for an employer. Shift workers who have one or two beers before going to work may believe they are doing nothing wrong. However, their perceptions and abilities to react to situations may be affected to the point that they do pose a safety risk. Perhaps more problematic are the employees who are hung over from the previous night. While they may not be legally impaired, their abilities to function at a productive and attentive level will be diminished. As a result, they may be at equal risk to have an accident or cause an accident.
Q: What steps can an employer take to assist an employee with a substance abuse problem?

Answer

Substance abuse is a recognized disability in Canada. As such, an employee with an admitted substance abuse problem needs to be accommodated to a reasonable extent. One of the issues around accommodation in this instance is the fact that there is a certain element of volition on the employee’s part: In other words, the employee has some degree of control over the disability.

Because of this, it is appropriate to take disciplinary measures against an employee for the behaviours associated with his or her chemical dependency, but not for the addiction itself. Hypothetically, if an employee with a substance abuse problem attended work regularly and performed to an acceptable standard, there is nothing the employer can do to discipline the employee for having the addiction. However, the employer can suggest, out of concern for the employee, that the individual seek help through the employer’s Employee Assistance Program, if there is one.

The right way to deal with an employee whose addiction has led to poor performance in the workplace is to deal with the workplace behaviour. If the employee has a high rate of absenteeism, he or she should be warned that a continued pattern of poor attendance could lead to the termination of employment. If the employee’s work performance is poor, he or she should be taken through whatever progressive steps the employer has in place to deal with poor performance.

Typically, people with addictions have difficulty coming forth and admitting they have a problem. In light of this, if an employer suspects that an employee has a substance abuse issue, it is appropriate for the employer to offer assistance through available counselling, but it is not appropriate to label the individual. In order for the employee to successfully rehabilitate, he or she is going to have to first admit having a problem. Confronting a person seldom works, particularly in the early stages of dealing an addiction.

Unfortunately, in other instances, an employee may not admit to a problem until after he or she has been threatened with termination or has been terminated. Under these circumstances, one form of accommodation is to reinstate the individual under a “last chance agreement”. These agreements usually contain clauses requiring the individual to:

- seek rehabilitation on an in-patient basis at a recognized facility;
abstain from the use of alcohol or intoxicating drugs;

- maintain an acceptable level of attendance once they have returned to full duties;

- attend to any prescribed after-care programs (e.g., Alcoholics Anonymous); and

- submit to any required tests when there is suspicion of drug or alcohol use at work.

Q: What does a last chance agreement look like?

Answer

Following is an example of a last chance agreement.

Sample Last Chance Agreement

Whereas [employee's name] reported to work on [month, day, year] in a condition unfit to resume his duties;

Whereas contrary to Company policy the Employee was under the influence of alcohol;

Whereas the Company has suspended the Employee indefinitely without pay;

Whereas the Employee has admitted to a substance abuse problem requiring treatment;

Whereas the Union has filed a grievance on behalf of the Employee; and

Whereas the parties hereto are desirous of a full and final settlement to all matters concerning the Employee's employment with the Company and the suspension thereof;

Therefore, in this matter, the parties agree on the following:

1. The parties agree that the Employee will enter an agreed-to rehabilitation program on an in-patient basis and will be eligible for disability benefit coverage under the Company's benefit program while participating in such a program, provided he abides by all the requirements of the benefits plan, including abstinence from the use of alcohol or illegal drugs.

2. The period from [month, day] until the Employee has successfully completed the stipulated rehabilitation program will be considered as a suspension without pay. This will not preclude the Employee from receiving disability benefits during this period if he otherwise qualifies under the terms and conditions of the benefits plan.

3. Upon successful completion of the prescribed rehabilitation program, the Employee will be reinstated to his former position without loss of seniority.

4. Once reinstated, the Employee agrees to abide by all Company policies and to maintain regular attendance at work.
5. The Company reserves the right to require medical proof that absences are not the result of alcohol use, and to have the Employee tested for the use of alcohol periodically for a period of not less than one year.

6. The Employee agrees to abstain from the use of alcohol and illegal drugs at all times.

7. The Union and the Employee agree to withdraw all grievances and complaints related to the suspension of his employment and accept these terms and conditions as a full and final settlement of any and all claims he may have against the Company in that regard.

8. The Union and the Employee acknowledge that the breach of any terms or conditions contained herein may result in the termination of the Employee’s employment for just and sufficient cause, and that the subject of any grievance launched with respect to such termination will be limited to whether or not a breach in fact occurred and not the quantum of penalty imposed for the breach.

9. This agreement shall constitute accommodation under the Human Rights Code.

Q: Does an employer have to accommodate an employee with a substance abuse problem?

Answer

The short answer is absolutely. Drug and/or alcohol addiction is recognized in Canada as a disability. However, unlike other disabilities, there is a certain degree of volition involved in substance abuse. In theory, an individual could choose to stop using drugs or alcohol; unfortunately, it is not always so easy.

Accommodation can take several forms. Since drug or alcohol addiction is considered a disability, an employer must afford an employee any time off and access to any employee benefits available for the treatment of the addiction. However, an employer does not have to accept poor performance, excessive absenteeism, or tardiness simply because there is a disability. Through accommodation, the employee must take the necessary steps to fulfill his or her employment obligations: In other words, the employee is, in turn, obligated to accommodate the needs of the employer.

Difficulty sometimes arises in determining how many times the employer must take steps to accommodate the employee. For some practitioners, when a “last chance agreement” is struck, the terms of the agreement should dictate that the employee has no further chances — it is a last chance after all. However, in some cases, arbitrators and human rights commissions have struck down such agreements as not being consistent with the rights the individual has to be accommodated in employment. In
other instances, employers have gotten around this technicality by inserting a clause into the agreement that states that the parties agree to recognize the agreement as the employer having fulfilled its obligations.

Most experts suggest that given the difficulty of overcoming an addiction, it is reasonable to expect an individual may have a relapse. On the other hand, an employer should not have to tolerate poor performance and excessive absenteeism. Hence, an employee must co-operate in an employer’s attempts to assist him or her in seeking rehabilitative assistance. The employer must exercise good judgment in determining if the individual is in earnest taking the necessary steps to reform his or her lifestyle choices.

In addition to formal employee assistance programs and other measures, some employers have encouraged recovering employees to take an active role in sponsoring employees who are at risk. When the culture is right, the employer can greatly benefit from any steps it takes to offer employees with substance abuse problems the help they need to recover.

Q: **What does a drug and alcohol policy look like?**

**Answer**

Following is an example of a drug and alcohol policy.

**Sample Drug and Alcohol Policy**

It is our company's desire to provide a drug-free, healthful, and safe workplace. To promote this goal, employees are required to report to work in an appropriate mental and physical condition, in order to perform their jobs safely and efficiently.

While on company premises or while conducting business-related activities on behalf of the company away from the premises, no employee may use, possess, distribute, sell, or be under the influence of alcohol or illegal drugs. The legal use of prescribed drugs is permitted on the job, provided such use does not impair an employee’s ability to perform the essential functions of the job effectively and in a manner that does not endanger the individual or other individuals in the workplace.

Violations of this policy may lead to disciplinary action, up to and including immediate termination of employment, and/or required participation in a substance abuse rehabilitation or treatment program. Such violations may also have legal consequences.

Employees with questions or concerns about substance dependency or abuse are encouraged to discuss matters with their supervisor or a Human Resources representative to receive assistance or referrals to appropriate resources in the community.
Employees with drug or alcohol problems that have not resulted in, and are not the immediate subject of, disciplinary action may be able to participate in a rehabilitation program as part of the company-sponsored Employee Assistance Plan. Please see a Human Resources representative for more details.

The company does not engage in pre-employment or random drug and alcohol screening. However, drug and alcohol testing may be required under the following circumstances:

- Where, after an accident/incident, demonstrable losses have been incurred and there is suspicion that drug or alcohol use may have been a factor;
- Where there is evidence of drug or alcohol use that is contrary to this policy; or
- Where an employee’s acknowledged substance abuse has led to a “Last Chance” agreement that includes post-rehabilitation monitoring.

