



# GUIDE TO GOING GLOBAL EMPLOYMENT

*Canada*



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## INTRODUCTION

Welcome to the 2023 edition of DLA Piper's *Guide to Going Global – Employment*.

### GUIDE TO GOING GLOBAL SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics that companies need to know. The *Guide to Going Global* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

### EMPLOYMENT

As business grows more global, the challenge for in-house counsel and HR professionals responsible for workforce issues and employment law compliance is intensifying. This guide is designed to meet that challenge head on and has been produced in response to feedback from clients in both established and emerging international businesses. We hope it will become an invaluable resource for you.

This 2021 edition of our popular guide covers all of the employment and labor law basics in 63 key jurisdictions across the Americas, Asia Pacific, Europe, the Middle East and Africa. From corporate presence and payroll set-up requirements, language rules, minimum employment rights, business transfer rules, through to termination and post-termination restraints, we cover the whole employment life span.

We have used our global experience and local knowledge to bring you this newest edition of our guide. With over 300 lawyers, DLA Piper's global Employment group is one of the largest in the world, with one of the widest geographical footprints of any global law firm. We partner with our clients, wherever they do business, to find solutions and manage risk in relation to their legal challenges and objectives.

While this guide provides high-level guidance, it is not a substitute for legal advice, and we encourage you to take advice in relation to specific matters. If you wish to speak to any of our contributors, their contact details are set out towards the back.

We hope that you find this guide valuable and we welcome your feedback.

To learn more about DLA Piper's global Employment practice, visit [www.dlapiper.com](http://www.dlapiper.com) or contact:

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This is a general reference document and should not be relied upon as legal advice. The application and effect of any law or regulation upon a particular situation can vary depending upon the specific facts and circumstances, and so you should consult with a lawyer regarding the impact of any of these regimes in any particular instance.

DLA Piper and any contributing law firms accept no liability for errors or omissions appearing in this publication and, in addition, DLA Piper accepts no liability at all for the content provided by the other contributing law firms. Please note that employment law is dynamic, and the legal regime in the countries surveyed could change.

## CANADA



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### LEGAL SYSTEM, CURRENCY, LANGUAGE

Common law throughout the majority of the country and civil law in the province of Quebec. The official currency is the Canadian dollar (CAD). The official languages are English and French.

### CORPORATE PRESENCE REQUIREMENTS & PAYROLL SET-UP

A foreign entity may engage employees in Canada, but the entity must have proper corporate and payroll registrations. Business and corporate tax planning considerations are often paramount, and consideration should be given to creating a corporate subsidiary in Canada as an alternative to registering a foreign entity.

Payroll registration is done through the Canada Revenue Agency (and, if applicable, through Revenue Quebec) by obtaining a business number. Employers must withhold and remit income tax, as well as various social security programs such as the Canada Pension Plan (or, in Quebec, the Quebec Pension Plan) and Employment Insurance. In some cases, additional taxes and remittances may apply or be required under worker's compensation legislation and as part of the public health care system (eg, in Ontario, the Employer Health Tax).

### PRE-HIRE CHECKS

#### Required

All employers should verify that individual employees are legally entitled to work in Canada by obtaining the employee's Social Insurance Number (SIN), but only after a conditional offer of employment is made. Certain employers may also require criminal records checks through a Canadian Police Information Check (CPIC). In some industries, a more comprehensive check may be required by law (eg, for persons who work with vulnerable individuals such as children).

Where a criminal record check is required by the employer, the prospective employee may have grounds to claim discrimination if a decision not to hire is based on:

- A conviction of a provincial offense revealed by the check

- A criminal offense for which a pardon has been granted or
- A criminal conviction unrelated to the individual's employment.

Criminal records checks should not be done without the prospective employee's consent and, in any event, it is recommended that a conditional offer of employment be made before a criminal record check is performed.

## Permissible

Verifying references, past employment and education is common and permissible, provided that:

- The applicant has consented and
- The employer conducts the verification in a consistent and non-discriminatory manner.

