

DENTONS

# Navigating Canadian employment law for U.S. businesses

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Grow | Protect | Operate | Finance

# Moderator:



**Colleen Hoey**  
Counsel, Ottawa, Canada  
+1 613 783 9665  
colleen.hoey@dentons.com

# Speakers:



**Dan Beale**  
Partner, Atlanta, United States  
+1 404 527 8489  
dan.beale@dentons.com



**Matthew Curtis**  
Partner, Toronto, Canada  
+1 416 367 6767  
matthew.curtis@dentons.com



**Catherine Coulter**  
Counsel, Ottawa, Canada  
+1 613 783 9660  
catherine.coulter@dentons.com



**Maggie Sullivan**  
Associate, Ottawa, Canada  
+1 613 288 2706  
maggie.sullivan@dentons.com

An aerial photograph of a dense evergreen forest, likely spruce or fir, with a vibrant purple overlay on the left side. The overlay has a rounded top and a pointed right edge, creating a shape that resembles a stylized tree or a decorative element. The text is centered within this purple area.

# **Jurisdiction: Federal vs provincial**

Matthew Curtis

# Jurisdiction

## Federal vs provincial

- In Canada, jurisdiction over employment is divided between the provincial and federal governments.
- Employers must be aware of which jurisdiction governs their employment relationships.
- Governing jurisdiction is primarily determined by where in Canada the work is being performed.
- The vast majority of workplaces in Canada are governed by provincial employment law.

# Federal jurisdiction

- Federal labour & employment is governed by the *Canada Labour Code*.
- Some areas that are governed by federal employment law include:
  - Banking.
  - Interprovincial railways.
  - Interprovincial transportation
  - Interprovincial telecommunications.
  - Airports, aircraft, and air transportation.
  - Radio and television broadcasting.

# Provincial jurisdiction

- The majority of workplaces are regulated by provincial legislation.
- All jurisdictions, with the exception of Quebec, are considered common law jurisdictions. Quebec is a civil law jurisdiction.
- Each province regulates labour and employment matters in a similar, though not identical manner.

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# **Employment contracts**

Matthew Curtis

# Employment contracts

- An employment contract is treated the same in Canada as an offer letter of employment.
- It may be in writing or oral. Highly recommended to be in writing to have express terms of employment.
- Fixed Term vs. Indefinite Term.
- Provisions that breach statutory requirements are void and unenforceable.
- Termination clauses in particular are closely scrutinized by the courts.



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# **Canadian employment relationships: No at-will employment**

Matthew Curtis

# Canadian employment relationships

- In Canada, the concept of “at-will” employment does not exist.
- Unless employees are dismissed with cause, they are entitled to notice of termination or pay in lieu.
- What constitutes “cause” is a very high legal threshold with the onus on the employer to prove.
- Changes to written employment agreements introduced to current employees must always be supported by fresh consideration.

# Mandatory statutory termination requirements

- All provinces and the federal jurisdiction have legislated minimum notice periods for the termination of individual employees.
- The length of due notice generally increases with the period of seniority with the employer.
- Group or “Mass” Termination Provisions.
- Statutory Severance Pay (Ontario and Federal).

# Common law requirements

- Judge made law based on similar facts in applicable case law.
- Key factors in determining an employee's reasonable notice period:
  - Character of the employment;
  - Length of service;
  - Age;
  - Availability of similar employment, having regard to the experience, training and qualifications of the employee.
- The maximum amount of common law notice is generally 24 months, though it can be higher in exceptional circumstances.

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# **Sale of business**

Matthew Curtis

# Share purchase

- When the shares of the corporation are sold, its ownership changes but its legal identity remains the same.
- The status as employer, and its resulting obligations and liabilities, do not change.
- Because there is no termination of employment, there is no break in service or seniority of the employees.

# Asset purchase

- In an asset purchase, the sale terminates the employee's employment with the vendor and the employment relationship does not always automatically transfer to the purchaser.
- The asset purchaser is not automatically required to take any of the vendor's employees unless required by statute.
- If the purchaser wishes to retain the vendor's employees post-closing, there may be deemed continuous service by operation of law.
- If the purchaser assumes any of the vendor's unionized employees, labour relations legislation typically deems the purchaser to be a successor employer.