Employees with questions on this policy or issues related to drug or alcohol use in the workplace can raise their concerns with their supervisor or with the Human Resources department without fear of reprisal.
# Workplace Safety Issues

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Q: What are the elements of an effective health and safety program?

Answer

The requirements for a comprehensive health and safety program include:

- a health and safety policy;
- health and safety responsibilities assigned to various stakeholders;
- safety coordination;
- health and safety information;
- hazard identification;
- accident/incident investigations;
- standards and procedures;
- health and safety representatives;
- a joint health and safety committee;
- health and safety training and education;
- a preventative maintenance program;
- pre-use inspections; and
- management inspections.

Health and safety policy: An effective program begins with a health and safety policy that describes senior management’s commitment to health and safety in a very specific and demonstrable way. This commitment must be documented and demonstrated through specific actions. Typically, the documentation consists of a policy statement that is reviewed (at least) annually to keep it up-to-date and relevant, as well as through minutes of health and safety meetings conducted by senior management. The commitment is also assessed through discussions with employees, who are able to comment on how well the commitment translates into preventative steps taken at the shop-floor level.

The health and safety policy should also outline the specific responsibilities of the organization, supervisors and employees.

Health and safety responsibilities: In addition to the general responsibilities outlined in the organization’s health and safety policy statements, there should be
documented responsibilities assigned to various stakeholders in the organization. These include managers, supervisors, workers, contractors and visitors.

Senior management responsibilities go beyond the day-to-day oversight of health and safety activities. The senior group is responsible for ensuring the continuous improvement of health and safety and the exercise of due diligence to protect the organization’s interests. Annually, the senior management group must review the H&S program and set new objectives for the coming year. The underlying concept is to ensure that health and safety becomes integrated into all aspects of organizational activity.

Managers have specific responsibilities, including:

- assigning competent people in supervisory capacities;
- performing periodic workplace inspections;
- promoting health and safety through discussions with employees;
- ensuring employees are properly trained and qualified to perform work safely;
- conducting investigations into workplace accidents, injuries and occupational illnesses;
- conducting work/task observations to ensure work is being performed safely;
- providing workers with the necessary equipment and/or tools to perform work safely;
- holding supervisors accountable for the achievement of health and safety program objectives;
- reviewing safety program elements (at least) annually; and
- responding to recommendations from Joint Health and Safety Committees and/or recommendations made as the result of an accident/incident investigation.

The level of responsibility each has will depend on how the workplace is organized. It’s important to have these responsibilities enumerated in job descriptions, and to have specific objectives outlined in any existing performance management system or bonus incentive scheme.

Workers should also have any specific responsibilities outlined in their job descriptions or, where none exist, the safe work procedures should be outlined in the standard operating procedures for the task. Notwithstanding, there should be some
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documentation that specifies the workers’ responsibilities to follow workplace safety rules and to follow standard operating procedures in a safe manner.

Contractors also have specific responsibilities. These include ensuring everyone in their charge works safely, conforms to the workplace safety rules, complies with all legislated requirements and is properly covered under workers’ compensation (and has a current clearance certificate to prove such).

Employers must also have documented requirements for visitors to be escorted, to wear proper personal protection, and to report any injuries that do occur.

Safety coordination: A comprehensive program will require having an individual assigned the specific responsibilities to coordinate the program activities. This can be part of an individual’s job responsibilities in a small organization, or it may involve assigning a full-time person to exclusively manage the health and safety programming. The person assigned should have specific health and safety knowledge gained through training and experience. This would include being familiar with the acts and regulations, as well as being competent to conduct investigations, inspections, audits and the training of others.

Health and safety information: Some relevant legislation and/or regulations require employers to post information in an accessible place where all workers will have an opportunity to read it. In other instances, the health and safety program, as developed by the employer, may have requirements for the posting of information. The following information should be posted or available in the workplace:

- *Health and Safety Act* and specific industry regulations;
- WHMIS regulations;
- relevant regulations regarding designated substances;
- material Safety Data sheets;
- WCB regulations (e.g., reporting injuries);
- emergency procedures, including contact names and phone numbers;
- Joint Health and Safety Committee meeting minutes and inspection reports;
- accident investigation reports; and
- Ministerial orders and inspection reports.

Hazard identification and control: This is a large task involving analyzing the tasks performed in each job and assessing the risk associated with each task. These
risks are classified according to the potential for the hazard to occur (frequency) and the probable impact it might have (severity). Once hazards are identified, controls must be put in place to reduce the chance for the hazard to occur, or to reduce its potential impact. Sophisticated programs will contain separate elements for Engineering Controls and Purchasing Controls — these are documented processes that are proactively followed to minimize the risks introduced into the workplace.

**Accident/incident investigations:** The process for investigations should be properly documented. Periodically, an audit should be conducted to assess the quality of investigations and the follow-up to recommendations arising from those investigations. Investigations should involve the injured worker, the health and safety representative, the health and safety coordinator and the employee’s supervisor. Investigations should identify the immediate and proximate causes that lead to the accident, and also identify potential root causes.

Proper investigations will involve isolating the site of the accident whenever possible, interviewing all witnesses, taking photos or samples, re-enactments of events (provided doing so poses no risk to the participants) and conducting any requisite tests on equipment or materials. The investigation should produce a report, recommendations and follow-up actions. Annually, senior management should review and analyse all accident investigations to ensure compliance, quality of investigation and to ensure all recommendations are followed up on.

**Standards and procedures:** To properly control work activities, and to ensure safe work practices are followed, it is necessary to develop standard operating procedures. In addition to having specific procedures defined for each and every work task performed, the organization should develop standard operating procedures for the following:

- illness and injury reporting;
- first aid;
- hazard reporting;
- emergency procedures (including evacuation plans, fire response plans, disaster recovery processes, etc.);
- use of emergency equipment;
- work refusals;
- equipment lock-out;
Health and safety representatives: In organizations where there is more than a minimum number of employees (the threshold is usually twenty) a representative should be chosen from among the workers to participate on behalf of all employees in investigations, inspections and Joint Health and Safety Committee meetings. The representative should be selected by the employees, usually through a democratic vote, however he or she may also be assigned by the employee’s bargaining agent in unionized workplaces. The individual has the power to make recommendations to management on matters related to health and safety and, in some jurisdictions, may have the power to stop unsafe work. In some jurisdictions there are specific training requirements for the Health and Safety representative, and it is the employer’s responsibility to ensure the representative gets this training.

Joint health and safety committees: Having a Joint Health and Safety Committee is another legislated requirement where the organization has twenty or more employees. The Committee must be made up of an equal number of management representatives and representatives chosen by the employees. Where there is not an equal representation, the employee representatives must outnumber the management representatives. The Committee should meet monthly or bimonthly, depending on the complexity of the organization’s operations. The Committee should conduct workplace inspections, review any relevant reports (including accident/incident investigations) and make recommendations to the organization’s management on safety programming issues. In more sophisticated environments, the Committee may even take a leadership role in promoting the Health and Safety Programming. The Committee should have a documented set of “Terms of Reference” that outlines its composition, quorum, selection of chairman or co-chairs, keeping of minutes and schedule of meetings and inspections.

Health and safety training and education: As with any training program, the basis for an H&S training plan should be a needs assessment conducted (at least) annually. In some instances, regular training and annual re-qualification is required by law, such as under the Workplace Hazardous Materials Information Systems (WHMIS) legislation. Other training may be required specifically by the employer to meet requirements for internal certifications or competencies. All training programs should include an Employee Orientation process for newly hired employees.

Preventative maintenance program: A preventative maintenance program ensures all equipment is in proper working order and, therefore, can be used safely
without risk to the operator. A PM program includes set standards for regular inspections by qualified individuals, and regular replacement of any parts or materials that are subject to wear. A proper PM includes keeping detailed records on-site and periodically reviewing the efficacy of the program.

