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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Labor Day Origins: Examining US And Canada Labor Laws

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Ryan H. Vann


Jeremy Hann

Labor Day is not only a day for barbecues, parades and end-of-summer activities, it marks the social and economic achievements of workers obtained through collective organizing. The holiday has a long history. In 1872, Toronto publishing workers marched to protest their long workday which they sought to reduce to nine hours. Ten years later, on Sept. 5, 1882, approximately 10,000 New York City workers held the first U.S. workers' strike — and first U.S. Labor Day parade — when they walked out of work and marched from City Hall to Union Square.

The idea of a "workingman's holiday" on the first Monday in September caught on in both the U.S. and Canada. Collective organizing also took hold as a means for protecting workers' rights in these newly industrialized countries. As we celebrate Labor Day this week, employers with global workforces should take note of the various ways unions and employers are required to work together to establish terms and conditions of employment. We outline below the current labor law framework in the U.S. and Canada along with recent trends.

The Current Landscape

US: Today, unions represent less than 7 percent of the U.S. private sector workforce.

The National Labor Relations Act establishes procedures for most private sector employees to engage in concerted activity, select and bargain with a representative of their choice for establishing the terms and conditions of their employment, or to refuse to participate in either activity. The NLRA applies to most private employers in the U.S. and is administered and enforced by theNational Labor Relations Board.

Canada: Today, unions represent about one-third of Canada's workforce.

Although labor unions and labor laws in Canada are largely based on the U.S. model, there are some key differences in the laws which are highlighted below. Labor relations in Canada are provincially regulated, with the laws varying by province, with the exception of employers in designated industries which are federally regulated. The law below is set out as for Ontario, which is the most populous of Canada's 10 provinces. Certain differences in other provinces are noted.

1. Certification

US: To be certified, a labor union must organize a majority of the employees in an appropriate bargaining unit. As a general rule, an appropriate bargaining unit consists of the employees at a single site of employment who have a substantial community of interest, but several recent decisions have illustrated the NLRB's willingness to entertain smaller and more exclusive units. Unions demonstrate they have majority support by obtaining (1) a majority of votes cast in an NLRB conducted secret ballot election, or (2) an employer's voluntary recognition of the union after proof of employee majority by signed cards or a petition, referred to as a "card check" process. Most employers choose not to use a voluntary card check process.

Canada: In most provinces a labor union must win a representation vote of all employees in an appropriate bargaining unit to be certified. Alternatively, an employer may also voluntarily grant recognition to a union in most provinces. The Labor Board will generally determine the appropriate bargaining unit by including all of the employees who share a community of interest in the unit.

Not all provinces have mandatory certification votes. In British Columbia, for example, the Labor Board will automatically certify a union if over 55 percent of the employees in the bargaining unit file membership applications. In Ontario in the construction sector, where greater than 55 percent of employees in the bargaining unit file membership cards, the union will be automatically certified. Where certification is granted without a vote, all employees of the proposed bargaining unit are subject to unionization regardless of whether the employee signed a membership card.

2. Representation Vote

US: To start the NLRB election process, a union or employee must file a petition with the NLRB, supported by the signatures of at least 30 percent of employees within an appropriate bargaining unit. If the signatures on the cards or petition are 30 percent or more of the employees in the unit, the NLRB will order a secret-ballot election, usually within two to three weeks of petition filing. If a majority of the eligible employees who actually vote, vote for union representation, the union is certified as the bargaining representative of the employees in the unit.

Canada: The Labor Board will order a representation vote when the union offers proof that a certain percent of bargaining unit employees are members of the union, typically by having those employees sign union membership cards. In Ontario, the threshold is 40 percent. If the employer challenges the union's assertions of percent support, the vote will be sealed pending a hearing to resolve the matter. The vote is held within a short time, within five business days in Ontario, after the Labor Board receives the union's application, unless the Labor Board orders otherwise.

3. Scope of Trade Union Rights

US: Once a workplace is unionized, employers must bargain with the union concerning "mandatory" terms and conditions of employment addressing wages, hours and working conditions. The employer is prohibited from dealing directly with any represented employee concerning terms and conditions of work. While the NLRA does not require a party to agree to a proposal or to make concessions, both parties must meet at reasonable times and confer in good faith in an effort to reach an agreement.

Canada: Once a union is certified, the employer is required to deal exclusively with the union regarding the terms and conditions of employment of those employees. The employer must meet with the union

and try, in good faith, to reach an agreement. Failure to proceed in good faith is an unfair labor practice, as is any attempt to deal directly with employees on such matters.

4. Collective Agreements

US: During the term of a collective agreement, an employer must abide by the contract terms and not make changes to terms and conditions of work unless the employer has been granted the specific right to act unilaterally in the written agreement or with union agreement. Many U.S. collective bargaining agreements contain evergreen clauses, which automatically extend the agreements for a one-year period unless one side provides a timely notice of termination.

