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Cross-Border Employment Law 101: Key Differences Between Canada and the U.S.

International Labor

Despite the close proximity and shared history of our nations, employment laws in Canada and the United States diverge on a number of important points. Employers with existing cross-border operations clearly need to be aware of these differences. But, they're not the only ones—hiring managers and business planners may also need to consider the new obligations before the company takes these on. The employment laws of the jurisdiction where the work is done will typically apply to the employment relationship. In this Bloomberg Law Insights article, Baker & McKenzie attorneys Jordan Faykus and Jeremy Hann highlight the key areas of divergence between U.S. federal employment laws and those of the Province of Ontario.

BY JORDAN FAYKUS AND JEREMY HANN

Despite the close proximity and shared history of our nations, employment laws in Canada and the United States diverge on a number of important points. Employers with existing cross-border operations clearly need to be aware of these differences. But, they're not the only ones—hiring managers and business planners may also need to consider the new obligations before the company takes these on. The employment laws of the jurisdiction where the work is done will typically apply to the employment relationship. Hiring an employee who works across the border can accordingly subject an otherwise domestic-only business to cross-border laws for that relationship. Hiring managers should be familiar with the applicable employment laws before extending an offer in such circumstances. Business planners should also understand the new obligations to fully assess a cross-border expansion decision.

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The key areas of divergence between U.S. federal employment laws and those of the Province of Ontario are highlighted below. Similar statutes and principles exist across Canadian provinces and therefore many of the differences outlined would be similar across Canada's various provinces.

1. Parameters of the Employment Relationship: Employment Standards

Most employees in the Province of Ontario are covered by the *Employment Standards Act, 2000* (ESA). The ESA (and similar legislation in other provinces) sets out hours of work, overtime, rest-periods, minimum wage and other minimum employment standards. Employers are prohibited from contracting out of these minimum standards.

U.S. wage and hour laws generally are controlled by the *Fair Labor Standards Act* (FLSA), a federal law that sets the minimum wage, hours of work and overtime rules. The FLSA and its corresponding regulations are enforced by the federal Department of Labor (DOL), and through private litigation. Many states and municipalities have enacted more stringent wage and hour

laws, particularly regarding minimum wage, rest-periods and overtime.

1.1 Working Hours

(a) Hours of Work and Overtime Pay. Hours of work in Ontario are generally limited to eight hours a day and 48 hours per week. Employees who work more than 44 hours in a work week are entitled to overtime pay for the time worked in excess of 44 hours.

In the U.S., on the other hand, there are no federal limits on the number of hours per day that an employee aged 16 years or older can work. Employees who are not exempt from the FLSA's overtime pay requirements, and who work more than 40 hours in a work week are entitled to overtime pay.

In both Ontario and the U.S., overtime pay is generally 1.5 times the employee's regular wage rate, although in Ontario the employee may be compensated by receiving paid time off work instead. There are exceptions to the overtime requirements in Ontario for certain professions, occupations and for employees whose work is supervisory or managerial in character. In the U.S., certain executive, administrative, professional, outside sales, and computer employees are exempt from the FLSA's overtime requirements. Also, in the U.S., state laws can provide more stringent exceptions to overtime, overtime premium pay based on hours worked per day, or higher premium pay calculations.

(b) Call-In Pay. Where an employee is ''called in'' to work outside his or her normal work schedule, or where an employee's hours are cancelled or shortened after the employee attends work, Ontario law requires that the employee be paid for at least three hours of work at the minimum wage rate. If the employee works for over three hours, he or she must be paid at the regular rate for the number of hours worked. Where, however, an employee is ''on-call'' but is not actually called in to work, he or she need not be paid for the on-call time.

In the U.S., the federal law requires non-exempt employees to be paid for all hours worked, including where the employee is ''called in'' to work outside his or her normal work schedule. Depending on the employee's terms of employment, and possibly the applicable state law, employers may be required to pay employees for a specific and/or statutory amount of time based on their schedule where hours are cancelled or shortened after the employee attends work. A different standard applies to on-call time as compared to Ontario. Where an employee is ''on-call'' but is not actually called in to work, he or she must be paid for ''on-call'' time where that time is controlled by the employer. The U.S. Department of Labor has released guidelines to identify situations in which employees should receive pay for being on-call. Generally speaking, if the employee is required to be physically at or in close proximity to the location of the employer's business, or must respond to calls so quickly that it restricts what an employee can do to a significant extent, he or she may be entitled to pay. These federal and state laws do not apply, however, to overtime exempt employees.

