

Canada

Introduction

Employment relationships in Canada are, for the most part, governed by the applicable laws of the province in which the work takes place. While there are federal statutes that govern private sector employment relationships in Canada, their application is restricted to employment under, or in connection with, work that falls within the legislative authority of the Federal Parliament (such as banking and interprovincial transportation). Each province has also enacted a number of other statutes that, in some form or other, govern or influence the employment relationship.

Terminations

Restrictions on Employers

All jurisdictions in Canada have an Employment or Labour Standards Act that sets out minimum requirements in regard to employment terminations. In Canada, all employment relationships are contractual. Collective agreements with trade unions are the most common form of written employer-employee contracts. However, whether there is a union or not, or the employee is a common worker or president of a large company, his or her employment is pursuant to a contract. The contract may be written or unwritten.

If a contract is written, the employer and employee can agree to any provisions that are not in violation of law. Most of the provisions of the various Employment or Labour Standards Acts are required minimums and cannot be taken away from an employee by the provisions of an employment contract. A contract does allow the parties, however, to deal with many matters that would not otherwise be part of their arrangement or that might be treated differently if a clear agreement between the parties did not exist.

The advantage of a written contract is that it provides clear evidence of the agreement made between the parties. Employment contracts can deal with as many aspects of the relationship as the parties wish to specifically set out. In special circumstances, employment contracts can be detailed and lengthy documents. In most circumstances, though, such contracts are actually quite short and deal only with those matters that have often proven to cause problems.

Unless special provisions exist in the employment contract, employees can be terminated either with notice or for cause. What constitutes cause may be specifically outlined in the employment contract and is typically outlined in collective bargaining agreements. For example, a salesman may be required by contract to achieve a 10% annual increase in sales. The contract may also set out what period of absence from employment for any reason, or for certain reasons, constitutes cause for termination. In most cases, however, general rules as to what constitutes cause will be applied, including:

- (i) Dishonesty (in most circumstances);
- (ii) Intoxication, depending on the circumstances and the effect of the intoxication upon job performance;
- (iii) Illness, if it leads to so much absence that the employee is not fulfilling obligations (however, statutory requirements prohibit discrimination based on disability - see below);
- (iv) Insolence, depending upon the circumstances;
- (v) Incompetence (the employer must be prepared to show what level of competence was expected, that this level of competence was known to the employee as being expected, and that it was not met); and,
- (vi) A conflict of interest.

The employer's inability to continue the employment for economic reasons is not cause for termination without notice, nor is a change in methods of production or operations.

Reasons that might otherwise be sufficient cause will cease to be so if the employer has condoned the employee's conduct. Therefore, an employer cannot suddenly terminate an employee for insolence where that level of insolence had been tolerated many times in the past. An employer that has condoned certain employee actions in the past, but that does not wish to continue to condone those actions, must inform the employee of this change in advance. Condonation is a problem particularly where an employer wishes to discharge an employee for incompetence. In incompetence cases, the employer will usually have been found to have condoned the level of performance that the employee has been delivering. For example, where an employee has been doing the same job for years at the same level of performance, or where an employee has been given raises and promotions, it is difficult for the employer to allege incompetence, as the court will usually conclude that the employer condoned the employee's performance.

There are also actions employers can take that may be considered termination by a court even though the employer did not perceive them that way. These “deemed terminations” include circumstances in which an employee is required to move to another location (unless provided for in a written employment contract); a significant change in salary or benefits; a significant change in responsibilities or in reporting positions; demotions; or forced resignations. If an action is determined to be a deemed termination, the employee is entitled to reasonable notice or pay in lieu thereof as in any other non-culpable discharge. However, employees seldom pursue remedies in these circumstances, as doing so means giving up their job. The law of deemed terminations is set out in court decisions and continues to develop. Therefore, precise guidelines cannot be set out and employers must be alert to the problems that can develop if employees do not approve of such changes.