Caution must be exercised in undertaking more detailed background checks to ensure that the scope of the detailed background check is not excessive and that proper consent has been obtained in accordance with applicable privacy laws.

Credit checks are generally permissible when the candidate's credit history is relevant to the position (eg, positions which involve handling money or involve financial decision making). Credit checks must be conducted in accordance with applicable consumer protection legislation, which requires that:

- Consent is obtained from the individual and
- A proper process is followed when the credit check is undertaken.

It is recommended that a conditional offer of employment is made before a credit check is performed.

## IMMIGRATION

Canadian citizens and permanent residents have a right to work in Canada. For other non-Canadian nationals, a valid work permit will usually be required. The process for obtaining work permits is managed by Canada's federal government through Immigration, Refugees and Citizenship Canada and Canada Border Services Agency. There are special provisions under the United States-Mexico-Canada Agreement (USMCA) – formerly the North American Free Trade Agreement (NAFTA) – which make it easier for certain American or Mexican professionals to obtain a work permit to work in Canada. There are also similar provisions under other international agreements or arrangements such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Canada-European Union Comprehensive Economic and Trade Agreement (CETA), and other similar trade agreements which also make it easier for certain categories of workers from signatory countries to work in Canada. In addition, companies which have or plan to establish a branch, subsidiary or an affiliate company in Canada may transfer qualified senior managers, executives or specialized employees to the Canadian entity.

## HIRING OPTIONS

### Employee

Indefinite, fixed-term, full-time, part-time or casual. Employers may generally provide for differential treatment between these categories of employees; however, basic employment standards apply to all categories in most Canadian jurisdictions.

## Independent contractor

Independent contractors may be engaged directly by the company or via a personal services corporation. The use of independent contractors creates misclassification exposure, which can give rise to tax, social security contribution and workers' compensation liabilities. It may also create potential claims for overtime, vacation, holiday pay and notice of termination. Classification may be different under different statutory schemes, and care must be taken to ensure the relationship is not truly one of employer and employee.

## Dependent contractor

In some Canadian jurisdictions, courts have recognized the concept of a dependent contractor, which is similar to an independent contractor except that the individual exhibits significant economic dependence on the employer. Dependent contractors are generally entitled to notice of termination, akin to employees. As with the use of independent contractors, the use of dependent contractors also creates misclassification exposure, which may include tax, social security contribution and workers' compensation liabilities. It may also create potential claims for overtime, vacation, holiday pay and notice of termination.

Classification may be different under different statutory schemes, and care must be taken to ensure the relationship is not truly one of employer and employee.

## Agency worker

The use of agency workers is common in some industries. Certain jurisdictions in Canada have special rules intended to provide protections to agency workers and may deem the contracting company liable if the agency fails to pay wages or provide required benefits to its workers. Many statutory regimes also have a mechanism for declaring a contracting company the true employer, a co-employer or common employer under applicable legislation. Some provinces have established a licensing framework for recruiters and temporary help agencies to operate within the given provinces, and employers using agencies in these provinces should ensure that the agency is properly licensed.

## Temporary foreign worker

Canada has a program that permits employers to hire temporary foreign workers to fill temporary labor and skills shortages when qualified Canadian citizens or permanent residents are not available.

In Canada, the authorization to hire temporary foreign workers is regulated by the Temporary Foreign Worker Program (TFWP). If the applicant does not qualify for an exemption from normal immigration requirements (typically through the International Mobility Program, or IMP), an employer will be required to obtain a Labour Market Impact Assessment (LMIA), after having met specific advertising requirements, to hire foreign workers to fill temporary and skill shortages. The LMIA confirms that the hiring of temporary foreign workers will not have a negative impact on the Canadian labor market. Some Canadian jurisdictions have statutes and regulations that apply specifically to the employment of foreign nationals working in particular industries.



## EMPLOYMENT CONTRACTS & POLICIES

### Employment contracts

Written employment contracts are recommended but are not required by law.