**Pre-use inspections:** Before equipment is operated, the employee should inspect it to ensure all parts are in good working order and are functional. Normally, the employee is given a checklist of things to be inspected before the equipment is used. In the event that a piece of equipment, or part thereof, is not operable, there should be a “red-tag” procedure to take the equipment out of service and to send it for the requisite repairs. A log should be kept of all equipment that is red-tagged so that recurrent problems can be addressed through the preventative maintenance program.

**Management inspections:** Managers from senior management down to front line supervisors should all be tasked with the responsibility to inspect the workplace, and to identify potential hazards or concerns on a regular basis. The frequency of inspections should differ, depending on the rank of the manager. Front-line supervisors should literally be inspecting the workplace daily, local managers should conduct monthly inspections and senior management might conduct quarterly or annual inspections, depending on the size and complexity of the business. A standardized recording system and follow-up process ensures the inspections lead to the removal of hazards and the implementation of H&S improvements.

**Q: What is the first step in developing a health and safety program?**

**Answer**

A health and safety program typically starts with the employer’s health and safety policy. Depending on the jurisdiction, this health and safety policy may need to be reviewed at least annually, and be signed and dated by the employer’s senior site manager. The policy should specify the senior management’s commitment to health and safety. It may also outline in general terms the health and safety responsibilities of managers, supervisors, and workers.

The health and safety program itself should specifically detail how the employer will meet the commitments set out in the health and safety policy. (The specific level of responsibility will depend on the workplace.) The policy should include specific objectives that can be audited on a regular basis.
Every jurisdiction has provisions for outside workplace inspectors from the provincial government or workers’ compensation board. The inspector should be able to see the employer’s health and safety policy in a highly visible location. The inspector may ask to review the employer’s health and safety program, and ask for evidence that the program is being followed.

Following is an example of an employer health and safety philosophy statement that would appear in a health and safety policy.

**Sample Health and Safety Philosophy Statement**

Our Company recognizes the importance of promoting and maintaining a healthy and safe working environment for every employee. Each executive, manager, and employee has specific Health and Safety responsibilities that must be followed diligently. Everything we do must be done in a safe, healthy, and effective manner to ensure a healthy and injury-free environment.

We are committed to our Safety Improvement Process and Total Loss Control Program. Both of these have been designed to eliminate personal injuries and any losses resulting from fires, security, and damage to property.

Our safety policies and work practices comply with the Occupational Health and Safety Act and all relevant regulations, and are combined with the recommendations of our Joint Health and Safety Committee. Our supervisors are required to enforce these policies in a fair and consistent manner with employees, contractors, subcontractors, suppliers, and visitors. Each employee, by accepting employment with our Company, agrees to comply with these policies.

Any safety hazards or incidents must be reported immediately to a supervisor, whether or not the incidents result in personal injury, property damage, or a “near miss”. Our supervisors have been trained to be competent in all matters related to health and safety. They will investigate all reported incidents and hazards, and will ensure that necessary corrective actions are taken to eliminate the risk to employees, and to prevent a recurrence.

Any employee can become involved in our safety program by serving on the Joint Health and Safety Committee, or by suggesting how a job might be done more safely.

Safety is everyone’s responsibility, whether we are working in the plant or the office, travelling outside on company business, or pursuing activities off the job. This is the commitment of the Company to you and your commitment to the company.
Q: What are the elements of a successful safety promotions program?

Answer

Safety promotions take many forms, and include communication efforts that keep safety in the forefront of workplace discussions and reward programs that recognize safety efforts.

Communication plans should include the following:

- **Scoreboards**: Many organizations post the relevant safety statistics to let employees know how well they as a group are performing. A popular statistic is the "Days Worked Without a Lost Time Injury" (or "Without a Recordable Injury", or "Without a Vehicle Accident"). The score has proven to be a significant motivator in shaping employee behaviours. Other statistics that are commonly posted include accident frequency and severity.

- **Graphs**: In continuous improvement programs, the graphical depiction of process deviations (accidents, injuries) serve as a discussion point in team meetings. The incident and the rate of incidents can be used as focal points to discuss process issues and determine root causes.

- **Safety bulletins**: Some organizations circulate information bulletins when a critical injury or loss has occurred to heighten awareness of potentially fatal hazards. These may be generated from internal sources across divisions or from industry sources. Again, they can be used as a focus point in team meetings.

- **Team meetings**: In addition to *ad hoc* discussions regarding accidents and injuries, the team meeting format should be used to discuss safety topics monthly. The Supervisor can be given a script and other supporting materials (videos, PowerPoint presentations) to use as training tools to develop awareness around specific topics, such as lockout procedures, noise, fall protection, use of personal protective equipment, common workplace hazards, safety rules and an often overlooked topic, off-the-job safety. These topics can be preplanned and coordinated through the Health and Safety Coordinator or the Joint Health and Safety Committee to augment programming initiatives or to reinforce policies and practices.

- **Promotional materials**: There are many products available, like posters and newsletters, that can be posted in the workplace to visually create a safety-oriented look. The whole idea of the visual workplace has a significant
impact on building a safety culture. Signage warning people of potential hazards, bright yellow paint used to caution pedestrians in high traffic areas, designated travel routes and general housekeeping all serve to present an image of attention to safety that cannot be underplayed.

- **Rewards:** Providing rewards for safety can be problematic. In large organizations, rewarding a group for working safely, by virtue of not having had any recordable injuries, can be interpreted by those who have been injured as a punishment for being hurt. Moreover, some critics cite the fact that rewards might discourage employees from reporting injuries or making workers’ compensation claims. However, there is also evidence that rewards and recognition work as an incentive to keep employees focused on safety. Certainly, leading measures such as adherence to the Safety Improvement Process should be the basis for recognizing positive behaviours, however it is difficult to get any employee or manager not to focus on the “score”.

**Q:** What are some tips for conducting safety audits?

**Answer**

A safety audit is a measurement of the strengths and weaknesses of a workplace’s health and safety controls and management systems. Although safety auditing is not a specific legal requirement, it demonstrates a high level of interest in health and safety matters. Of course, the importance of auditing is amplified when conditions within the workplace change (e.g., when a new piece of machinery is introduced, a new worker is hired, a pre-existing worker changes jobs, a new operations process is initiated, etc.).

Auditing can be done internally, but for professional expertise, it may be preferable to engage the services of an external agency, such as the Industrial Accident Prevention Association, or a private safety consultant. There are a large number of single practitioners operating in the field of health and safety, and these individuals are able to offer affordable services, including auditing, for employers of all sizes. Also, standards such as the International Safety Rating System (commonly known as the “Five Star” system) can be used.

The basis for any Safety Improvement Process audit is documentation. Common elements to be evaluated include:

- management commitment;
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- planned safety inspections;
- accident investigation procedures;
- safety promotion activities;
- functioning of the Health and Safety Committee;
- job task analysis;
- job observations;
- engineering and purchasing controls;
- health surveillance programs;
- personal protective equipment; and
- housekeeping.

Each of these elements should be supported by a management system, and should be documented. For example, the procedure for conducting a proper accident investigation should be in writing, and everyone involved in an investigation should have received training. A record of who has received the training should be maintained. A regular assessment of the efficacy of the investigations should be conducted, and feedback should be given to those involved.

The role of management: A thorough auditor will want to ensure that management is not just paying lip service to the safety program. In order for the safety program to be successful, management must be completely involved. If management knows what is really going on and is willing to participate in the process, this is the clearest indication they can provide to show commitment to the health and safety of its workers.

The role of the health and safety committee: Members of the Health and Safety Committee ought to have an intimate understanding of the Safety Improvement Process. If they do not, this will be identified as a major area for improvement. One activity for the Committee is to implement the Safety Improvement Plan. Involving them in safety audits will help empower them so that they can become part of the solution.