Notice Provisions/Consequences of a Failure to Provide the Required Notice

Any notice of termination must be in writing, and delivered personally to the employee or mailed by registered mail. In the absence of a specific contractual provision, Canadian courts generally require employers to give lengthy periods of notice of termination to middle ranking and senior employees. However, regardless of his or her position, every employee must be given “reasonable notice” unless the termination is “for cause.” If the applicable contract does not define “reasonable notice,” it is not unusual for the courts to impose a one-year period, and some courts have required a notice of termination period as long as 24 months. Often, a court’s decision is based on the length of time it believes the employee will need to find a similar job, considering the employee’s age, profession, experience, position, and length of service.

If the courts determine that the appropriate amount of notice has not been given, the employer must pay severance in its place. The pay required is the amount the employee would have earned during the notice period, including benefits and regular bonuses (discretionary bonuses are not included). However, the employee is under a duty to try to mitigate his or her actual losses. Accordingly, the employee must seek other employment and any income received from other employment would be deducted from the amount of severance owed by the employer.

Where an employment contract specifically sets out the required period of notice, the courts will accept the contractual provision unless it is considered to be unreasonable. For example, an employee who the courts may have found to be entitled to a 12-month

to 15-month notice therefore may be entitled to as little as a three-month notice pursuant to a written agreement. Contractual periods of notice therefore reduce costs to employers and make termination a more affordable solution when problems occur in the employer-employee relationship.

However, notice periods provided for in a written contract must be reasonable and, at a minimum, equal to the notice of termination required by the relevant Employment or Labour Standards Acts. Minimum statutory notice periods may vary between provinces, although many are similar to those in the Ontario Employment Standards Act. The Ontario Employment Standards Act bases the minimum required notice period for individual employees on the employee's length of service as follows:

<u>Length of Service</u>	<u>Notice Requirement</u>
3 months, but less than 1 year	1 week
1 year, but less than 3 years	2 weeks
3 years, but less than 4 years	3 weeks
4 years, but less than 5 years	4 weeks
5 years, but less than 6 years	5 weeks
6 years, but less than 7 years	6 weeks
7 years, but less than 8 years	7 weeks
8 years or more	8 weeks

Statutory notice requirements do not apply to certain categories of employees. These categories include workers who are:

- (i) Employed for a definite term or task for less than one year (having successive one-year periods does not preserve the exemption);
- (ii) Temporarily laid off;
- (iii) Guilty of wilful misconduct, disobedience or willful neglect of duty;
- (iv) Whose employment has been made impossible by an unforeseeable event, such as a plant burning down;
- (v) Employed in construction, alteration, repair, or demolition of buildings, roofs, sewers, water or gas mains, pipelines, tunnels, bridges, or canals, and certain related construction;
- (vi) Employed under a call-in arrangement where they can decide whether or not to work each time called; and,

- (vii) Of an established retirement age. However, most provinces prohibit mandatory retirement based upon age under their human rights legislation.

In cases where more than 50 employees are terminated at the same time, all employees are entitled to the same amount of notice. The required notice period varies with the number of employees being terminated. For example, under the Ontario Employment Standards Act, the requirements are:

<u>Number of Employees</u>	<u>Notice Requirement</u>
50 to 100	8 weeks
200 to 499	12 weeks
500 or more	16 weeks

In Ontario, the statutory notice period for mass terminations cannot begin until the Ministry of Labour receives a disclosure statement outlining, among other things:

- (i) The economic factors responsible for the pending terminations;
- (ii) The consultative process involving the employer, employees, and the community that is intended or in place to deal with the terminations;
- (iii) A statistical profile of each employee involved noting age, sex, occupation, and length of service; and,
- (iv) Any proposed adjustment programs to aid the affected employees.

