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WORKPLACE LAW STRATEGIES

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Canada Labour Code Changes and What they Mean for You

Sweeping changes to the *Canada Labour Code* come into force on September 1, 2019. Employers governed by the *Code* must be aware of these changes and make revisions to the practices to ensure compliance. The *Code* affects any federally regulated businesses, which includes about 18,000 employers and 900,000 employees. Employees in the following businesses and industries are likely working in a federally regulated sector:

- Banks
- Marine shipping, ferry and port services
- Air transportation including airports, aerodromes and airlines
- Railway and road transportation that involves crossing provincial and international borders
- Canals, pipelines, tunnels and bridges (crossing provincial borders)
- Telephone, telegraph and cable systems
- Radio and television broadcasting
- Grain elevators, feed and seed mills
- Uranium mining and processing
- Businesses dealing with the protection of fisheries as a natural resource
- Many First Nations activities
- Most federal Crown corporations
- Private businesses necessary to the operation of a federal act.

The *Code* provides the minimum employment standards that must be followed by any business that is federally regulated and as of September 1 there are a significant number of changes to the standards. Further changes will be coming into force in 2020. The changes cover a wide array of things ranging from vacations to job scheduling and everything in between. The changes will have a significant impact on both the cost of doing business and the processes required of federally regulated employers. The changes provide significant new protections for employees. For any federally regulated employer it will be important to obtain advice to ensure compliance with the changes.

The Regulations to the *Code* include significant record keeping requirements in relation to the new provisions. The new provisions coming into force September 1, 2019 fall under four general categories:

1. Vacations and holidays;
2. Hours of work;
3. Leaves; and
4. Flexible work arrangements.

Details of each of the above categories is found below.

1. Vacations and Holidays

The changes with respect to vacations and holidays both increase the amount of vacation entitlements, who is entitled to vacation pay and also provide for the opportunity to interrupt a vacation leave with another form of leave.

- **Vacation entitlements** – vacation entitlements are increased to the following:
    - o After 1 year of service – unchanged - two weeks and 4% vacation pay;
    - o After 5 years of service – three weeks and currently 6% vacation pay – under the previous legislation this occurred after 6 years of employment; and
    - o After 10 years – four weeks and 8% vacation pay which is a new category of entitlement.

Additionally, annual vacation may now be taken in more than one period.

- **Eligibility for general holiday pay** – the 30 day eligibility requirement is eliminated and all employees are now entitled to holiday pay.
- **Substitutions** – rather than requiring a substituted day off for a holiday, any day may be substituted for a general holiday.
- **Interruptions** – an employee is now entitled to interrupt or postpone a vacation in order to take another leave of absence, including maternity leave, parental leave, compassion care leave, family responsibility leave, leave for victims of family violence, medical leave, leave for traditional Aboriginal practices, or bereavement leave.

2. Hours of work – Scheduling, breaks and rest periods

The revised *Code* is more onerous with respect to scheduling and changing schedules, provides employees with greater ability to refuse overtime and increase the reasons for and the amount of breaks in the work day. Generally, managers and certain professionals are excluded from these requirements.

- **24 hours notice of shift change** – unless a change in shift is a result of an employee's request for a flexible work arrangement or is necessary as a result of an unforeseeable emergency, employers must provide 24 hours written notice of any change or addition to a work period or shift.
- **Right to refuse overtime for family responsibilities** – unless overtime is the result of an unforeseeable emergency, employees have the right to refuse overtime to enable them to carry out responsibilities related to the health care of a family member or the education of any family member who is less than 18 years of age. The employee is required to take reasonable steps to carry out the family responsibility by other means prior to refusing the overtime. Employees are protected from disciplinary action for the refusal to work overtime in these circumstances.
- **Medical breaks** – employees are entitled to take any unpaid breaks necessary for medical reasons. This includes such things as breaks to take medication, breaks for rest periods or breaks for exercise. Employers have the right to request a certificate from a health care practitioner indicating the length and frequency of medical breaks needed and any other necessary information. Regulations accompany the *Code* may exempt certain employees or classes of employees from this requirement if it cannot reasonably be applied to them.
- **Nursing breaks** – an employee who is nursing is entitled to take unpaid breaks to nurse or express breast milk and no medical or other certificate is required for this to apply.
- **96 hours advance notice of schedule** – employers are required to provide work schedules in writing and 96 hours in advance. Employees are entitled to refuse any work shift that starts less than 96 hours in in advance after the schedule is released. There are three exceptions to this:

(1) Where a collective agreement applies that has a different time frame or provides that this section does not apply;

(2) Where the scheduling changes is a result of the employee's request for flexible work arrangements; or

(3) Where it is necessary for the employee to work to deal with an unforeseeable emergency.

- **Modified work schedules** – modified work schedules now apply to individual employees rather than just groups of employees and provide for the potential to have maximum hours exceed those provided for in the *Code*.
- **Paid time off in lieu of overtime** – employees can enter into agreements to have time off in lieu of being paid overtime but the time off must be at a rate of 1.5 hours for each hour worked. If agreed, the time off can be taken within a 12 month period. If no agreement it must be taken within 3 months, failing which the overtime must be paid out. It is the employer's responsibility to ensure that this section is complied with.
- **30 minute breaks every 5 hours** – employers must provide employees with an unpaid break every 5 hours of at least 30 minutes. If the employer requires the employee to be available during the break they must pay the employee during the break. If there is an unforeseen emergency, the employer has the right to postpone or cancel the break.
- **Eight hour rest periods** – employees must have at least eight consecutive hours of rest between work periods or shifts. In an unforeseeable emergency, this requirement is suspended.

3. Leaves of Absence

The revisions to the *Code* expand the type of leaves employees are entitled to, decrease the eligibility requirement of leaves and expand the type of health care practitioners that can provide any necessary certificates for the leaves.

- **Eligibility for leaves** – the previous requirement for a minimum length of service prior to entitlement to sick leave, maternity and parental leave, leave related to critical illness and leave related to the death or disappearance of a child has now been eliminated. Under the revised *Code* there is no minimum length of service to be entitled to leave.

- **Medical leave** – sick leave has now been renamed as medical leave. The scope of the leave has been expanded to included organ or tissue donation and medical appointments during work hours. The length of the leave remains 17 weeks.

- **Bereavement leave** – Two additional unpaid days are added to the existing three paid days of leave. Employees are only entitled to the three paid days of leave if they have been continuously employed for three months. The leave days must be taken between the day of the death of the immediate family member and up to six weeks after the latest of the day on which the funeral, burial or memorial service occurs.

- **Personal leave** – employees are now entitled to up to five personal leave days per year. Personal leave days may be taken for:

1. Personal illness or injury in addition to medical leave;
2. Responsibilities regarding the health or care of a family member;
3. Responsibilities regarding the education of a family member who is younger than 18;
4. An urgent matter concerning the employee or family member;
5. For attendance at the employee's Canadian citizenship ceremony; or
6. Additional reasons prescribed by regulation.

After three months of continuance employment employees are entitled to three paid days of personal leave. The employer may request documentation supporting the leave if the request is made no more than 15 days after the employee returns to work.

- **Leave for jury duty or court** – employees are entitled to a leave of absence to attend court to act as a witness or to serve on a jury, or for jury selection. The available leave is for the length of time necessary to attend court. The employer may request documentation supporting the leave.

- **Leave for victims of family violence** – this is a new category of leave under the revised *Code*. Employees are entitled to up to 10 days of leave each calendar year if the employee or their child is the victim of family violence. If the employee has had three consecutive months of continuous employment, the first five days of the leave is paid leave. There are requirements for taking this form of leave outlined in the legislation, including the need to obtain counselling. The employer can request documentation supporting the leave but must do so within 15 days of the employee returning to work.

- **Leave for traditional Aboriginal practices** – this is again a new form of leave under the revised *Code*. After an aboriginal employee has completed at least three months of continuous employment they can take up to five days of unpaid leave each year to participate in traditional aboriginal practices including hunting, fishing and harvesting. The legislation provides that other traditional practices which qualify for this leave may be prescribed by regulation.