Committee members often see themselves as self-appointed safety program critics. This is a legitimate role, and actually makes committee members a valuable source of information because they do not have the same bias as management. Management should not, however, fear that committee members will be negative or
destructive. As volunteers, committee members are usually motivated to help improve the processes. If they have previously been involved, they will take pride in what they have contributed.

Having a defined plan that identifies the important role played by the Health and Safety Committee is an excellent way to provide direction to its members, and to ensure they are focused more on proactive measures than on criticizing the organization’s shortcomings. Moreover, the management’s commitment to use an auditing tool (to identify shortcomings and to establish programming initiatives) can be a powerful signal to committee members that management is equally committed to making things better.

**The role of the worker:** The best and most important test of the Safety Improvement Process’s effectiveness is worker awareness. How good is a safety promotion campaign if it does not reach the workers? If there are documented safe operating procedures derived from Job Task Analysis, employees should be aware of where they are kept, and there should be evidence that they are being used. In preparing for an audit, do not replace that worn, fingerprinted binder of procedures with a brand new one the day before the audit. A few smudges only prove the binders are being read.

In order for the auditor to be thorough, he or she must also conduct a tour of the worksite. The auditor will want to see that people are wearing the personal protective equipment prescribed, and the auditor will talk to people on the floor to gauge their attitudes and observe how they work. The auditor will also want to comment on housekeeping in the workplace, as it reflects management’s real attitude toward safety. How well the workplace conforms to the old adage: “A place for everything and everything in its place” can only be measured through observation. The tour also lets everyone know that the audit is being conducted. It tells workers that management is concerned about their safety. It says to workers that “we, the management, want to hear from you”.

**Q:** What is required for an effective accident investigation?

**Answer**

Whenever an accident occurs, the very first step is to ensure anyone who has been injured receives proper medical treatment. The next, perhaps obvious, yet often overlooked, step is to review the immediate cause and ensure it is isolated, so no further injuries happen.
The scene of the accident or injury should be isolated and preserved, except where it is necessary to disturb the scene in order to assist an injured worker, or to prevent subsequent injuries from occurring. A second exception is when the nature of the incident or injury is minor, and the isolation of the work area will significantly disrupt production. This latter exception is subject to a manager’s judgment and can be problematic. It is not intended as a means to get around proper investigation techniques.

In fact, senior managers may be well advised to insist the area be isolated until the investigation has progressed, as a means of creating a sense of urgency and expediting the initiation of the investigation.

When should a supervisor start the investigation? Immediately.

When the site is isolated, the supervisor can take photographs or draw a diagram to capture the relevant details and question witnesses at the site. They can point to anything they believe may have been a causal factor. Once this is completed, and the sight has been made safe, work can resume (except in the case of critical injuries or fatalities where the Ministry of Labour may have to authorize the resumption of work).

Accident investigations require detail to be effective. Every bit of information should be gathered regarding the scene, time of day, environmental conditions and the people involved (the injured worker, co-workers and witnesses). Supervisors should remember that in most jurisdictions the worker representative from the Joint Health and Safety Committee has a right to participate in the investigation.

Once the sight has been inspected and the necessary evidence has been preserved (in the form of photographs, diagrams, descriptive reports) the scene can be cleaned up and returned to normal operations. The next step is to interview any remaining witnesses who were not interviewed at the scene. It is critical to an effective investigation to conduct these interviews as soon after the accident as possible. Otherwise, memories fade or become susceptible to influences that may alter them. Witness statements should be written out and presented to the witness for verification. This sometimes helps to stimulate the memory.

The investigation report is nothing more than a straight account of what occurred. The purpose is not to allot responsibility for the occurrence, nor to initially assess why it happened. This comes next when the information is assessed and the supervisor, along with anyone else he or she needs as a resource, attempts to determine the root cause. In many investigations, the supervisor merely reports what
was the immediate cause. For example, if an employee slips in a puddle on the floor, the immediate cause is the puddle. The root cause lies in why the puddle is there. The trick is to keep asking why until you have discovered a systemic issue that somehow failed to work in preventing the accident. This is going to take time and deliberate effort. Some techniques include recreating the accident conditions (this has to be done with extreme caution) and testing equipment forensically to find potential defects. The idea is to come up with potential actions which will improve the safety systems and proactively prevent recurrences.

Accident investigations are intended to get to the root causes of accidents and, thereby, eliminate hazards. Investigations are not, however, effective if no one follows up on them. A proper tracking of the follow-up is, therefore, an important part of the process.

Q: What are the reporting requirements when an accident occurs?

Answer

General legislation in Canada requires the employer to investigate and report to the governing ministry whenever an employee has been critically injured or a death has occurred. In some jurisdictions, this requirement extends to dangerous circumstances, such as when a fire or explosion has occurred, regardless of whether or not an injury has also occurred.

If a person has been killed or has suffered a critical injury at a workplace, or a dangerous circumstance has occurred, legislation prohibits any person from interfering with, disturbing, destroying, altering, or carrying away any wreckage, article, or thing at the scene of the occurrence or connected with the occurrence until authorized to do so by an inspector. The statutory exceptions are to:

- save a life or relieve suffering;
- maintain an essential public utility service or a public transportation system; and
- prevent unnecessary damage to equipment or other property.

If a person is killed or critically injured at the workplace, the employer is required to immediately notify an inspector, the Health and Safety Committee, Health and Safety Representative and trade union of the incident by the most direct means possible.

The term "critical injury" is defined to mean an injury of a serious nature that:
places life in jeopardy;
produces unconsciousness;
results in substantial loss of blood;
involves the fracture of a leg or arm, but not a finger or toe;
involves the amputation of a leg, arm, hand or foot, but not a finger or toe;
consists of burns to a major portion of the body; or
causes the loss of sight in an eye.

The various jurisdictions define critical injury differently. Some include the circumstance where an individual is hospitalized for a period of more than 24 hours.

Depending on the relevant legislation, the employer is usually required to submit a written report of the incident within 48 hours of the death or critical injury. The written report should contain the following information:

- the name and address of the constructor and the employer (or the person submitting the report);
- the nature and the circumstances of the occurrence, and the bodily injury sustained;
- a description of the machinery involved;
- the time and place of the occurrence;
- the name and address of the person who was killed or critically injured;
- the names and addresses of all witnesses to the occurrence;
- the name and address of every physician or surgeon, if any, who attended the injured person for the injury; and
- the steps taken to prevent a recurrence.

In some jurisdictions, the employer is required to file a report if a person is disabled from performing his or her usual work, or requires medical attention due to an accident, explosion or fire at a workplace (but no person dies or is critically injured because of that incident). This report follows a similar form to that which is required in the case of a critical injury or death, and should be submitted to the Joint Health and Safety Committee, Health and Safety Representative, trade union and the Director (if an inspector requires notification of the Director) within four days of the
occurrence. The same is required when an employer has been informed by an employee that he or she has filed a claim for an occupational illness with the appropriate workers’ compensation board.

Q: **What are the requirements for accommodating an employee who has been injured on the job?**

**Answer**

When an employee has been injured so seriously that he or she cannot continue at his or her regular work, employers must, as soon as is reasonably possible, obtain necessary medical aid or convey the employee to a place where he or she can receive medical aid. In a sense, workers’ compensation legislation provides a disability insurance system that accommodates employees for losses incurred as a result of workplace injuries by replacing part of their lost income, health care and other costs related to the work injury.

In addition, workers’ compensation legislation requires employers to facilitate an injured workers’ return to the pre-injury position, or to other suitable employment, as quickly as is practical. The worker must have been employed by the accident employer for a specified period of time prior to the accident (generally one year) before the employer is required to re-employ.

Similarly, human rights legislation prohibits employers from discriminating against an employee as a result of a disability and specifically prohibits discrimination against employees who have a claim for workers’ compensation. Both of these legislative regimes place on the employer a duty to accommodate the injured worker, provided such accommodation does not place an undue hardship on the employer.