The Minister has the authority to require that the employer participate in certain job relocation programs. Officials of the Ministry of Labour, the Ministry of Industry and Tourism, and the Federal Department of Human Resources Development will follow up the employer's notice to varying degrees, depending on the social and political impact of the mass termination. These officials may determine whether they can help the employer overcome any financial problems and thus avoid the terminations. At the same time, they will establish programs designed to help the workers find new jobs. These relocation programs can involve the participation of the employer, government representatives, and a third party, often a local businessperson. In certain circumstances, the employer may be asked or required to offset the cost of these programs.

In instances where 10% or less of the employees in an establishment are dismissed for reasons other than plant closure or reduced operations, only the individual

notice requirement applies. Special rules also apply to employers with seniority systems that allow for bumping rights, as contained in most collective agreements. In such cases, if bumping could result, the employer may post a notice as to who is being dismissed, setting out their seniority, job classification, and proposed termination date. This posted notice then becomes notice to anyone bumped.

Termination Indemnities

In Ontario, although not in most other Canadian jurisdictions, in addition to the requirement to provide notice or pay in lieu of notice, the employer must also pay severance if:

- (i) The employer has an annual payroll in Ontario of CA\$2.5 million;
- (ii) The employee has at least five years of service; or,

Severance pay is also required where more than 50 employees are dismissed as a result of the closure of all or part of a business. In such cases, the CA\$2 .5 million requirement does not apply.

Where the severance is initially considered a layoff, it will be deemed to be a dismissal if the lay-off period exceeds 35 weeks in a period of 52 consecutive weeks

The amount of severance pay required by legislation is one week's pay per year of service to a maximum of 26 weeks' pay. The formula also provides for partial years of service. For example, an employee with 10 and one-half years of service will be entitled to severance pay of 10.5 times his or her weekly wage rate. All periods of employment must be counted, even those followed by a break in employment. In order to meet its severance pay commitments in a manageable fashion, an employer may apply to the Minister of Labour for approval to make payments in installments over a maximum period of three years. Employees who resign after receiving a notice of termination are still entitled to severance pay, as long as the employer is provided with two weeks' written notice of resignation, and the last working day falls within the statutory notice period.

Employees who are rehired by the same employer within 13 weeks of termination are considered to have never been terminated in determining their length of service for the purpose of giving notice of termination at some future date. However, any

severance pay actually paid will be a credit against any future obligation. Special agreements may be reached with a trade union regarding an employer's severance pay obligations, in which case such arrangements govern in place of the Act's requirements.

Litigation Considerations

Until the 1960s, it was not unusual for a dismissed employee to take whatever the employer offered and find another job. Today, more and more employees discharged either for cause, or with what they believe to be too short a notice period or too little severance pay, are seeking legal advice and threatening to sue their employers. A large number of these cases are settled with the employer making an additional payment rather than risk the expense of losing a lawsuit. Settlement amounts are usually kept low as the employee typically has a similar desire not to risk losing a suit or having the stigma associated with suing a former employer.

Employers, therefore, must carefully prepare their strategy in a termination situation before communicating their decision to the employee. In some cases, especially where the dismissal of executives is motivated by economic circumstances, companies engage the services of specialised management consultants to assist in the dismissal and aid the employee in finding a new job. This discharges some of the company's moral responsibility to the employee and lessens any possible claim for damages as a result of the dismissal.

Employers considering discharging an employee for cause should also be aware that it can be very difficult to prove the existence of cause in court, particularly when there is no specific written contract to show inadequate performance. If incompetence or poor performance is the reason for the termination, the employer should be prepared to show that the employee was made aware of the standard expected and was warned about the consequence of failing to meet it. In order to prove these warnings in court, they should be in writing, along with an acknowledgement of receipt by the employee. If the employer intends to dismiss an employee for cause, the employer should start preparing for a lawsuit even before the employee is dismissed. It is important that the employer prepare evidence of the employee's failures as early as possible in the process. For example, supervisors and fellow employees with complaints against the employee should be told to record their complaints in writing. Documents regarding the employee's performance should be gathered, reviewed, and safely stored.