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# **PTO/Vacation – Is there a difference?**

Catherine Coulter



# Paid time off / vacation – Is there a difference?

- While it's possible to create a U.S. style PTO Policy in Canada, it still needs to comply with Canadian statutory vacation requirements.
- Vacation time and vacation pay are **not** the same.
- In most provinces, employees with up to 5 years of service must receive at least 2 weeks of paid vacation time; employees with 5 or more years of service must receive at least 3 weeks of paid vacation time.

# **Paid time off / vacation – Is there a difference?**

- In most provinces, employees with up to 5 years of service must receive at least 4% vacation pay on all wages; employees with 5 or more years of service must receive at least 6% vacation pay on all wages.

# Key vacation rules in canada



# Canadian vacation – The devil is in the details

## *Tip #1:*

- Commissions and incentive bonuses fall under the statutory definition of wages.
- Therefore, if you don't add at least the statutory 4% or 6% vacation pay to your commission or incentive bonus payments to employees, you probably have a vacation pay liability.

# Canadian vacation – The devil is in the details

## *Tip #2:*

- Vacation pay liabilities are not just a corporate liability, but also a liability to corporate directors.

# Canadian vacation – The devil is in the details

## *Tip #3:*

- Carefully track the vacation time your employees take, and the vacation pay which they are paid. Be particularly careful to do this if you grant unlimited PTO.
- The onus is on the employer to track employee vacation.

# Canadian vacation – The devil is in the details

## *Tip #4:*

- Make sure that you make it clear in an employment agreement or vacation policy as to what non-statutory (excess) vacation carries forward if unused, and what vacation is forfeited.
- Note that statutory vacation time and vacation pay can never be forfeited.

# Vacation pay cases

## *Jimmy How Tein Fat v. PRGX Canada Corporation*

- This 2023 Ontario court decision stated that the “discoverability principle” applies to vacation pay claims.
- This means that employees may be able to get around limitations defences (i.e. extend the period of time during which unpaid vacation pay is owed).



# Legislative updates

## *Bill 149, Working for Workers Four Act, 2024 (Ontario)*

- Effective as of June 21, 2024, a **written agreement** is required if an Ontario employer intends to pay vacation pay with any method other than a lump sum amount prior to an employee's vacation time.

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# **Restrictive covenants in Canada**

Catherine Coulter

# The basics

- Non-solicitation and non-competition covenants must be reasonable with respect to duration and geographic scope.
- Canadian courts will not “read down” overly restrictive covenants.
- Canadian courts do not like to enforce a non-competition covenant where a non-solicitation and confidentiality covenant would suffice to protect the employer.

# The basics

## (con't.)

- A restrictive covenant which acts as a restraint of trade will generally be struck down by the Canadian courts.
- A “no hire” clause in a non-solicitation provision is generally a step too far.
- Keep non-competition covenants in separate paragraphs or agreements from non-solicitation covenants.

# The basics

## (con't.)

- Ontario legislation no longer permits non-competition covenants at all, except for C-Suite level employees and in the case of some very limited sale of business circumstances.

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**PEO's:**  
**How do PEOs function in Canada  
compared to the U.S.?**

Maggie Sullivan

# What is a PEO and what does a PEO do?

- PEO stands for “**Professional Employer Organization**”
- A PEO is an organization to which business can outsource an array of human resource responsibilities, such as:
  - Payroll processing;
  - Benefits administration;
  - Tax filing;
  - Hiring, onboarding, and training;
  - Statutory entitlements;
  - Employment contracts and other documents; etc.
- PEOs may contract to become the “employer of record” of their clients’ employees, or at least a co-employer of those employees.

# Considerations for engaging a PEO in Canada

The contracting business with remain the employer of its employees

- As previously noted, PEOs may contract to become the “**employer of record**” of their clients’ employees, or at least a co-employer of those employees.
- However, In Ontario for example, “**employer**” is defined as:  
“an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it...”.
- That obligation cannot be removed by way of a contract with a PEO or other “employer of record”. It exists as a matter of basic law.



# Considerations for engaging a PEO in Canada

Why does the contracting business' employer status matter?

- While PEOs may purport to be experts in Canadian employment law, errors or misunderstandings may arise.
- **Compliance is not guaranteed.**
- Accordingly, if employment laws are not followed, liability will fall to the PEO's client.
- Further, a PEO's service agreement with their clients may include extensive indemnities to protect the PEO from such liability.

