Cross-Border Employment Relationships: Key Considerations For Employers With Extra-Provincial And Foreign Employees Or Candidates

written by Tina Tsonis | September 19, 2022

Overview

The COVID-19 pandemic has posed a number of novel challenges for employers. Terms like the "Great Resignation" or the "Big Quit" – a trend of employees voluntarily leaving their jobs in light of return-to-office mandates, amongst other issues – have become common parlance. Subsequently, employers in many, if not all, industries are reporting labour shortages, retention challenges and increasing demand from employees for flexible working conditions.

In response to this retention challenge, some employers have opted to establish (or preserve COVID-related) flexible work arrangements that, in turn, allow employees to reside and work from a different province than the employer's physical establishment. United States and Canada cross-border relationships are also becoming increasingly common.

To support working arrangements where multiple jurisdictions are involved, employers must adopt certain practices, such as preparing or updating appropriate employment agreements, buttoning up policies, and adjusting payroll processes according to the relevant provincial and federal employment regulations and standards. To assist with such considerations, below we note some of the main differences in employment legislation and related obligations across provinces, and as between Canada and the United States.

At-Will Employment

American employers will be familiar with the term "at-will employment," which enables an employee to be terminated without just cause, notice, or pay in lieu of notice. In Canada, there is no at-will employment, and terminations for just cause provide the only exception to requirements around statutory notice or pay in lieu of notice (and in Ontario, severance pay).

It should also be noted that not all "just cause" terminations exempt employers from having to provide minimum statutory entitlements on termination. For example, in

Ontario, an employer must demonstrate that an employee engaged in "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer" to be exempt from providing statutory notice and severance – a high threshold set out in the *Employment Standards Act, 2000* (the **"ESA"**) that is not easily met by what many may believe, on its face, constitutes just cause.

Changing Terms and Constructive Dismissal

As a result of at-will employment in the United States, employers can make unilateral changes to an employment agreement without the risk of a claim of constructive dismissal. Such a claim is centred on the argument that the terms of employment have been alerted in such a way so as to signal that the employer no longer intends to be bound by the employment relationship, and corresponding entitlements akin to a without cause termination. In Canada, significant changes to the terms of employment can typically only be changed if the employer provides reasonable notice or "consideration" – a legal term that means something in exchange – for example, an increase in pay or a bonus.

Fundamental changes to an employment agreement that may constitute a constructive dismissal can include demotion, material salary decreases, and changes in working conditions. In a post-COVID world, the most often asked question has been: can a return-to-office mandate for employees previously permitted to work from home due to the pandemic qualify as a fundamental change?

In a pre-pandemic case,*Hagholm v. Coreio Inc.*, 2018 ONCA 633, the Ontario Court of Appeal held that an employee previously working from home three days a week was constructively dismissed when required to attend at the office full time. This unilateral change amounted to a constructive dismissal. However, the employee had been working under the same arrangement for 22 years, on the terms that were negotiated at the time of their hiring. This is quite apart from employees mandating return-to-in-person work that was previously the norm and/or expectation. How the case law surrounding this issue will be interpreted within a pandemic context is yet to be seen, but it is recommended that employers plan ahead and provide their employees with as much notice as possible for changes in work arrangements, such as a return-to-office mandate.

Temporary Layoffs/Furlough

In Canada, employees cannot be temporarily laid off ("furloughed," in U.S. terms) from their jobs absent a provision in their employment contract or collective bargaining agreement conferring this right on the employer. This is notwithstanding any statutory "rules" around temporary layoffs regarding their permitted time frames or other conditions to be met; the employer must have contracted with the employee to be able to do this. If an employer temporarily lays off an employee without a contractual term allowing them to do so, this amounts to a unilateral change in the terms of employment, creating the risk of a constructive dismissal claim by the employee.

Furlough, in contrast, is an option available in the United States and is defined as a temporary leave of absence from work ordered by an employer. Employees can be put on furlough without consent if there is a qualifying legal basis, such as saving the company from insolvency. Normal economic risks, such as a decrease in sales or increased costs, are usually insufficient grounds to furlough an employee.

While in Canada, the employment contract is the source of the right to temporarily lay off an employee, the employment contract can be a source of limits on the pre-existing right to furlough in the United States. It is advised that employers review

individual contracts prior to implementing either form of temporary leave, and seek advice from their legal counsel.

Restrictive Covenants

Restrictive covenants such as non-competition, non-solicitation, and non-disclosure clauses are governed by common law in Canada, with the exception of Quebec which uses a civil code akin to some European jurisdictions.