- **Reservist leave** – employees are now entitled to this leave if they have been employed for three months, rather than the previously required six months. The leave has also been expanded to include military skills training. The length of the leave is capped at 24 months during any 60 month period, although there are exceptions to this.

- **Certificates provided by health-care practitioners** – the Code has been revised to allow for the provision of certificates for certain leaves by a "health care practitioner" rather than a "qualified medical practitioner" as previously required. This expands the categories of professionals able to provide the certificates required for certain leaves.

4. Flexible Work Arrangements

The revisions to the *Code* provide significant rights to employees to request flexible work arrangements and put the onus on employers to establish a reason why the flexible work arrangement request should not be granted.

- **Right to request flex work** – Once an employee has completed six months of consecutive employment, they now have the right to request a change of hours, a change of work schedule, a change of work location and other terms and conditions to be prescribed. The grounds on which an employer may refuse such a request are limited. Examples of the grounds on which an employer may refuse such a request include:

  - Additional cost that would burden the employer;
  - Detrimental impact on work quality of quantity;
  - Insufficient work; and
  - Inability to reorganize work among employees.

Employers must respond in writing to requests for flex work and must do so within 30 days of receiving the request. For unionized employees, the changes must be agreed in writing by both the employer and the union.

The revisions to the *Code* place significant new obligations on employers, provide for greatly expanded circumstances where leaves will be granted, increase eligibility for leaves and enhance the ability of employees to demand flexible work arrangements.

There are further changes to the *Code* that will be coming into force subsequent to September 1, 2019. The date that these changes will come into effect has not yet been set, but employers should be aware that the following changes will be occurring:

1. Terminations

Changes will be imposed with respect to both individual terminations and group terminations. Under the existing Code there is a two week notice period for individual terminations. Under the revised Code, on a date which is yet to be fixed, this will be replaced with the following, which mirrors the *BC Employment Standards* requirements:

- 3 months of continuous service – 2 weeks notice
- 3 years of continuous service – 3 weeks notice
- 4 years of continuous service – 4 weeks notice
- 5 years of continuous service – 5 weeks notice
- 6 years of continuous service – 6 weeks notice
- 7 years of continuous service – 7 weeks notice
- 8 years of continuous service – 8 weeks notice

The requirements with respect to group terminations will be supplemented to provide that in addition to the existing 16 weeks of notice that must be provided to the Minister of Labour, the employer will be required to provide notification to all affected employees of at least eight weeks' notice. This notice can be satisfied by either providing notice, pay in lieu, or a combination of both.

There is a new record keeping requirement as well that requires employers to provide terminated employees with a statement of benefits specifying the vacation benefits, wages, severance pay and any other benefits and pay arising from their employment.

2. Reverse onus in denying employment

Under the revised *Code* in circumstances where employers responding to a complaint under the Code denying that the complainant is an employee, there will be a reverse onus, placing the burden of proof on the employer to establish that the individual is not an employee.

3. Equal pay

This revision to the *Code* will require employees to pay part-time, casual, contract or seasonal employees the same as full time employees performing the same job. This rule applies unless there are objective reasons to justify a differential wage such as seniority or merit and the burden is on the employer to establish the rationale for the differential. Employees will have a right to request a review of their wage.

4. Temporary help agencies

The revised *Code* will impose a number of prohibitions regarding the payment of fees and restricting employees from entering into employment relationships with clients of the Agency. Equal pay provisions will apply to Agencies and will require them to pay their employees the same as employees of their client who perform the same job, unless they are able to establish a rationale for the differential. Employees of Agencies will have a similar right as employees to request a review of their wage if they are not being provided with equal pay.

5. Deemed continuity of employment

The current Code deems employment to be continuous when two federally regulated employers transfer work through a sale, merger or otherwise. Under the revisions, additionally businesses that become federally regulated after a transfer of the business will be subject to the continuous employment deeming.