1.2 Vacation and Holiday Pay

(a) Vacation Pay. Every Canadian province has legislation that requires employers to provide minimum paid vacation time to employees. Under the ESA, employees in Ontario are entitled to two weeks' vacation, after one year of service and annually thereafter. They are also entitled to vacation pay in an amount equal to 4 percent of their annual wages earned in the course of the year in which vacation is accrued.

By contrast, most U.S. jurisdictions do not require employers to provide any paid vacation. Where an employer voluntarily assumes an obligation to provide employees with paid vacation, U.S. law does not generally mandate the amount of money that must be paid for vacation.

(b) Holiday Pay. In Canada, there are certain holidays on which employees are entitled to receive public holiday pay, whether or not they are required to work on those days. In Ontario, the recognized public holidays are New Year's Day, Family Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Christmas Day, and Boxing Day. Further, most Ontario employers voluntarily recognize the August Civic Holiday as a paid holiday. Employees may agree to work on these holidays but, if they do, in addition to public holiday pay, they must be paid at least 1.5 times their regular rate. Alternatively, the employee can be given a substitute day off with public holiday pay.

In the U.S., employers are not generally required to recognize paid public holidays, nor are they prohibited from requiring employees to work on a holiday. Although there are federal and state laws that recognize public holidays, they generally pertain only to government employees; however, it is common practice for private sector employers to close during these holidays and provide their workers with pay.

1.3 Leaves of Absence

(a) Family-Related Leaves. Employees in Ontario are entitled to up to 52 weeks of unpaid leave for pregnancy leave (17 weeks) and parental leave (37 weeks or 35 weeks if following a pregnancy leave). Other statutory unpaid leaves in Ontario include:

(i) Family Medical Leave, up to eight weeks in a 26-week period to care for or support certain family members suffering from a serious medical condition with a significant risk of death occurring in the same 26-week period;

(ii) Family Caregiver Leave, up to eight weeks per calendar year to provide care or support to certain family members suffering from a serious medical condition; and

(iii) Critically Ill Child Care Leave, up to 37 weeks in a 52-week period to care for or support a critically ill child of the employee.

Most employees in the U.S. are entitled to 12 weeks of unpaid leave in a 12-month period for:

(i) the birth or adoption of a child,

(ii) a serious health condition affecting the employee or certain members of an employee's family, or

(iii) qualifying exigencies involving military duty.

The FMLA also allows up to 26 weeks' leave for em-

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ployees whose certain family members are seriously injured while on active military duty.

In both Ontario and the U.S., the leaves are job-protected but generally unpaid. Most employees are eligible for government or employer insurance benefits during the leave. At the end of the leave, the employee is generally entitled to be reinstated to his or her pre-leave position, if it still exists, or to an open comparable position, if the pre-leave position no longer exists. Further, employers cannot penalize an employee in any way because he or she is eligible to take or has taken a statutorily permitted leave. Length of service requirements and certain other criteria may need to be met for eligibility.

(b) Illness and Disability Leave. The ESA also provides for a Personal Emergency Leave of up to 10 days of unpaid, job-protected leave each calendar year due to illness, injury and certain other emergencies of either a personal nature or related to certain family members. Employers are also generally required to accommodate absences and the individual needs of employees with disabilities to the point of undue hardship under the Ontario *Human Rights Code*. Undue hardship is a very high threshold to meet—it is a much higher threshold than the comparable concept in the U.S.

In the U.S., the family-related leave law generally governs leaves for illness or disabilities. Beyond those statutory entitlements, the federal *Americans with Disabilities Act* (ADA) governs workplace accommodations for persons with disabilities, including leaves of absence. Under the ADA, employers with 15 or more employees are required to provide reasonable accommodations for a disabled employee where the accommodation enables the employee to perform the ''essential'' functions of the job, and is not an undue burden to the employer. A reasonable accommodation may include reassignment or temporary unpaid leaves of absence. State and local laws may provide for additional unpaid and paid leaves for employee or family member illness.