While the definition of “undue hardship” remains unclear, a number of factors will be taken into consideration by tribunals and the courts in determining if the accommodation meets the test for undue hardship. These include such factors:

- financial cost;
- safety considerations, and the substantive impact on the safety of other workers;
- impact on any collective agreement, including seniority provisions; and
- impact on the company’s operations, including production quality and productivity (i.e., competitive position).
To facilitate return to work, the injured employee may participate in a vocational or physical rehabilitation program funded by the workers’ compensation board (WCB). A variety of rehabilitation programs exist, and determination of what programs are available to the worker depends on the jurisdiction.

All workers’ compensation boards may provide for physical rehabilitation and vocational rehabilitation to assist a worker to return to his or her employment, or to similar or suitable employment. This may include vocational testing, retraining or training. Some also provide for psychological services to help the worker overcome the personal consequences of the employment injury, and to help him or her adapt to the new situation.

Employers’ specific responsibilities for accommodating an injured employee are outlined as follows:

- Contact the worker as soon as possible after the injury.
- Maintain communication throughout the worker’s recovery and return to work.
- Re-employ the worker (subject to certain legislative minimums for organization size and the length of the worker’s employment).
- Attempt to provide suitable work that the worker has skills and qualifications to perform, is safe and within the worker’s physical capabilities and restores the worker’s pre-injury earnings as closely as possible.
- Provide the WCB/WSIB with any information requested about the worker’s return to work.
- Co-operate with the worker and the WCB/WSIB in the return-to-work process.

Injured employees also have the following responsibilities:

- Obtain immediate medical attention.
- Contact the employer as soon as possible following the injury.
- Maintain contact with the employer throughout their recovery and return to work.
- Assist the employer in identifying suitable alternative work that the individual is qualified and able to perform.
- Provide the WCB/WSIB with any information requested.
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- Co-operate with the employer and the WCB/WSIB in any return to work process.

Q: What are the elements of an effective modified work program?

Answer

Initiating a modified work plan for an injured employee begins immediately after the employee has reported that the injury has occurred. Obviously, the first priority is to ensure the injured employee gets whatever first aid or medical aid treatment is required. However, it is important to ensure the treating physician is also made aware of the organization’s policy on Early Return to Work initiatives and modified work programs. An effective way to do this is to develop a package for the injured employee to take to the doctor that contains a statement outlining the organization’s policies.

The package should also contain a form for the doctor to complete that outlines any restrictions from performing work the employee may have as a result of the injury. Often for ease of use by the doctor these forms are merely checklists asking the doctor what restrictions the employee may have with regards to typical activities, such as:

- lifting;
- standing or walking;
- sitting;
- bending;
- working overhead;
- climbing (stairs or ladders); and
- repetitive motions.

The organization may also ask the employee to sign a release to give to the doctor, so that an occupational health specialist can discuss the employee’s physical condition with the doctor. This ensures any work that might be provided is suitable and will not exacerbate the injury further. The doctor should also be asked to provide a prognosis as to when the employee may be able to return to full duties without restriction.
It is a good idea to ensure a supervisor takes the injured employee to seek medical attention, though many organizations experience cultural issues that make it difficult to do this. The thought behind this is that much can be accomplished in a very short period of time. First and foremost, it is a powerful way of communicating to the employee that the organization (and the supervisor) cares about his or her welfare. Second, the supervisor can, depending on the circumstances of the injury, use the opportunity to discuss the accident with the employee as part of the investigation. Third, the supervisor and the employee can jointly discuss the next steps with the doctor to ensure the proper course of action is chosen to enhance the employee’s rehabilitation.

The sooner the organization can get information, the sooner it can start the process of returning the employee to active duty. The primary purpose behind Early Return to Work programs and Modified Work programs is to complement the rehabilitation of the employee back to full health. The fact that the company can also mitigate the costs associated with the accidental injury is secondary.

Modified work can take many forms. The success of the program will depend on how well the organization prepares its supervisors in planning for such needs.

Modified duties may require the employee to get assistance in doing one aspect of his or her normal duties for a period of time. For example, the employee may need help lifting any object over a given weight. The assistance may come from help from others or through mechanical assistance.

Another possibility is that the employee may simply need to graduate back to full duties. This might entail being allowed to work a minimal number of hours each day for a short period, subsequently increasing the number of hours worked over time until the individual can assume normal hours of work. For the organization, this may mean having to carry an extra worker during this time to accommodate the employee’s inability to perform for a full shift.

In many instances, the employee may be fully capable of performing sedentary work for a period of time. This may require the organization to place the individual in an entirely different position for a period of time. Some organizations keep an inventory of possible projects an injured worker might be assigned to so they can use them in a productive fashion when the need arises. In fact, a common caveat to modified work programs is to avoid assigning injured workers to “make work projects”. They will resent the implication and see the program as nothing more than a means to cut costs. If the work is truly meaningful, and perhaps challenging, the employee may see it as an opportunity to make the most of a difficult situation.
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It is essential to involve the injured worker in all aspects of putting together the modified work plan. In some instances, employees may be reluctant to co-operate because they misunderstand or distrust the organization’s motives. This can only be overcome through a series of positive experiences. This is why the focus must be on doing what is right for the individual. All modified work plans should be documented, and reviewed at least once a week with the employee to ensure the goals and objectives of the employee’s rehabilitation are being met.

The most problematic aspect of modified work programs is the need to permanently accommodate injured workers. Commonly, the vast majority of injured workers merely need some form of short-term accommodation before returning to their full duties in the pre-injury positions. However, unfortunately, some employees are injured to such an extent that they can never return to full duties and may never be able to return to their former jobs. In these instances, the employer is required to accommodate the injured worker short of imposing undue hardship on the organization.

This may mean buying equipment that will assist the employee in performing the available work or retraining the employee to perform alternative work. The employer is not required to create a position that does not exist or to move the employee into a position he or she is not qualified to perform. Nor is the requirement to accommodate unlimited. If the costs of accommodating an employee are prohibitively high, or accommodating the injured worker results in increasing the risk to the safety of that employee, or others, the organization can escape its responsibilities.

Moreover, the workers’ compensation boards have long recognized that, despite the obligations placed on employers, there are circumstances where it simply does not make sense to push for a return to work with the pre-injury employer. Hence, the Boards run vocational rehabilitation programs to assist employees in seeking alternative employment. The employer should monitor these efforts and, wherever possible, offer assistance. However, it may come to a point where there is nothing more that the employer can do to help. Certainly, at this point the organization should seek either legal advice or advice from an experienced and qualified human resources practitioner.
Q: What is meant by frustration of contract in the employment context?

Answer

Under an employment contract, whether implied or expressed in writing, employees have the fundamental duty to attend work and perform their duties to a standard acceptable by the employer. Employment contracts are assumed to be long-term contracts unless they are defined for a specific term. Therefore, employers can expect employees will continue to perform their duties, including regularly reporting for work, over a long term.

However, some circumstances keep some employees from performing all their duties, at least in the short term. Employees get sick and are unable to work. This is not sufficient to be considered a breach of contract. Similarly, the contract remains intact when an employee is injured on the job and is unable to either attend work or to perform the full extent of his or her duties.

However, an employment contract is frustrated when an employee can no longer be expected to perform his or her duties, including attending work regularly. Before an employer is entitled to deem the employment relationship to be frustrated by a workplace injury, the employer needs to determine if the employee’s physical impairment is permanent. If the disability is transitory, and the prognosis for improvement is good, then the contract cannot be said to be frustrated. In the absence of a definitive prognosis the employer will have to rely on objective evidence, such as a significant time away from work without any sign of improvement in the employee’s condition. The usual rule of thumb is two years.

Even if the injury has resulted in a permanent disability, the employer cannot unilaterally deem the contract to be frustrated in performance unless it has made every reasonable effort to accommodate the employee’s disability, and is unable to do so without suffering undue hardship. Undue hardship includes considerations regarding costs, production productivity and quality, the safety of the employee and others, as well as the impact of accommodation on the collective agreement (if any).