### Probationary periods

In most jurisdictions, a probationary period of up to 3 months is permitted. During the probationary period, an employer may be able to terminate an employee without being required to provide statutory notice of termination or pay in lieu. Employees terminated during a probationary period may still allege discrimination in the course of employment or upon termination and recover damages if the employer is found to have discriminated against the employee. In addition, absent a clear contractual limit on an employee's right to notice of termination during the probationary period, an employee may still have a claim for notice of termination or pay in lieu of notice at common law. In Quebec, such contractual limitation on an employee's right to reasonable notice of termination pursuant to the Civil Code of Quebec is not permitted, and the employee may still have an entitlement to such notice during a probationary period, depending on the circumstances.

### Policies

Most jurisdictions require a written health and safety policy with certain contents based on the number of employees and/or the scope of the employer's operations. Various jurisdictions require specific training for employees on health and safety standards. Several jurisdictions require workplace violence, workplace harassment, workplace sexual harassment and/or anti-bullying policies. These, along with anti-discrimination policies, are highly recommended in all jurisdictions. In Ontario, depending on the number of employees, specific policies are also required with respect to accessibility, an employee's right to disconnect and electronic monitoring.

Accessibility policies apply not only to employees but also to interactions with the public and other third parties. Privacy policies are also required, and, in a number of jurisdictions, the privacy policy must address the protection of employee personal information.

A number of jurisdictions require the posting of information on basic employment laws and health and safety standards.

### Third-party approval

Generally, there is no requirement to file employment contracts or policies or have them approved; however, in Ontario, regular compliance filings are required of most employers under accessibility legislation.

## LANGUAGE REQUIREMENTS

Canada has 2 official languages: English and French. Individuals are entitled to receive certain government services in either official language.

In Quebec, language laws require that communications, documents and publications be made in French, subject to certain exceptions. In particular, employment contracts, offers of transfer, employment application forms, documents related to conditions of employment and training documents must be available in French, even where

employees have requested English versions of same. In many cases, employees must be provided with the French version of these documents first, and it is only where the employee subsequently requests an English version of same that one can be provided.

In Quebec, employers are prohibited from requiring a candidate to be proficient in a language other than French in order to be qualified for a role, unless the nature of the duties requires such knowledge. In the case where the job does require the knowledge of a language other than French, employers are required to take all reasonable means to avoid such a requirement.

In some jurisdictions, basic workplace rights must be posted in English and the majority language of the workplace.

In addition to an employer's statutory obligations, it is recommended that essential employment documents (including, for example, health and safety materials) be translated into other languages if an employee or group of employees is unable to understand the contents of the document as published in English or French.

## WORKING TIME, TIME OFF WORK & MINIMUM WAGE

### Employees entitled to minimum employment rights

In most cases, all employees are subject to minimum labor and employment standards legislation. However, there are a number of common exceptions to some or all of these standards based on the nature of the employee's position or work and the employee's qualifications. For example, professionals (eg, lawyers and doctors) are often exempt from some or all of the minimum standards; supervisors and managers are often exempt from hours of work and overtime rules; and various jurisdictions have exemptions for IT professionals or special rules for particular industries.

### Working hours

Daily and weekly maximums vary by jurisdiction. Standard working hours are, on average, 40 hours per week.

### Overtime

Overtime rules vary by jurisdiction with some jurisdictions having daily overtime thresholds (often 8 hours) and others having weekly overtime thresholds (often 40 to 44 hours per week). Overtime is generally payable at 1.5 times the employee's regular rate and, in some jurisdictions, after a certain threshold is reached, 2 times the employee's regular rate. Overtime eligibility is not restricted to employees paid on an hourly basis. Salaried employees may also be eligible for overtime.

### Wages

Minimum wage varies by jurisdiction. In addition, many jurisdictions have different minimum wages for certain categories of employees, such as food servers and students.

### Vacation

Amounts and related requirements vary by jurisdiction. In many jurisdictions, vacation entitlement starts at 2 weeks of vacation time following 12 complete months of service; however, vacation pay (eg, a corresponding 4 percent of wages) begins to accrue immediately upon the commencement of employment. In most jurisdictions,



vacation entitlement increases to 3 weeks (and 6 percent vacation pay) after 3 to 5 years of service, depending on the jurisdiction. Many employers provide a greater vacation entitlement and allow vacation to be taken in the first year of employment as the vacation time accrues. "Use it or lose it" policies are not permissible in most jurisdictions.

