



TOP 5 CANADIAN EMPLOYMENT LAW TRENDS FOR 2016

Article by Ryan Campbell

Having recently reflected on the Top 10 Canadian Employment Law Cases of 2015, we have now compiled a list of five significant Canadian employment law trends that employers can expect to see in 2016.

By being aware of these trends, employers, business leaders and human resources professionals will be able to address potential pitfalls proactively.

1. The duty of good faith in the employment relationship

A 2014 decision of the Supreme Court of Canada emphasized the duty of good faith in contractual dealings and created a new general duty of honesty in contractual performance. That decision began to find its way into employment law jurisprudence in 2015, and is expected to continue to influence employment law in Canada in 2016. Canadian courts have already relied upon the 2014 Supreme Court of Canada decision to require employers to, among other things:

- pay a discretionary bonus following the termination of the employment relationship;
- provide an employee with a “cooling-off period” to reconsider the employee’s resignation decision; and
- justify awarding bad faith damages payable by an employer for conduct during the course of the employment relationship.

2. The transient workforce

With the concept of a “sharing economy” becoming more mainstream, employers are also looking for creative ways to control capacity, eliminate waste and remain nimble. One way that employers are attempting to achieve these objectives is to use contractors or fixed-term employees to perform tasks traditionally performed by long-term employees.

Although the use of contractors or fixed-term employees may be financially attractive for many reasons, it does not come without risks. For example, contractors characterized as “independent contractors” may be found to be “dependent contractors” or “employees” by Canadian courts, thereby triggering various statutory and common law obligations for the employer.

Fixed-term employees who move from one employer to another may pose risks to an employer’s confidential information and/or disrupt the relationship between the employer and its customers through unlawful competition or unlawful solicitation.

3. Increasing damages awards and penalties

Canadian courts and administrative tribunals have been levying harsher penalties against employers, directors, officers, and supervisors for violations of human rights, occupational health and safety, and employment standards legislation. It is expected that this will continue in the year to come.

In 2015, these penalties included prison sentences for directors, officers and supervisors who contravened applicable occupational health and safety legislation, and several general damages awards in excess of \$200,000.

4. Whistleblowing

Employment standards legislation has long provided protection from reprisal for employees seeking to enforce minimum employment standards. However, Canadian jurisdictions have historically provided limited (if any) protection to individuals (including employees) seeking to raise regulatory compliance concerns about private-sector organizations (including their employers).

Recent changes to the compliance landscape in some Canadian jurisdictions may increase instances of whistleblowing. For example, the Ontario Securities Commission is currently in the final stages of a consultation process regarding OSC Policy 15-601 *Whistleblower Program*, with a view to implementing that program in Spring 2016. On February 18, 2016, the CSA Group (formerly the Canadian Standards Association) announced the release of “Whistleblowing Systems - A Guide”, which is designed to “help organizations empower employees to report suspected issues at work within the framework of both corporate ethics and compliance as well as an occupational health and safety program.”

The increased emphasis on whistleblowing creates several challenges for the employment relationship, including a strain on an employee's duties of confidentiality and loyalty to the employer in circumstances where external reporting is incentivized.

5. Prevention of workplace sexual violence and harassment

In 2014 and 2015, Canadian media outlets reported on several high-profile instances of workplace sexual violence and harassment, which has not gone unnoticed by decision-making bodies (e.g. courts, tribunals, etc.). In addition to resulting in increased damages awards and penalties described above, instances of workplace sexual violence and harassment have also caught the attention of Canadian lawmakers.

For example, the Ontario legislature has introduced the *Sexual Violence and Harassment Action Plan Act* (Bill 132). If passed, Bill 132 will, among other things, amend various provisions of the Ontario *Occupational Health and Safety Act* to require employers to take steps to protect workers from workplace sexual harassment (and workplace harassment, generally), including conducting investigations into incidents and complaints of workplace sexual harassment (and workplace harassment, generally).

Ryan Campbell Biography

Ryan Campbell is an associate at DLA Piper (Canada) LLP in Toronto where he practises employment law. He regularly advises local and multinational employers on a broad range of workplace issues including occupational health and safety, workers' compensation, employment contracts, performance management, accommodation, terminations, social media in the workplace, and employment-related litigation. Ryan also advises targets and acquirers regarding employment matters arising in corporate/M&A transactions.

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