Employment Discrimination

Prohibitions on discrimination is one of the fastest changing areas of employment law in Canada. In recent years, Canada's appellate courts have been called upon to rule on such seemingly diverse issues as whether mandatory drug testing in employment relationships is permissible; whether government benefits that refuse to recognize same sex relationships are legal; and whether women are entitled to disability insurance benefits during normal pregnancies. Adjudication of these and other difficult legal questions shows no signs of abating in the foreseeable future. Additional recent developments in Canadian labour legislation include the introduction of compassionate care leave and benefits in some provinces and the elimination of mandatory retirement provisions in most provinces.

In Canada, jurisdiction over employment law, including human rights laws, generally lies with each of the provinces. In addition, the federal government has authority over industries that have a national significance, such as atomic energy, banking, broadcasting, airlines, and railways.

All provinces in Canada have detailed human rights statutes designed to protect employees from discrimination in employment on various grounds. These statutes contain some important differences, and therefore, care must be taken in reading them. Generally, however, most Canadian human rights statutes prohibit discrimination on the basis of race, colour, ancestry, place of origin, ethnic origin or citizenship, creed, sex, sexual orientation, age, record of offences, marital or family status, and handicap or disability.

Legislation also provides specific and expanded definitions for some of these terms. For example, under the Ontario Human Rights Code:

- “Sex” includes the state of being pregnant, thereby protecting pregnant employees from discrimination in employment on the basis of sex;
- “Handicap” generally includes any physical or mental impairment (some cases have held that an impairment must be chronic to qualify as a handicap, and thus the common flu has been held not to constitute a handicap under the Ontario Code), as well as injuries for which workers’ compensation benefits were either awarded or claimed;
- “Record of Offences” means a non-criminal conviction (e.g., careless driving) or a criminal conviction which has not been pardoned; and,

- “Age” is defined as over the age of 18.

Age discrimination is a growing issue in Canada as a result of changing demographics in the workforce. Canadian labour laws do not specify a mandatory retirement age for employees. In principle, older people have the right to be offered the same opportunities in employment, promotion and training as all other workers. Employers cannot refuse to hire, train or promote people simply because they are older.

In the Federal Jurisdiction, mandatory retirement is permitted. Specific laws differ across provinces but most provincial human rights legislation finds the practice of mandatory retirement discriminatory in enterprises under provincial or territorial jurisdiction. This is true in Alberta, Manitoba, Newfoundland and Labrador, Ontario, Prince Edward Island, Yukon, British Columbia, Saskatchewan, the Northwest Territories and Nunavut. Nova Scotia will prohibit mandatory retirement in 2009. In New Brunswick, the human rights legislation does not consider it discriminatory to terminate employment because of the terms or conditions of a *bona fide* retirement or pension plan. If there is no such plan, employees who are forced to retire can file a complaint for age discrimination under the human rights legislation.

In Quebec, a civil law jurisdiction, it is discriminatory to force an employee to retire because of age under Quebec labour standards legislation. The employee’s right to work beyond a certain age or number of years of service does not preclude an employer from dismissing, suspending or transferring an employee for good and sufficient reason.

Some specific occupations are also regulated by laws and policies that set an age limit. Also, under provincial human rights laws, there is no discrimination when there are *bona fide* and reasonable requirements for an employment or occupation.

In addition to being protected from discrimination, employees are also protected from harassment in their employment. “Harassment” is often defined as engaging in activity that the employer knows, or reasonably ought to know, is unwelcome. To be prohibited, harassment must be tied to a protected category.

Generally, legislation provides protection against discrimination for job applicants as well as employees. For example, the Ontario Code prohibits employers from discrimination in employment advertisements or applications. Employers are also prohibited from asking questions in job interviews that directly or indirectly discriminate against an applicant on prohibited grounds of discrimination. In Ontario, the Human Rights Commission has extensive policies on how it believes employers should prepare employment application forms and conduct interviews.