# Takeaways

- As PEOs become more widely adopted in other jurisdictions, we can perhaps expect increased attention by Canadian legislators.
- To date, we have not seen any litigation in Canada involving liability against an organization in the context of a PEO arrangement.
- It will always be important to speak with Canadian legal counsel before engaging with a PEO, and to have Canadian counsel review any proposed service agreements and employment documents.
- In the current legal landscape and given the potential for compliance issues as it concerns abiding by employment standards legislation, PEOs may be best used for benefits administration and payroll processing for Canadian organizations.

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# **Misclassification: Contractors vs. employees in Canada and the U.S.**

Maggie Sullivan

# Consequences of misclassification in Canada

Employers may be subject to liability with respect to the following:

## Canada Revenue Agency:

- Employer tax deductions; fines for non-compliance

## Provincial Workplace Safety and Insurance/Workplace Compensation Boards:

- Investigation into your workplace; repayment of outstanding premiums; significant fines for both the Company and Directors and Officers personally; a provincial offence.

## Employment standards:

- Vacation pay; overtime pay; leave entitlements; termination pay.
- Potential fines and criminal sanctions.
- Personal Director liability.

# Employee vs contractor “Test”

Factors which are indicative of a contractor relationship include the following:

- **Exclusivity** – Contractors do not generally work full time or exclusively for one organization;
- **Length of service** – Contractors generally do not enter into lengthy contracts or a series of rolling contracts with the company to which they provide services;
- **Incorporation** – Contractors often incorporate as a separate corporation or sole proprietorship and will provide their services through same;
- **Control** – Contractors have control over the timing and performance of their work (including hours of work and job-site location);
- **Tools** – Contractors generally supply their own tools and equipment;
- **Job Titles** – Contractors are not given job titles;
- **Benefits** – Contractors are not offered benefits typically extended to employees, and are not entitled to paid vacation or paid public holidays;
- **Insurance** – Contractors are generally responsible for their own insurance coverage; and
- **Taxes** – Contractors are responsible for remitting their own taxes, and no employment source deductions are taken by the company which engages their services.

# Ontario specific considerations

## Business consultants & information technology consultants

As of January 1, 2023:

- In order to be exempt from the ESA, “business consultants” and “information technology consultants” must:
  1. Provide their services through a personal service corporation or a sole proprietorship as opposed to in their own name;
  2. Be paid a fee of \$60/hour or greater; and
  3. Have a written agreement setting out the foregoing.

# Ontario specific considerations

## Business consultants & information technology consultants

Business consultant:

- Someone who provides advice or services to a business or organization on its performance, including advice or services in respect of operations, profitability, management, structure, processes, finances, accounting, procurements, human resources, environmental impacts, marketing, risk management, compliance, or strategy of the business or organization.

Information technology consultant:

- Someone who provides advice or services to a business or organization on its information technology systems, including planning, designing, analyzing, documenting, configuring, developing, testing, and installing.

# Dependent contractors

## The middle ground between employee and independent contractor

A person may be found to be a dependent contractor when:

- There is near or complete exclusivity between the individual and the company; and
- The individual is economically dependent on the company such that the working arrangement accounts for “substantially more than a majority” of the contractor’s income.

Consequences of being deemed a dependent contractor:

- Dependent contractors are entitled to common law reasonable notice upon termination

If the assessment leads to the conclusion that the person fits or may fit the definition of dependent contractor, then it is likely best to insist on an employment relationship and employment agreement instead.



# Thank you



**Colleen Hoey**  
Counsel, Ottawa, Canada  
+1 613 783 9665  
colleen.hoey@dentons.com



**Dan Beale**  
Partner, Atlanta, United States  
+1 404 527 8489  
dan.beale@dentons.com



**Matthew Curtis**  
Partner, Toronto, Canada  
+1 416 367 6767  
matthew.curtis@dentons.com



**Catherine Coulter**  
Counsel, Ottawa, Canada  
+1 613 783 9660  
catherine.coulter@dentons.com



**Maggie Sullivan**  
Associate, Ottawa, Canada  
+1 613 288 2706  
maggie.sullivan@dentons.com

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