When an employee loses his or her position because the employment contract has become frustrated in performance, he or she is not entitled to compensation (severance or notice). On the other hand, the termination should not affect the receipt of workers’ compensation benefits in any way.
Usually, organizations look at deeming employment contracts to be frustrated for “administrative” reasons. For example, internal controls might fix the head count allowed within a division and, therefore, employees unable to perform their duties need to be removed from the payroll listing in order to make room for replacements. In other instances the termination may simply signal an end to the organization’s efforts to continue to manage the case. While this may seem harsh to the injured worker, the reality is that management resources are limited and must be focused in areas where there is likely to be a return to the organization.

Q: What statistics should be kept to monitor health and safety performance?

Answer

Statistics on health and safety provide a foundation for the analysis of trends and root causes. They are also an excellent management tool for managing the safety experience through the setting of objectives. Notwithstanding, statistics represent trailing measures to be improved upon. A comprehensive safety program will focus more on leading measures that focus on proactive steps taken to prevent occurrences. Leading measures typically involve management audits of the Safety Improvement program.

The most common statistics kept are:

- injury/accident frequency;
- injury/accident severity; and
- days lost due to injury and workers’ compensation costs.

Injury frequency is usually expressed as the number of injuries per 100 employees.

\[
\text{Frequency} = \frac{\text{number of injuries} \times \text{total hours worked}}{200,000 \text{ hours}}
\]

Injuries can be defined in a number of different ways to yield different statistics. Injuries may include all reported injuries, or all injuries requiring medical attention from a licensed physician, or only those injuries that lead to lost time from work. Keeping all three is a good idea. Over the short term, management will likely want to focus on reducing the number of lost-time injuries through aggressive injury management programs, including Early Safe Return to Work programs (sometimes referred to as “gradual return-to-work programs”) and Modified Work Programs.
Other frequencies can also be calculated depending on the need of the organization. Organizations with large fleets often track the frequency of vehicle accidents expressed as a number per 1,000,000 kilometres driven, or another appropriate denominator.

Severity is an index of the days lost as a result of workplace injuries. In order to calculate this, of course, the organization will first have to keep track of the actual days lost due to workplace accidents. Some problems that occur in doing this include how to deal with claims in dispute and how to deal with days lost from prior years’ accidents.

In the first case, all claims should be included until there has been a final disposition of the claim by the WCB. Once a claim has been turned down the days lost can be backed out. In the second instance most organizations track days lost from current year accidents separately from those lost due to accidents occurring in prior years. The rationale for doing this stems from there being a greater probability that, through expedient interventions, management may be able to reduce the potential number of days lost. As time passes, the ability to reduce the severity decreases.

The severity index is simply the number of days lost per 100 employees. As with frequency, this statistic makes it possible to compare statistics across divisions or locations, and to compare statistics with industry competitors.

Severity = (number of days lost x total hours worked)/200,000 hours

More information is always better. Information that should be collected for future analysis might include the following:

- time of injury (time of day, day of week, month);
- conditions (temperature, humidity, housekeeping);
- location (specific machine, plant location);
- body part injured (head, right/left arm/leg, lower/upper back);
- type of injury (bruise, fracture, laceration, muscle strain); and
- cause of injury (fall, fall from height, struck by object, motor vehicle accident, contact with hazard).
Q: Why should near misses be investigated?

Answer

A “near miss” is an incident where an unexpected and undesired event occurs but no loss actually results. For example when a brick falls off a scaffold and lands on the ground, barely missing a passing employee, a “near miss” has occurred. Had the brick struck the employee or a vehicle, then the result would have been an accidental injury or loss. The difference is a product of luck.

As the saying goes, “safety doesn’t happen by accident”. Investigating near misses creates an opportunity to proactively uncover root causes, and to eliminate potential risks, without there having to be a precipitating loss. The logic is sound. However, the common view is that for every lost time or critical injury there are hundreds of near misses. This may pose a daunting task for many organizations that simply do not have the resources to investigate every incident that deviates from the norm.

An alternative is to quickly assess the risk potential in terms of severity and frequency, and to conduct fairly extensive investigations into incidents that are either highly likely to occur with regularity or those that have a high potential for resulting in a critical injury or other substantial loss. For example, if a machine was discovered unguarded during a routine inspection the observer might determine based on general knowledge and rules-of-thumb that the potential for serious injury is very high. It, therefore, is an incident that should be investigated to determine why the machine was unguarded. Of course, in such an example a stop work order must be issued anyway to prevent the equipment from being used until it is guarded properly.

In another example, a supervisor may get a report from an employee that two forklifts narrowly missed colliding with each other. Again, the potential for serious injury or damage is high. It, therefore, warrants a preliminary enquiry to determine if the incident was an aberration or if it was a common occurrence that has previously gone unreported. If it was previously unreported, failure to investigate may actually constitute a dereliction of responsibility. Not investigating the incident could be interpreted as a failure to take every reasonable step in protecting the health and safety of workers.

Ideally, every incident or near miss should be investigated to some extent. The first step is to establish mechanisms to ensure they are being reported. This requires significant effort because in many organizational cultures employees fear reprisals when they report incidents. Typically, when something goes wrong we look for
someone to blame, and it is often the one who reported the problem we look to first. It is essential in establishing a comprehensive safety improvement process to first look at process deviations as systemic failures, rather than as examples of individual misconduct or incompetence. It is also essential that management collectively accept that system failures are their responsibility to correct. Disciplining employees for anything other than deliberate culpable acts will not create a culture of safety first.

**Q: What are an employee’s rights to refuse unsafe work?**

**Answer**

Every worker covered by Canadian occupational health and safety legislation has the statutory right to refuse to perform work if it is dangerous or unsafe, without threat to his or her job security. Additionally, the statutory right includes a remedy to that worker if the exercise of that right results in employer reprisal.

Prior to occupational health and safety legislation, which provides workers with a statutory right to refuse to perform unsafe work, there were other legal means by which worker safety was addressed. For example, the common law placed a duty on employers to provide workers with a safe workplace. If an employer breached this common-law duty and injury resulted, a worker could sue his or her own employer for negligence. However, the majority of workers forfeited their legal right to sue their employer in exchange for guaranteed benefits under workers’ compensation legislation.

Collective agreements also protect the safety of workers. Workers, through their bargaining agent, can establish a right to refuse to do unsafe work in the collective agreement. However, this protection extends only to those employees who are organized. Furthermore, traditional safety legislation, which imposed a duty on workers not to work in contravention of the statutory prohibitions, was inadequate because workers did not have any power to enforce the legislation. Therefore, without a statutory right to refuse to perform work in unsafe conditions without fear of reprisal from the employer, there was inadequate protection to workers confronted with unsafe working conditions.

It is also arguable that at common law it was the right of an employee to refuse to perform work in conditions that were so dangerous as to be unlawful. In fact, that protection has proved illusory. First, safety laws and regulations might not cover the many kinds of situations that arise in different industrial settings. As a result, even though the law of master and servant might prohibit the discharge of an employee for
a refusal to perform work that is unlawful, the lines of illegality were often blurred and sometimes non-existent. Second, there was no ready, practical procedure by which a rank and file employee could vindicate his common-law right not to be discharged for a refusal to perform unlawful work. The time and cost of civil litigation to enforce that right effectively put it out of the reach of the very employees who most needed it.

Therefore, Canadian governments have enacted explicit statutes granting employees the right to refuse to perform any work they believe poses an immediate or imminent danger to their health and safety, or to the health and safety of others. In general, if a worker believes the work assigned is unsafe, he or she can refuse that work until the situation is corrected. The worker must tell his or her employer or supervisor immediately, and an investigation must be conducted. Additionally, the worker has the right to refuse work if a complaint about a workplace hazard has not produced a satisfactory result, or if the problem is urgent. The worker cannot be suspended, fired or docked pay for refusing unsafe work.