Canadian human rights laws define, and restrict, two types of discrimination: direct discrimination and constructive, or systemic, discrimination. Both types of discrimination are illegal, unless an employer can rely on certain limited defences. Direct discrimination occurs when an employer makes a decision because the person belongs to a protected group, such as not hiring a candidate because of his or her race or ethnic origin. Constructive, or systemic, discrimination occurs when a factor or condition exists that has the effect of discriminating against a protected category. For example, an employer operating a plant without a wheelchair ramp may be guilty of constructive discrimination should the absence of the ramp prevent a disabled individual from applying for a position. In this type of case, the employer may not intend to exclude disabled employees, but the situation has a direct negative impact on those employees. Human rights laws provide that individuals in these types of circumstances are entitled to the same protection they would have received had the prospective employer made a conscious effort not to hire them because they were disabled or otherwise belonged to a protected group.

Potential Employer Liability/Employee Remedies for Employment Discrimination

In cases of alleged discrimination, human rights commissions may take action. Human rights commissions have substantial powers to enforce and administer human rights statutes. Their powers include:

- (i) The ability to pursue complaints “on their own motion” (i.e., regardless of whether an individual or organisation files a complaint);
- (ii) The authority to fully investigate complaints, which includes the power to interview employees and other witnesses, require employers to provide access to personnel files and other documents, and to remove files for the purpose of copying them; and,
- (iii) The power to settle complaints.

If a complaint is adjudicated, adjudicators have substantial remedial authority, which is premised on putting a complainant in the position he or she would have been had the employer not breached the statute. This authority includes the power to order reinstatement of employees found to have been dismissed contrary to the statute.

Adjudicators also have significant authority regarding monetary remedies. In recent cases where employers were found to have terminated employees based on age, adjudicators have awarded damages to employees that were equal to what they would likely have earned in continued employment through to normal retirement age, including pay and benefits. Employers may also be subject to fines for discrimination. Provisions exist for monetary fines against individuals or organisations found to have engaged in particularly egregious violations of the law. Such fines are uncommon, however, and generally only result after a quasi-criminal conviction (e.g., the Ontario Human Rights Code requires the consent of the Attorney General of Ontario to pursue such an action).

Practical Advice For Employers On Avoiding Employment Discrimination Problems

In Canada, human rights laws generally provide employers with a defence to alleged employment discrimination occurring under certain limited conditions. The laws provide that employers may discriminate when the individual in question cannot perform the essential duties of the position in question (although employers must show that they have attempted to accommodate the individual's situation up to the point of "undue hardship"). For example, Section 17(1) of the Ontario Human Rights Code, which deals specifically with discrimination on the basis of a handicap, states that: "A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap." This type of defence is called a "bona fide occupational requirement" (BFOR). A BFOR permits discrimination where the requirement is necessary for the performance of the job, and the individual cannot do the job because he or she cannot perform the BFOR. For example, a delivery service may require a driver's licence as a BFOR for a delivery position. A blind individual could be legally excluded as a candidate for the position, subject to accommodation requirements, since he or she would not be able to acquire a driver's licence.

Human rights statutes do not typically define BFORs. However, there is a substantial body of case law regarding the meaning of the concept. In most cases, court decisions have shown that in order to successfully rely on a BFOR defence, an employer must prove it implemented the BFOR in good faith and that the BFOR was necessary for the efficient and economical performance of the job without endangering the

employee being accommodated, other employees, or the general public. Many courts have struggled to elaborate the components of this test. At a practical level, BFOR defences can be broken down into BFORs based on safety, economic considerations, and efficiency considerations.

To successfully use a BFOR defence, an employer must first establish that it accommodated the employee's situation up to the point of "undue hardship." In Canada, and particularly in Ontario, an employer must demonstrate substantially more than mere business inconvenience before it can satisfy its obligation to accommodate employees in categories that are protected from discrimination. Nowhere is this seen more clearly than in cases where employees claim that they have been improperly discriminated against on the basis of handicap.