6. Workplace harassment and violence

These revisions are expected to come into force in 2020 along with the new *Work Place Harassment and Violence Prevention Regulations*. The revisions are significant and employers would be well served to begin now to create their program and the required documents to ensure that they are ready to be compliant when the revisions come into force. The *Code* will define harassment and violence as "any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee. The requirements relate to both current and former employees and impose significant record keeping and reporting responsibilities on employers. The new requirements include the following:

- **Workplace assessment** – Employers will have to jointly conduct a workplace assessment that identifies risks of harassment and violence in the workplace and implement preventative measures to protect the workplace from these risks. The workplace assessment will need to be reviewed and updated at least every 3 years. A workplace assessment review must also be undertaken in certain situations including:

- where the resolution process cannot proceed;
- when the complainant wishes to remain anonymous;
- when the complainant choses to stop proceeding with the resolution process prior to an investigation being started; or
- when the responding party is not an employee of the employer.

- **Harassment and violence prevention policy** – employers are required under the *Code* to have workplace harassment and violence policies. There are a number of requirements to make the policy compliant with the *Code* including:

  - Must designate a person to receive complaints of harassment and violence;
  - Upon receipt of a complaint, the designated person or supervisor must attempt to resolve the complaint with the employee promptly;
  - The employer cannot refer an unresolved harassment or violence complaint to an internal committee or representative;
  - Must outline how an employer is to be informed of external dangers that could lead to harassment and violence in the work place such as family violence and stalking; and
  - Must set out the measures they may implement to minimize dangers.

- **Investigations and resolution** – employers are required to respond to every notification of an occurrence of harassment and violence in the workplace within 5 days of notification. Options for resolution include early resolution, conciliation and investigation. Early resolution and conciliation must be concluded within 6 months and investigation within 1 year. If an investigation is chosen, employers will have to follow the requirements regarding investigations, including:

  - the qualifications of the investigator;
  - how the investigator is appointed;
  - what types of reports the investigator must submit; and
  - how the employer will handle the reports.

If a complaint of violence or harassment are not resolved by the employer, they now are referred to the Minister rather than an internal workplace committee or health and safety representative. The Minister must now either be satisfied that the complaint has been adequately dealt with, or the matter is trivial, frivolous or vexatious. If not satisfied with either of these, the Minister is obligated to investigate the complaint.

- **Records and Reports** – Employers are required to keep the following records:

  - All notifications of harassments and violence in their workplace;
  - Records of the actions taken to address the notifications;
  - Records of the decisions they make in the event they are unable to agree on an issue that they must do jointly; and
  - Records of any delays to the timeline.

Employers are also required to internally report data twice per year on occurrences resolved through early resolution and conciliation to the policy committee, workplace committee or health and safety representative. The Employer is also required to report occurrences that result in the death of an employee to the Minister within 24 hours and to provide aggregated data on all occurrences annually to the Minister.

- **Emergency procedures** – employers are required to jointly develop and implement emergency procedures to be followed in situations where an occurrence of harassment of violence is an immediate danger to the health and safety of employees or where there is a threat of such occurrence happening in the workplace.

- **Training** – Employers are required to jointly identify or develop harassment and violence training and to ensure that it is delivered to employees, employers and the designated recipient. There is a requirement that the training be delivered at least once every three years and must provide instruction on:

- The elements of the prevention policy;
- Crisis prevention;
- Personal safety;
- De-escalation techniques; and
- How to respond to different types of occurrences.

- **Support Measures** – Employers are required to offer support to employees affected by harassment and violence in the workplace. This duty requires Employers to provide information respecting the medical, psychological or other support services that are available within their geographic area.

- **Application to former employees** – Employers that become aware of occurrences of harassment and violence in the workplace with respect to former employees which become known to the employer within three months after the day on which the former employee ceased to be employed, will trigger obligations with respect to the former employee.

7. Employment equity and accessibility

A new *Pay Equity Act* will be coming into force in 2020. This will provide a pay equity framework for federally regulated employers with more than 10 employees in both the public and private sectors. This Act also imposes record keeping and reporting obligations on the employer including the requirement to provide an annual statement to the Commissioner and to maintain certain records relating to the pay equity plans.

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