In addition, paid time off for public/statutory holidays is also required, and certain requirements must be met if employees will work on a public/statutory holiday.

## Sick leave & pay

Entitlements vary by jurisdiction but are generally without pay. A notable exception is British Columbia, which provides 5 paid sick days to employees. Quebec also provides 2 days, and Prince Edward Island provides 1 day. Employees in certain federally regulated industries are entitled to 10 paid sick days. In addition, a number of provinces have enacted paid sick days specifically related to individuals impacted by COVID-19.

Employees in most jurisdictions have rights to a certain number of days of statutorily protected but unpaid sick leave. Some jurisdictions require a certain number of sick days to be paid, while the remainder is unpaid.

Although not required to do so, many employers provide additional paid sick days as well as short- and long-term disability benefits. Employees without access to such benefits may have the right to claim Employment Insurance sick leave benefits. A number of jurisdictions also provide employees with a certain number of statutorily protected but unpaid days to deal with responsibilities in relation to a family member. Some jurisdictions require a certain number of these days to be paid, while the remainder is unpaid.

Notwithstanding applicable statutory sick leave and family responsibility entitlements, employers also have a duty to accommodate an employee on the basis of, among other things, disability and family status. Therefore, an employer may be required to permit an employee to be absent without pay for more than their statutory sick leave days.

## Maternity/parental leave & pay

Entitlements differ slightly by jurisdiction. In most jurisdictions, pregnant employees have the right to take pregnancy (ie, maternity) leave of up to 17 weeks (18 weeks in Quebec and 19 weeks in Saskatchewan) of unpaid time off work.

In addition, in most jurisdictions, new parents – whether by birth or adoption – have the right to take unpaid parental leave of between 59 and 65 weeks, depending on the jurisdiction, when a child is born or comes into their care or control for the first time. Parental leave does not need to be commenced immediately upon the birth of the child or when the child first comes into the employee's care or control, and employees in some jurisdictions have up to 78 weeks to start the leave, while in other jurisdictions, the leave must be completed within 78 weeks. Birth mothers who have taken pregnancy leave must commence parental leave immediately after the end of the pregnancy leave in most jurisdictions, except where the child has not yet come into their care, custody or control.

Employers must generally maintain benefits for the pregnancy or parental leave; however, the employee may usually be required to pay their share of the premiums. Subject to certain narrow exemptions, employees have a right to reinstatement at the end of the leave and continue to earn credit for length of service and seniority during the leave.

An employer cannot penalize an employee in any way because the employee is or will be eligible to take a pregnancy or parental leave, or for taking or planning to take a pregnancy or parental leave.

In Quebec, birth fathers are also eligible for up to 5 weeks of unpaid paternity leave, and all employees are eligible for 5 days – 2 of which are paid days – of leave upon the birth or adoption of a child or the termination of a pregnancy.

## Other leave/time off work

Employees may also be entitled to leave for other purposes, such as bereavement, domestic or sexual violence, voting, compassionate care/family caregiver, family responsibility, critical illness, death or disappearance of a child, military reservist, etc. These types of leaves, durations of the leaves, and the criteria to qualify for the leaves vary between jurisdictions.

Employers must generally maintain benefits for these leaves as well; however, the employee may usually be required to pay their share of the premiums. Subject to certain narrow exemptions, employees have a right to reinstatement at the end of the leave and continue to earn credit for length of service and seniority during the leave.

## DISCRIMINATION & HARASSMENT

All Canadian jurisdictions have legislation which prohibits harassment and discrimination based on a number of grounds. Protected grounds vary by jurisdiction, but generally include race, religion, age, disability, sex, gender identity and gender expression, sexual orientation, national or ethnic origin, record of (criminal) offenses, marital status and family status. Employees who suffer harassment or discrimination may have a civil cause of action and/or access to a specialized tribunal or commission.