For example, the Ontario Human Rights Commission has published a very extensive policy that sets forth the Commission's view on what employers must demonstrate to show undue hardship in situations requiring accommodation of employees with handicaps. Under this policy, an employer will not have demonstrated accommodation up to the point of undue hardship unless implementing particular accommodative measures would substantially affect the viability of the enterprise. To successfully show attempts at reasonable accommodation, an employer must demonstrate that it has carefully listened to the employee, evaluated the reasons for the requested accommodation, assessed the requested accommodation and its potential impact on the company and other employees, and attempted to find a solution to the situation.

Regarding age discrimination in Ontario, there is still a limited ability for employers to maintain a mandatory retirement policy for certain workers. Employers must justify such policies, by proving that:

- The policy is reasonably connected to the job function;
- The mandatory retirement policy is applied in the honest belief that it is necessary for legitimate work-related purposes, such as safety concerns; and
- The policy is reasonably necessary to accomplish the legitimate work-related purposes, even with accommodation of the mature worker to the point of the employer's undue hardship.

Sexual Harassment

Laws on Sexual Harassment

In Canada, all employees have a legally protected right to work in an environment where their dignity is respected and they are free of harassment. This protection is based on detailed and comprehensive human rights laws passed in each province, territory, or by the federal government. Most employees are subject to the human rights laws of the province in which they reside and work. However, employees who work in those sectors that fall within federal jurisdiction, such as banking, telecommunications, airlines, and railroads, are protected by the federal *Canadian Human Rights Act*.

The protection against sexual harassment can be found as a direct prohibition in the statute and in the anti-discrimination provisions of the various human rights laws. Several provinces, including Ontario and Quebec, as well as the federal government, have specifically provided in their human rights statutes that sexual harassment in the workplace is a human rights violation. For example, the Ontario Human Rights Code provides that every employee has a right to freedom from sexual harassment in the workplace by the employer, an agent of the employer, or by another employee. The Act also states that every person has a right to be free from:

- (i) Sexual solicitation or advances made by a person in a position to confer, grant, or deny a benefit or advancement to the person, where the person making the solicitation or advance knows or reasonably ought to know that it is unwelcome; or,
- (ii) A reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance, where the reprisal is made or threatened by a person in a position to confer, grant, or deny a benefit or advancement to the person.

In those jurisdictions where the statute does not contain a specific prohibition against sexual harassment, employees are still protected against sexual harassment by the provisions in each jurisdiction that prohibit sex discrimination in the workplace. Courts and tribunals in Canada have uniformly found harassment to be a form of discrimination and, therefore, sexual harassment to be a form of sex discrimination. In addition, Canadian courts and tribunals have been guided by certain statutory definitions of sexual harassment. For example, the Canada Labour Code defines sexual harassment as any conduct, comment, gesture, or contact of a

sexual nature that: (a) is likely to cause offence or humiliation to any employee; or (b) might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.

Sexual harassment is generally found to fall within two categories. The first, “quid pro quo” sexual harassment, is conduct between two workplace parties that makes the workplace intolerable for one of those two individuals. The second is sexual harassment created as a consequence of a “poisoned work environment.” Both can and often occur simultaneously.

“Quid pro quo” sexual harassment is any course of conduct or comment of a sexual nature that places or might be perceived to place a condition of a sexual nature on employment or on any employment opportunity. The second form of sexual harassment is more subtle and is described as a “poisoned work environment” in Canada (or in the United States, as a “hostile environment”).

A “poisoned work environment” is created by any course of conduct or comments of a sexual nature that is likely to cause offence or humiliation. A poisoned work environment includes leering or staring; displays of obscene posters; graffiti of a sexually explicit nature; sexually suggestive remarks or gestures; unwanted touching, patting, or pinching; and sexually degrading language.