While broad non-competition clauses in employment contracts are enforceable in the United States, they are almost always unenforceable in Canada as they are regarded as a restraint on trade or a person's ability to make a livelihood. Canadian courts will, on occasion, enforce non-competition clauses where the restriction is reasonable in its temporal and geographical application and can objectively be shown to be necessary to protect the employer's legitimate business interests.

An illustration of the degree of restrictions is the recent amendment to the ESA in Ontario, which now fully restricts employers from entering into an employment contract that includes a non-compete clause, other than with an executive, C-suite employee, or in the context of a sale of a business. Contravention of this provision will result in the clause being excised from an otherwise valid agreement.

Overtime Eligibility

In the United States, an employer can contract out of overtime eligibility with their employee. This is not the case in Canada, where employment standards legislation such as the ESA prescribes overtime eligibility to most employees, with the exception of management and certain high-skill roles such as engineers and lawyers. How overtime is calculated varies by province, but as a general rule, employees are entitled to 1.5 times their normal pay for work beyond the regular 40-44 hour workweek. Whether an employee is paid hourly or is salaried is not a factor in determining eligibility for overtime pay, which is a common misconception.

Privacy Laws and the Right to Disconnect

Generally speaking, Canadian privacy laws have expanded in recent decades and now carry serious implications regarding private and confidential employee information, data collection, and employee monitoring. For more information on employee monitoring developments in Ontario, please consult our recent guidance.

One contemporary development of note, which is perhaps the most outward response to pandemic-era work shifts, is the Ontario government's recent amendment to the ESA, requiring employers to develop a "written policy on disconnecting from work." The content of this policy is not meant to create a new right for employees to disconnect, but, rather, a written set of expectations surrounding disconnecting from work. Detailed guidance on such policies can be found here.

Tax Implications

Throughout the pandemic, there have been increasing examples of United States companies hiring Canadian employees, but not requiring them to relocate to the United States, either on a temporary or permanent basis. While there are benefits to casting broader geographical talent nets, or to confront COVID-era issues such as lack of office space, there are also tax implications to be mindful of when hiring cross-border candidates, a category that includes out-of-province employees.

Source Deductions and Withholding Rules

In Canada, the amount of mandated payroll deductions varies by province. The provincial tax regulations an employee is subject to is determined by the location of the establishment where they report to work. If an employee works entirely remotely, then they do not report for work at an establishment and the withholding rules are dictated by the location from which they are paid; this is usually the location of the business's payroll department. In the case of hybrid models, the Canada Revenue Agency ("**CRA**") has issued an administrative policy clarifying how to determine an employee's place of work for withholding rules: if an employee has a "recurring" presence in the office, usually considered a weekly presence of at least one workday, the establishment's province will dictate the applicable withholding rules. In contrast, where an employee has a presence that is less than weekly, the location of the employer's payroll department or payroll records will be determinative.

In general, employers should be aware of the residency status of their employees so that they can ensure the appropriate tax obligations are met. However, Canadian employee source deductions, as well as reporting obligations, apply to an employee who performs services in Canada, regardless of their residency status or that of their employer. If a tax treaty applies, the employer may qualify for relief if they submit the appropriate waiver to the CRA (the U.S. equivalent of the Internal Revenue Service).

Tax Returns and Reporting

Activities carried on by a Canadian employee, in Canada, on behalf of a United States employer can be considered as "carrying on business" in Canada, and the employee could be regarded as a permanent establishment of the employer in Canada, depending on the nature of those activities. If the United States employer is carrying on business in Canada, the employer will be required to file tax returns in Canada and its business profits may be subject to Canadian taxation, subject to certain Canada-U.S. tax treaty exemptions. Among other reasons, this may warrant a discussion with corporate counsel regarding establishing a Canadian entity and having any employment agreements reviewed to ensure they are enforceable in the employee's primary place of work.

Help Agencies and Foreign Workers

For American businesses expanding into Canada, temporary help agencies can be a useful mechanism to scale growth in a new market. When used correctly, the temporary help agency assumes the role of employer so that the client – in this case, the United States business expanding into Canada – has no employment-related obligations or liabilities with respect to the temporary workers retained. However, the use of temporary help agencies is not without risk.

The first risk to consider is regulatory. Prior to enlisting the assistance of a temporary help agency in Canada, businesses should ensure the agency satisfies the appropriate licensing requirements, which vary by province. For example, British Columbia, Quebec, and Alberta require temporary help agencies to be licensed to operate within their respective province. In Ontario, the recently enacted *Working for Workers Act, 2021* will require for the first time the licensing of temporary help agency and recruiters. The new statutory provisions, which will amend the ESA, have not yet come into force. The Government of Ontario has signalled the licensing requirements are expected to come into force in 2024.