## WHISTLEBLOWING

All Canadian jurisdictions have legislation which prohibits retaliation for employees asserting their rights under applicable labor and employment legislation. An employee who suffers retaliation may have a civil cause of action and/or access to a specialized tribunal or commission. In addition, employers may face criminal sanctions for unlawful retaliation under the Criminal Code of Canada which prohibits employers from threatening or taking disciplinary action against, demoting or terminating an employee in order to deter them from reporting information regarding an offense they believe has been or is being committed by their employer to a relevant authority.

## BENEFITS & PENSIONS

Employers are not required to provide benefits or pensions other than those provided through social security contributions (ie, Canada Pension Plan/Quebec Pension Plan and Employment Insurance regimes) and, in most jurisdictions, workers' compensation insurance. Many Canadian employers do, however, provide health and welfare benefits and some form of retirement savings program. In Quebec, employers are required to make a Registered Retirement Savings Plan available to employees through a third-party provider but are not required to contribute on behalf of the employee.

## DATA PRIVACY

Legislative requirements vary by jurisdiction. Where privacy laws apply, personal information must only be collected with consent and may only be used for the purposes for which it was collected. In most jurisdictions, email and internet use may be monitored where notice has been given through clear employer policies.

## RULES IN TRANSACTIONS/BUSINESS TRANSFERS

In most jurisdictions, legislation exists which will either:

- Require the transfer of employees as a result of a sale of a business or
- Provide that employees who accept an offer of employment with, or simply continue to be employed by, the purchaser will have their employment deemed continuous and their past service honored.

Unless a contract or collective agreement provides a right or option to claim termination amounts, employees accepting a purchaser's offer of employment, either expressly or by continuing in employment, will not be entitled to claim termination amounts from the seller.

## EMPLOYEE REPRESENTATION

In Canada, the level of union density continues to decline, particularly in the private sector. Unions continue to have high levels of representation in the broader public sector, especially in certain traditionally unionized industries such as automotive, construction and transportation. Many businesses have no union or other worker representation. There are no works councils. Industry-level collective bargaining agreements are rare outside of certain industries in Quebec and the construction industry.

## TERMINATION

### Grounds

Termination for cause without notice or pay in lieu is permissible, but the standard is high, often requiring gross or willful misconduct, willful neglect of duty, fraud, serious breach of applicable policies or material or repeated insubordination. Termination without cause is permissible in most jurisdictions, provided that proper notice of termination or pay in lieu and any severance entitlements are provided. If an employer reprises against an employee for exercising a statutory right under employment standards, human rights or occupational health and safety legislation, no amount of notice will make the termination lawful.

In Quebec and Nova Scotia, additional protections exist for certain employees who have acquired tenure (ie, achieved a certain length of service), and in those circumstances, termination may not be possible except for bona fide reasons, such as position elimination or lack of work.

Federally regulated employers may not terminate a non-managerial employee with at least 1 year of service without sufficient reason – generally just cause or a discontinuance of the job function. Employers are federally regulated if they operate in industries that fall within the federal government's constitutional jurisdiction and concern matters of national interest, notably:

- Banking
- Telecommunication
- Air transport
- International and interprovincial rail and road transport Marine shipping, ferry and port services
- Radio and television Broadcasting Fisheries
- Interprovincial canals, pipelines, tunnels and bridges Grain, feed and seed mills
- Uranium mining and processing

The vast majority of employees in Canada – approximately 90 percent – are provincially regulated.

## Employees entitled to termination protection

Generally, employees in Canada cannot be terminated without just cause or without proper notice or pay in lieu and severance pay, if applicable, under statute and at common/civil law. The right to reinstatement, however, is generally limited to unionized employees, employees terminated contrary to human rights legislation, employees terminated for exercising a statutory right with respect to working conditions or legislated employment standards (such as the right to a pregnancy leave) or for certain employees who both have the requisite length of service and are working in federally regulated industries or are employed in the provinces of Quebec or Nova Scotia.

## Prohibited terminations

Employees may not be terminated based on a prohibited ground, for filing a harassment complaint or as an act of reprisal for asserting a statutory right with respect to working conditions or legislated employment standards.