Employee Remedies for Sexual Harassment

Where a person believes he or she has been a victim of sexual harassment, that person has the right to file a complaint with a provincial or federal administrative agency (Human Rights Commission), which has been established exclusively for the enforcement of human rights. Upon the filing of the complaint, the Human Rights Commission will investigate to determine the validity of the complaint and whether it will order a full inquiry into it. Where an inquiry is ordered and the complaint is verified, the victim can be awarded compensatory damages and restitution.

In Ontario, a new system has been introduced that will have the effect when fully implemented, to have all complaints heard by the Human Rights Tribunal. The role of the Human Rights Commission will be diminished and they will no longer investigate or determine the validity of complaints.

Victims can also receive compensation for “mental anguish,” which is akin to an award of punitive damages. In Ontario, mental anguish awards are capped at

CA\$10,000. In addition, boards of inquiry have broad authority to order anything that would achieve compliance with the law. Such orders may include reinstatement of a victim's employment, promotions, hiring, change of a victim's supervisor, implementation of workplace policies, letters of apology, etc. Victims who are in a unionized workplace may also have the right under their collective agreement to file a grievance alleging sexual harassment. An independent arbitrator would have the authority under the collective agreement to interpret and apply the human rights laws of that jurisdiction. A non-unionized victim of sexual harassment also may seek redress in the civil courts in the context of a wrongful dismissal claim. Although sexual harassment is not in itself actionable in the courts, a victim may seek punitive damages where the employer is alleged to have acted in bad faith in the termination of employment.

The majority of claims for sexual harassment are settled between the victim, employer, and Human Rights Commission without the necessity of formal inquiries.

Potential Employer Liability for Sexual Harassment

Employers are required to provide workplaces that do not discriminate and are free of harassment. Employers are, therefore, required to put in place measures to prevent sexual harassment in the work environment. An employer can also be held liable for the inappropriate conduct of its officers, supervisory personnel, and agents. This responsibility is the result of vicarious liability on the employer. The employer may also become liable for sexual harassment where the "harasser" is a non-supervisory employee or if the inappropriate conduct is of a customer or client if the employer becomes aware of the offending conduct but fails to take reasonable steps to bring it to an end.

Practical Advice to Employers on Avoiding Sexual Harassment Problems

In order for an employer to meet the strict statutory requirements to provide a work environment free of harassment, as well as provide a due diligence defence should a complaint arise, the employer must take positive steps and action in its workplace. The critical element in a pro-active workplace strategy is the development and implementation of a harassment policy. The purpose of such a policy is to demonstrate the employer's commitment to a harassment-free

workplace, educate employees on harassment issues, and advise employees on the consequences of engaging in inappropriate conduct. The essential elements of an effective and defensible sexual harassment policy will:

- (i) Include a statement of the employer's principles with regard to creating and maintaining a harassment-free work environment;
- (ii) Define sexual harassment;
- (iii) Identify the types of conduct that constitute sexual harassment;
- (iv) Include a commitment to take disciplinary action against harassers;
- (v) Provide an effective internal complaint procedure and a description of the steps to follow;
- (vi) Provide a commitment to respect the confidentiality of the complainant as much as possible; and,
- (vii) Provide a commitment to take immediate remedial action.

In addition, the employer must take steps to implement the sexual harassment policy, which includes employee training on the policy, distribution of the written policy to new and existing employees, inclusion of the policy in the employee handbook and posting the policy in common areas.

Particular Statutory Protections - Anti-Reprisals

There are a number of statutory protections that prohibit termination of employees for certain protected types of conduct. For example:

- Occupational Health and Safety legislation protects the right of employees to report unsafe working conditions;
- Environmental Protection legislation protects the right of employees to report offences, including “spills” of waste into the environment;
- Election Acts protect the right of employees to have certain hours free from work to cast a vote in an election.

There is also legislation specific to certain professions that protect their right to engage in certain types of conduct.