In Alberta and British Columbia, the right to refuse is actually a duty. That is, no worker is allowed to carry out unsafe work. With the right, workers are protected from discipline, discharge or prosecution if they refuse to work. With the duty, workers may be subject to discipline, discharge or prosecution if they fail to refuse to work.

Depending on the jurisdiction, the worker must have “reasonable cause”, “reasonable and probable grounds”, “reasonable grounds”, or “reason to believe” that the work is dangerous. The case law in the various provinces and territories reveals that a worker will be regarded as having reasonable grounds to believe a situation unsafe if, objectively, such reasonable grounds exist, and provided that there is no reason to believe that the worker was acting out of ulterior motives. If the reasonable grounds are not objectively demonstrable, then the worker may show, from his or her own subjective point of view, why he or she personally had reasonable grounds. In the final analysis, if the worker appears to be genuinely concerned about the health and safety risks of a particular situation, then that worker will be vindicated in using the right to refuse.

The purpose of the right to be free from employer reprisals is to protect workers from arbitrary discipline. In general, if a worker believes he or she has been dismissed, suspended, transferred or subject to a discriminatory measure or reprisal, or any other penalty for exercising his or her rights or functions under the applicable occupational health and safety legislation, he or she may file a complaint. An inquiry
will take place to determine whether the alleged contravention occurred. The burden of proof is upon the employer to prove that the worker was not unjustly discharged or disciplined before disciplinary action can be carried out. If it is determined that there has been a contravention, the employer can be, among other things, ordered to stop and reverse any sanction taken against the worker.

Workers are generally protected against reprisals for doing anything that is a legitimate health and safety activity, including:

- reporting problems to supervisors, the committee, the representative or the inspector;
- asking for information, training, protective equipment or investigations;
- being a committee member or representative and performing these functions; and
- refusing unsafe work.

Q: How should a work refusal be handled?

Answer

The specific procedure to be followed in exercising the right to refuse work is set out in the relevant provincial, territorial or federal legislation. In general, the worker reports the problem to a supervisor or other member of management. The supervisor investigates the circumstances of the refusal, in the presence of the worker and a member of the health and safety committee, the health and safety representative or anyone chosen by the worker. Either the problem is rectified or, if the worker still has reasonable grounds to refuse to work, a safety inspector or officer is notified. The inspector examines the problem in the presence of the worker and a Joint Health and Safety Committee representative, and then makes an order requiring the worker to return to work or an order requiring improvements.

There may be a right of appeal from an inspector’s order. There are variations in the different jurisdictions with respect to who may exercise the right of appeal, the time limitations for commencing an appeal, the remedies available on appeal and, in some jurisdictions, the existence of a second level of appeal.

In most jurisdictions, the health and safety legislation contains a provision to continue payment of the refusing worker. In addition, the worker is able to exercise
the statutory right to perform work in unsafe conditions without fear of reprisal from his or her employer.

In most jurisdictions, the employer is not permitted to assign another worker to perform the work that has been refused to be done by the worker unless the replacement worker has been informed of the refusal and the reasons for the refusal.

Unionized workers with a safety concern can check their collective agreement or speak to a union steward. If there’s a work refusal, collective agreements specify the steps to take in different detail than the occupational health and safety legislation. Unions bargain into collective agreements stronger safety standards and better enforcement mechanisms compared to the minimum standards in the law.

Q: **What personal protective equipment (PPE) is required?**

**Answer**

Personal protective equipment (PPE) includes any device or clothing worn or carried by an individual to protect the individual from exposure to a known or potential hazard. Examples of PPE include:

- hard hats or caps;
- safety glasses, goggles or shields (including welding masks);
- hearing protection (ear plugs or muffs);
- dust masks;
- self-contained breathing apparatus;
- protective vests;
- gloves;
- safety belts and lanyards;
- protective coveralls (including biohazard or chemical hazard suits);
- alarm or alert devices; and
- safety boots (steel-toed/soled shoes).

In some instances, the use of Personal Protective Equipment is prescribed by regulations. For example, under the *Workplace Hazardous Material Information Systems Act* employees must use the equipment specified by the appropriate Material
Safety Data sheet. Specific industry regulations will also dictate the noise levels under which ear plugs or ear muffs must be used.

In other instances, the use of Personal Protective Equipment is covered by the general provision that requires employers to take every reasonable precaution to protect the health and safety of workers. This translates into a requirement to prescribe rules on the use of PPE and to enforce those rules. There is no specific requirement to supply the PPE necessary. Hence, many employers require employees to supply their own safety shoes or other protective equipment. However, in specialized circumstances the employer should supply the equipment. As well, under most collective agreements there is some provision for the issuing of PPE or a cost sharing arrangement.

**Q: What is meant by engineered controls?**

**Answer**

Personal Protective Equipment is used to mitigate risk. For example, using ear plugs does not make the noise go away. Rather, it attenuates the impact of noise on the hearing organs and prevents damage. The preferred approach to improving safety is to engineer out the noise. If the equipment can be made to run more quietly, or can be isolated away from potential contact with humans, then the risk can be eliminated and not merely guarded against.

Machine guarding is another form of protective device. An engineered control would be along the lines of fail-safe devices that make it literally impossible for workers to come into contact with a dangerous element like a moving part.

Engineering out risks is not restricted to equipment. Materials that are free of toxins might be substituted for dangerous goods to eliminate the risk to humans, rather than requiring the use of masks and hazard suits. The idea is to use the power of engineering to eliminate hazards altogether.

Conversely, when the risk cannot be engineered out the organization has a duty to ensure the equipment and materials it uses in its processes conform to minimal standards dictated by regulations. Every organization should ensure that whenever it is introducing new equipment or materials a competent expert, often an engineer, reviews the specifications to ensure the equipment or materials conform not only to industry regulations and standards, but also to the safety standards of the organization.
Q: How should an organization conduct workplace inspections?

Answer

Workplace inspections happen at several different levels. One of the tasks of management is to coordinate these different levels, and to ensure the inspections are driving corrective actions and continuous monitoring of hazards or potential hazards. Workers and their supervisors are continuously in the workplace, and should be vigilant in keeping an eye out for any hazards. Organizations should establish practices where hazards are immediately reported, corrected and documented. These records can later be reviewed by management and the Joint Health and Safety Committee to analyse potential trends.

Each day, the supervisor should inspect the workplace using a checklist. Again, hazards that are identified should be immediately corrected. Other specific maintenance issues can form part of the checklist. For example, the supervisor may want to spot check pre-use inspection sheets on equipment to ensure these are being completed and completed properly. The supervisor may also want to check any logs to see what activities have been taking place. If a hazard was previously recorded, the supervisor can check to see if the corrective action was appropriate and prevented a recurrence. These checklists should be kept on file.

The Joint Health and Safety Committee is also tasked with doing a more formal monthly inspection. A checklist is again used to ensure critical elements are not overlooked. This might include ensuring firefighting equipment has been regularly inspected and maintained, and that other pieces of safety equipment (eye-wash stations, safety showers, Material Safety Data Sheet Stations) have been maintained. The list also serves as a tool to ensure routine items are specifically looked for. It is easy to sometimes overlook a common occurrence like a blocked exit way. Making this an item to look for ensures complacency is overcome.

In addition to these inspections, organizations that value safety typically require senior managers to periodically conduct their own inspections. This communicates to all employees that the management group does more than merely pay lip service to the notion of safety. This also demonstrates due diligence. It shows management has done more than merely read reports on what is happening on the shop floor. During these senior management inspections, it is a good idea to talk to workers and let them know precisely what is happening. Soliciting their views on health and safety lets management know if the “improvement process” is really driving cultural change, or if it is simply a paper tiger.
Q: What are the requirements for forming a Joint Health and Safety Committee?