Canada: Every negotiated collective agreement must be ratified by a union's membership before it comes into effect. Ratification occurs when more than 50 percent of those voting in a secret ballot vote cast their ballots in favor of the new collective agreement. Some union constitutions require a higher threshold. Collective agreements are usually established for time periods of one to three years.

5. Strikes and Lockouts

US: Economic leverage may be used by either party — on the one side a union strike or a work to rule campaign or on the other side a lockout by the employer while continuing to operate with supervisory personnel and/or temporary replacements. The NLRB, upon review, can order the parties to negotiate. An employer may permanently replace economic strikers but may not permanently replace unfair labor practice strikers. At the conclusion of a strike, an employer must reinstate striking employees upon their request. An employer which refuses to reinstate unfair labor practice strikers is subject to a backpay obligation. Similarly, an employer which does not reinstate economic strikers who have not been permanently replaced is subject to a backpay obligation. Unreinstated economic strikers retain the right to return to work permanently.

Canada: In Ontario, strikes and lockouts during the term of a collective agreement are prohibited. It is common for a provision restating this requirement of the labor relations legislation to be found in the collective agreement. A legal strike or lockout can occur after bargaining has taken place, a neutral government employee has failed in an attempt to assist the parties, and a waiting period has expired.

6. Unfair Labor Practices

US: Employees who work for most private-sector employers in the U.S. have the absolute right to act in concert even in the absence of a union. Accordingly, employers are prohibited (even if there is no union) from: (1) questioning employees about their union activities; (2) promising or implementing wage increases to discourage union activity or support; (3) threatening to close a plant or lay off employees to discourage union activity; (4) threatening employees with loss of benefits; (5) discharging, disciplining or taking any action against an employee because of his/her support for a union; and/or (6) restricting employees from talking or communicating with each other about gripes at work or terms and conditions of employment.

Canada: Most labor relations statutes contain a number of provisions designed to protect an employee's right to join a union and the union's right to organize and represent employees, free from employer interference. The legislation generally prohibits employers and their representatives and agents from: (1) interfering in a union's organizing campaign; (2) firing a person, or refusing to employ a person, because of their support for or membership in a union; (3) restricting a person's right to join a union;

and (4) intimidating, disciplining or in any way discriminating against a person because of his or her support for or membership in a union. Employer support of a trade union is also prohibited.

In certain provinces, including Ontario, the Labor Board has remedial authority to impose certification, as well as other broad remedies, on the employer where it can be proven that the employer has committed an unfair labor practice that is found to have interfered with the employees' ability to express their free wishes through a vote. Certification in this manner is usually reserved for the more egregious cases of employer interference.

On the Horizon

US: The NLRB (along with other federal agencies) has made clear its intentions to broaden the long-standing definitions of "employer" and "employee." Through a series of recent decisions, the NLRB has expanded rights to previously unrecognized employees and imposed liability and obligations to companies not previously involved in the statutory relationship, each of which centers on the control exercised by those companies.

First, the NLRB has aggressively pursued employer status in long-standing independent contractor relationships. Second, the NLRB is seeking to pierce the franchisor/franchisee relationship among many of the largest franchisors in the country. Third, the NLRB has targeted the use of employee staffing companies through joint employer liability. Fourth, the NLRB has expanded bargaining rights for those not traditionally represented, including temporary employees, as well as graduate students working for private universities.

Many of the cases remain subject to appeal and court decision, so the status of "employer" and "employee" will remain unknown for some time. What is clear, however, is that the NLRB is strongly focused on expanding the reach of labor rights and representation across sectors of the workforce where union representation has traditionally not been available, and is (or should be) giving companies pause when considering the optimal structure of their workforce.

Canada: In Ontario, recent amendments to labor relations legislation reflect the current Canadian trend of extending traditional labor law protections to certain special groups of employees that have not always received the full protection that most other more traditional unionized workforces are entitled to. This year, the Ontario government has granted firefighters new protections against unfair labor practices and introduced mandatory dues schemes for firefighters at the request of organized labor. The new laws also subject firefighters to new rules which allow for "closed shop" collective agreements. Finally, firefighters will now be able to take advantage of an expedited labor board-run arbitration/mediation procedure which can override grievance procedures in their current collective agreements.

Although today's employer-employee relations are not as tumultuous as those leading to the founding of Labor Day, these are revolutionary times for labor relations in both countries. For companies operating in the U.S. and Canada — the two founding countries of Labor Day — navigating the certification and bargaining process are important aspects of managing a global workforce.

—By Ryan H. Vann and Jeremy Hann, Baker & McKenzie LLP

Ryan Vann is a partner in Baker & McKenzie's Chicago office. Jeremy Hann is of counsel in Baker & McKenzie's Toronto office.