## Third-party approval for termination/termination documents

Approval is not required. However, for group terminations, notice in a prescribed form must generally be provided to the applicable Ministry of Labour and may need to be posted in the workplace (in some cases, before the termination will be effective).

## Mass layoff rules

There are rules to be followed in the event of a mass layoff. Most jurisdictions provide for increased statutory notice or pay in lieu and/or severance pay in the event of a group termination and may require the provision of notice to a government ministry. In most jurisdictions, the threshold is 50 or more employees within a specified

period. However, in some cases, the threshold is much lower (eg. in Quebec, the threshold is more than 9 employees). There is generally not a consultation obligation; however, notice may need to be given to a governmental authority.

## Notice

The statutorily required minimum length of notice of termination varies by jurisdiction and, for individual terminations, is based on an employee's length of service. For individual terminations, most jurisdictions limit notice of termination to 8 weeks. Significantly longer notice periods (up to 2 years or more in exceptional circumstances) may be awarded at common law unless there is a valid termination clause in an employment agreement which limits the common law entitlement. In Quebec, similar entitlements exist and generally cannot be limited by contract at the outset of the employment relationship.

## Statutory right to pay in lieu of notice or garden leave

Pay in lieu of notice is permitted. Garden leave is becoming more common and, with appropriate care and planning, an employer may often achieve this objective for a reasonable period.

## Severance

Eligible employees in Ontario and the federal jurisdiction are eligible for severance pay. In Ontario, eligible employees (ie, those with 5 or more years of service who work for an employer that has a payroll in Ontario that exceeds 2.5 million per annum or are terminated as part of a group of 50 employees in a 6-month period as a result of a permanent discontinuance of all or part of the employer's business at an establishment) receive 1 week for each year of service, with partial years prorated to a maximum of 26 weeks. In the federal jurisdiction, eligible employees receive the greater of 2 days' wages per year of service or 5 days' wages.

## POST-TERMINATION RESTRAINTS

These are difficult to enforce. Restrictions must go no further than necessary to protect the employer's legitimate business interests. Garden leave is becoming more common. In Quebec, employers cannot rely on restrictive covenants when an employee has been terminated without cause.

## Non-competes

Will generally not be enforceable for mere employees and not where a non-solicitation provision would have been sufficient. Must be reasonable in scope geographically and temporally, and in some jurisdictions, must also specify the type of restricted employment and the restricted job functions. Must be clear and unambiguous. A requirement not to interfere with business relationships might also be enforced if it is reasonable, clear and unambiguous.

In Ontario, employers are prohibited from entering into any agreement with an employee containing a non-competition clause, with limited exceptions for senior-level executives and in the context of a sale of a business.

## Customer non-solicits

More likely to be enforced than a non-competition agreement, non-solicitation agreements must still be reasonable in scope geographically and temporally. Must be clear and unambiguous.

## Employee non-solicits

Likely to be enforced if reasonable, clear and unambiguous.

## WAIVERS

Generally, employees may not waive or contract out of statutory rights or benefits unless they are doing so in exchange for a "greater right or benefit" with respect to the same subject matter of the right being waived.

## REMEDIES

### Discrimination

In most jurisdictions, general damages for breach of the legislation, injury to dignity or mental distress may be awarded in discrimination cases in addition to lost wages and compensation for the loss of employment. Damage awards in this regard are increasing as many jurisdictions have removed legislative caps on the amounts which can be awarded. Additionally, human rights tribunals or commissions have the power to order reinstatement and other non-monetary remedies.

### Unfair dismissal

As noted above, only certain employees in the federal jurisdiction and employees who have met certain service requirements in Quebec and Nova Scotia have this right. Damage awards may vary widely based on individual circumstances. Reinstatement is possible.

### Failure to inform & consult

Not applicable for this jurisdiction.

## CRIMINAL SANCTIONS

The main areas where criminal sanctions arise are under occupational health and safety legislation and related Criminal Code provisions. Both employees and directors may be subject to criminal sanctions.

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