2. Workers' Compensation Insurance

Each province in Canada has enacted workers' compensation legislation. In Ontario, this is the *Workplace Safety and Insurance Act, 1997* (WSIA). The WSIA establishes a public workers' compensation insurance regime for which most employers in Ontario are required to register and pay premiums, calculated as a percentage of insurable earnings, which percentage is determined on the basis of the employer's rate class (i.e. industry risk profile).

Similar to Canada, most states in the U.S. have also enacted workers' compensation legislation. Most state laws establish or require an insurance regime for employers, which generally require insurance premiums, or some fund from which an employer pays for the wage replacement benefits, medical care, vocational rehabilitation, and other benefits to employees injured on the job.

3. Employment Insurance

In all cases, employment insurance (EI) is a federal matter in Canada. EI benefits provide employees with a temporary income replacement as a result of employment interruptions due to without cause terminations, work shortages, sickness, non-occupational accidents, maternity leave, parental and adoption leave, and family medical leave. EI is financed through employee and employer premiums.

In contrast to Canada, there are separate state and federal employment insurance benefit regimes in the U.S. for employees who are unemployed due to non-cause dismissals (unemployment insurance), and those who have employment interruptions due to sickness, disability, or parental or family leave (family leave, disability or social security insurance). Most of these benefit programs are financed through employee and employer payroll tax and withholding regimes, and are administered by state agencies.

4. Terminating the Employment Relationship

In Canada, the common law requires that an employer must provide ''reasonable notice'' of termination to an employee, or pay in lieu of such notice, unless the employee is terminated for cause or the employment contract specifies otherwise in an enforceable termination provision. Cause has been very narrowly defined and is often difficult for employers to establish. Reasonable notice depends on a number of variables and seeks to reflect the amount of time that the dismissed employee will require to find comparable alternate employment. Where reasonable notice is not provided, the employer will be liable in damages. Damages typically encompass all compensation and benefits the employee would otherwise have received had he or she worked through the notice period. However, employees are obligated to mitigate their damages by seeking reasonable alternate employment and taking such employment if offered.

The ESA also provides certain minimum standards for notice, which are usually significantly less than the common law entitlement, and range from one to eight weeks, depending on the length of service. The statutory notice period may increase if the employer dismisses 50 or more employees. The ESA also sets out obligations relating to severance pay, which arise in specific situations.

In the U.S., unless otherwise modified, employment generally is ''at-will'', and employment generally may be terminated without cause or notice, subject to certain exceptions (e.g., employment contracts, collective bargaining agreements which often require ''just cause'' for termination, and non-discrimination laws). Federal law also generally requires employers with 100 or more employees to provide 60-days' advance notice of covered plant closings and mass layoffs. Various states have similar notice requirements.

Canadian and U.S. Cross-Border Employment Considerations

It is important for both companies with existing cross-border operations and those contemplating hiring one or more employees to work across the border to understand cross-border employment laws. Where an employee works across the border, the employment agreement must be drafted to comply with the laws of the governing jurisdiction (as mentioned above, in most cases this will be the jurisdiction where the work is done). Many employers also seek to limit their employment law obligations to the extent possible and this can only be accomplished with a sound understanding of the legal framework of the governing jurisdiction.

A more complicated situation arises when an employee works for an employer on both sides of the U.S./Canada border. In such cases, both U.S. and Canadian law may potentially apply. Generally, an employer should consider where the employee will ultimately work and reside (the U.S. or Canada) and for how long, and consider which laws the employer and employee will want to apply. U.S. law is generally more flexible, however a Canadian-based employee may prefer to have Canadian employment protections. These issues should be considered and the terms of employment and the governing law should be set out in a written agreement between the parties before an employee begins a cross-border assignment. For long-term re-assignments, employers should consider entering a new agreement that contemplates that the re-assignment will be subject to the laws of the jurisdiction of the re-assignment. Other employment structures can include a temporary secondment or assignment, or a joint employer relationship with a third party or related employer. As with many areas of law, employment laws are constantly evolving. It is therefore necessary to ensure that the current state of the law is considered.

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