Answer

A Joint Health and Safety Committee is an advisory group of worker and management representatives who meet on a regular basis to deal with health and safety issues. Depending on the jurisdiction, the committee may also be called the Workplace Health and Safety Committee (Federal), Joint Work Site Health and Safety Committee (Alberta, Northwest Territories and Nunavut), Occupational Health Committee (Saskatchewan), Workplace Safety and Health Committee (Manitoba) or the Health and Safety Committee (Quebec, Newfoundland and Labrador).

Health and safety committees identify potential health and safety problems and bring them to the employer’s attention. In particular, committees receive, consider and dispose of worker complaints relating to the health and safety of the workplace, establish educational and other programs for the workers’ protection, participate in health and safety-related inquiries and investigations, access government and employer reports relating to the health and safety of the workers whom it represents, and request from an employer whatever information it considers necessary to identify existing or potential health hazards at the workplace.

Health and safety committees are established by health and safety legislation. Depending on the jurisdiction, the establishment of a health and safety committee is either mandatory or subject to ministerial decision. Certain types of workplaces may be exempt from this requirement, depending on the size of workforce, industry, accident record or some combination of these factors.

Most Canadian health and safety legislation sets guidelines for organizing the committee, the structure of the committee, meeting frequency and the roles and responsibilities of committee members.

Most jurisdictions require that a health and safety committee be established in a workplace of 20 or more workers. The laws typically state that committees should consist of 2 to 12 members, and at least half of the members on the committee must represent workers who do not exercise managerial functions. Other jurisdictions permit the employer and the workers or union to agree on the appropriate number. Depending on the jurisdiction, the worker members of a health and safety committee are either elected by the workers or appointed by the trade union. The employer appoints the employer members to the committee. Chairpersonship of meetings is not specifically addressed in all Canadian jurisdictions. Where it is addressed, a sharing
of leadership roles between management and labour is a general requirement. Most often, there are two chairpersons, one representing management and one from labour, rotating roles at successive meetings. The required frequency of meetings varies across Canada, from once a month to every three months, to nine times per year.

Most jurisdictions require that minutes be written for all committee meetings, and that they be made available for inspection by the government safety officer or inspector. Some jurisdictions require that the minutes be posted in a prominent location at the workplace and that another copy be forwarded to the appropriate government office. Most governments provide their committees with minute forms to use.

Most jurisdictions require that employee members of the health and safety committee do not suffer economically because of the performance of their duties, such as listening to worker complaints, resolving complaints with supervisors, answering worker’s questions or attending educational functions.

Q: What is the role of the Joint Health and Safety Committee?

Answer

The powers, duties and functions of health and safety committees are set out in the occupational health and safety acts and regulations that apply to the particular jurisdiction. The legislation in each jurisdiction describes what minimally must be done. In most cases, this amounts to giving recommendations, keeping records, holding meetings and so on. But the legislation need only be a starting point, not the end point, for a committee determined to have an impact on health and safety.

For example, a typical list of committee duties appears in the *Canada Labour Code*, at subsection 135(7). Under this section, a Workplace Health and Safety Committee must:

- consider and expeditiously dispose of health and safety complaints;
- participate in the implementation and monitoring of programs for the prevention of workplace hazards;
- participate in the development, implementation and monitoring of programs to prevent workplace hazards, if there is no policy committee in the organization;
- participate in all of the inquiries, investigations, studies and inspections pertaining to employee health and safety;
participate in the implementation and monitoring of a program for the provision of personal protective equipment, clothing, devices, or materials, and, if there is no policy committee, participate in the development of the program;

ensure that adequate records are kept on work accidents, injuries and health hazards;

coop-erase with health and safety officers;

participate in the implementation of changes that may affect occupational health and safety, including work processes and procedures, and, if there is no policy committee, participate in the planning of the implementation of those changes;

assist the employer in investigating and assessing the exposure of employees to hazardous substances;

inspect each month all or part of the workplace, so that every part of the workplace is inspected at least once a year; and

participate in the development of health and safety policies and programs, if there is no policy committee.

In most jurisdictions, a worker member or delegate of the health and safety committee, is entitled to attend the inspections of the workplace by a government safety officer or inspector. In some jurisdictions, committees are also entitled to participate in the investigation of accidents at work that caused or could have caused a fatality or severe injury. Additionally, the health and safety committees have the power to participate in the resolution of situations where a worker has invoked the right to refuse work.

In general, health and safety committees in Canada exercise advisory powers only. Health and safety committees do not have legal authority to bind management by their decisions, to close down a particular operation or to stop management from introducing a particular substance, machine, or process. However, in Ontario, the Joint Health and Safety Committee has the power to make the employer accountable for its recommendations. Under subsections 9(20) and 9(21) of the Occupational Health and Safety Act, R.S.O. 1990, c. O.1, an employer who receives a written recommendation from a joint health and safety committee must respond in writing within 21 days; the response must contain a timetable for implementing the recommendations with which the employer agrees, and a rationale for any rejections of the committee’s recommendations.
Although the authority of health and safety committees is limited by the statutory or regulatory provisions that apply to their particular jurisdiction, the committee is not legally prevented from accomplishing things on its own. For example, if the consensus at a meeting is that the safety supervisor will change the content of the worker training program, and the supervisor is present and agrees, then obviously the decision does not need to go on to senior management for approval. The committee can effectively do whatever any of its members individually have the power to accomplish.

Q: What responsibilities does an organization have for the health and safety of contractors?

Answer

Under health and safety legislation, a company who contracts to have work done on its behalf is ultimately responsible for the health and safety of the workers who actually perform the work. This means that workers, even though they are not directly employed by the organization, have to be protected by the organization. The specific responsibilities are exactly the same as if these workers were employees.

It might be argued that an organization might take on a contractor precisely because the organization itself does not have the competence to oversee the performance of the work, and to ensure it is done safely. Nevertheless, it holds the legal responsibility to ensure the contractor is competent and that proper safety practices are in place and are followed.

Q: What steps are necessary for implementing a Contractor Safety Compliance program?

Answer

In order to ensure compliance by contractors, and anyone else who might be at risk (such as visitors to a facility) organizations should develop Contractor Safety Programs. The first step in the program is to develop a policy for compliance, and to ensure that policy is agreed to by the contractor as a condition of the contract. Specific penalties, including forfeiting the contract for serious breaches, should be put into the contract as a means to enforce the policy.

A common program element is to insist that all of the contractor’s employees who will be involved in the work undergo training on the organization’s health and safety policies and safety rules. The contractor’s employees will be required to
successfully complete the training and, thereafter, to carry a certificate of competence. In this way, anyone in the organization can periodically check to ensure the contractor’s employees are in compliance.

Another common element is to arrange for a pre-work conference, wherein the contractor goes over the methods to be used in the work processes to ensure safety. Once the methods are agreed to, in the case of complex contracts, periodic reviews may take place to ensure the agreed upon methods and guidelines are followed.

When safety is truly a priority, the organization can rely on any employee to keep an eye on the contractor’s employees. As a matter of policy, the organization may want to inform the contractor that it has empowered all of its employees to confront anyone who is not complying with its safety policies. This empowerment may extend to having the authority to stop work an employee believes poses a danger to himself or others. In extreme cases, the contractor may be expelled, or an employee of the contractor may be expelled, as a result of safety infractions. Certainly, an employee of the contractor who reports to work without the proper Personal Protective Equipment would be sent away. Under no circumstances would a contractor or his employees be allowed to circumvent a rule that the organization’s own employees had to follow.

It is also important to ensure that the organization is protected from liability. In some instances, a contractor may not be covered under workers’ compensation and, in addition to facing charges under the occupational health and safety legislation, the organization could expose itself to civil litigation. Hence, most organizations insist that contractors produce a certificate of compliance to show they have coverage under workers’ compensation, as well as evidence of additional liability insurance to protect the organization in the event that the contractor is found responsible for some form of negligence in performing the work.

If the work being performed is beyond the organization’s normal areas of competence, they would be well advised to seek independent advice to review the scope of the project and the methods to be used.
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