The Government of Ontario is also proposing to hire a dedicated team of officers to crack down on temporary help agencies and recruiters who are exploiting and trafficking domestic and foreign workers. Under the new licensing provisions, penalties could be issued against unlicensed agencies and recruiters, as well as the

clients who use them, with proactive inspection measures to ensure compliance with applicable requirements. The Director of Employment Standards will maintain a public record regarding licence status. Although the Director will have discretion to decline licences to applicants on reasonable grounds, the actual licensing process and criteria will be based on regulations which have not yet been published.

The second risk to consider is the common employer doctrine, which recognizes that an employee may simultaneously have more than one employer if more than one entity in fact controls the working relationship. Therefore, even if a temporary help agency is the sole employer for the purposes of employment law statutes, the common law may still impose employer obligations on the client. In the decision of *O'Reilly v. ClearMRI Solutions Ltd., 2021 ONCA 385*, the Ontario Court of Appeal stated that the common employer doctrine only applies if evidence establishes an *objective* intention by the parties to create an employment relationship between the individual employee and the related businesses. Mere allegations of corporate affiliation are not sufficient to bring the common employer doctrine into play. In practical terms, the longer a temporary placement is with a client, the more that worker will likely be integrated into the client's operation. If the placement extends for years, the client will likely assume total control over the employee's working conditions, training, supervision, and compensation increases. As such, the case for common employer becomes stronger.

Foreign Workers

Immigration is central to the Canadian economy and workforce. In 2021, Canada welcomed more than 400,000 new permanent residents – the highest single-year total in the country's history. In light of the aging population and the volume of Canadian workers in retirement, immigration already accounts for almost all net labour force growth in Canada.

The pandemic exacerbated an already tight labour market. Many employers look to foreign workers because Canadian citizens and permanent residents, who are legally entitled to work in Canada, cannot fulfil their personnel needs.

Despite the need for foreign workers, there are regulatory hurdles that employers must satisfy. Most employers require a Labour Market Impact Assessment ("**LMIA**") before they can hire a temporary foreign worker. An LMIA confirms: (i) there is a need for a temporary foreign worker; and (ii) no Canadians or permanent residents are available to do the job. However, employers can leverage LMIA exemption codes or work permit exemptions. The application of either form of exemption is highly technical and advisement by local immigration counsel is recommended.

The Government of Canada does have an Express Entry system for high-skilled foreign workers. As part of this process, the government supports high-skilled foreign workers, based on their potential to become economically established in Canada and to assist employers to meet their skilled labour shortages. Employers who wish to hire skilled foreign workers and support their permanent resident visa application can do so through the Immigration, Refugees and Citizenship Canada Express Entry system. Criteria for involvement in the program includes language ability, work experience, and a valid job offer for full-time employment or certificate of qualification in a skilled trade.

Employers should appreciate that once regulatory hurdles are cleared and the foreign national is working in Canada, both federal and provincial laws provide protections for those workers. For example, in Ontario, the *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009*(the "***Foreign Nationals Act***") prohibits recruiters and employers from exploiting foreign nationals by engaging in

unlawful practices, including but not limited to the following:

- charging the foreign worker any fees for the recruiter's services;
- deducting wages for the recruiter's services;
- leveraging the services of another recruiter that is known to have charged an unlawful fee;
- taking possession of any property or documents the foreign workers are entitled to possess;
- intimidating or penalizing foreign workers for asking about or asserting their rights under the *Foreign Nationals Act*.

To be clear, recruiters in Ontario are prohibited from charging fees of any kind to foreign nationals who are employed or attempting to find employment in the province, pursuant to an immigration or foreign temporary employee program. The prohibition extends to businesses acting on behalf of a recruiter. Temporary help agencies and employers are therefore prohibited from deducting from a foreign national's wages any recruitment costs associated with a foreign temporary employee program.

Despite the regulatory hurdles and protections associated with employing foreign workers, the Canadian government is generally receptive to immigration. Given the extraordinary number of first- and second-generation Canadians leaving the workforce, reliance on foreign workers is relatively commonplace and accepted in Canadian society.

Conclusion

This guide has sought to highlight some key elements of Canadian employment law that are necessary and important to consider, particularly from the perspective of extra-provincial or United States employers considering making hiring decisions in Canada.

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