MANAGING A GLOBAL WORKFORCE ACROSS MULTIPLE JURISDICTIONS

Max Brunette
Marcus Ostrowerka
Michael Schalke
Amy-Lynn Smith

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AGENDA

1. Medical Marijuana in the Workplace
2. Changing the Language in your Bonus Plans
3. Hiring a Foreign Worker
4. Managing your Global Workforce

MEDICAL MARIJUANA IN THE WORKPLACE

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HISTORY OF MEDICAL MARIJUANA IN CANADA

- **2000: *R v Parker* (ONCA) - Possible existence of a medical exemption**
- **2001: *Marijuana Medical Access Regulation* - Access to Dried Marijuana**
  1. Requirements: Physician Declaration (detailed) + Gov't Authorization
  2. Supply Sources: (1) Health Canada; (2) Personal-Use Production License; or (3) Designated-Person Production License

HISTORY OF MEDICAL MARIJUANA IN CANADA

- **2014: *Marijuana for Medical Purposes Regulations* (MMPR) - Replaced MMAR**
  1. Relaxed Requirements: No Gov't authorization required, just submit to licensed producer a medical documentation (no details required in medical document)
  2. Stricter Supply Sources: Licensed commercial producers

HISTORY OF MEDICAL MARIJUANA IN CANADA

- **2015: *R v Smith* (SCC) - Requiring medical marijuana to be in a dried form**
- **February, 2016: *Allard v Canada* (FC) - Prohibition on patients growing marijuana violates Charter**
- **August, 2016: *Access to Cannabis for Medical Purposes Regulations* – Replaces MMPR**

INCREASE IN USE AND WORKPLACE IMPACTS

Current trend of medical marijuana users:

- January 2012: 13,781
- January 2013: 28,970
- December 2013: 37,884
- March 1, 2016: 53,649
- **June 30, 2016: 75,166**
- 2024 (est.): 450,000

INCREASE IN USE AND WORKPLACE IMPACTS

- Shoppers Drug Mart has applied to be distributor
- Prescriptions granted without regard to workplace safety
- Onus on employers to ensure workplace safety
- Legal use ≠ right to be impaired at work

HUMAN RIGHTS LEGISLATION AND DUTY TO ACCOMMODATE

- **Treat medical marijuana like any other prescription**
- **Human rights legislation**
  1. Medicinal marijuana may be related to underlying disability
  2. Bona Fide Occupational Requirement
  3. Duty to accommodate to point of undue hardship
     - Safety is not trumped by human rights
- **Recent human rights cases and grievances involving medicinal marijuana at workplace**

HUMAN RIGHTS LEGISLATION AND DUTY TO ACCOMMODATE

1. ***French v. Selkin Logging* (July 2015, BCHRT)**
   - Employee operated heavy equipment
   - Smoked marijuana for pain during breaks
   - No prescription for marijuana
   - After accident at work, employer commenced investigation. Employee did not show up to work and employer viewed him as having quit
   - Human rights complaint dismissed:
     - Zero tolerance policy was BOFR
     - Smoking marijuana at work, without legal or medical authorization, was undue hardship

HUMAN RIGHTS LEGISLATION AND DUTY TO ACCOMMODATE

2. ***Old v Ridge Country Contracting*** **(April 2015, BCHRT)**
   - Employee operated heavy equipment
   - Employee disclosed medical marijuana use for seizures
   - Terminated on basis of safety risk from seizures / impairment due to marijuana
   - No evidence that employer:
     1. sought more information or clarification about safety risk; or
     2. engaged employee in accommodation process

SUMMARY OF ACCOMMODATION PRINCIPLES

- **Medical marijuana not necessarily a bar to safety-sensitive work**
- **Once aware employee uses medical marijuana, employer *must* make further inquiries**
- **Obtain medical information**
  - Restrictions or limitations
  - Medication which may affect performance
- **Engage employee in accommodation process**
- **Independent medical examination or review**
- **Conduct a thorough investigation**

CHANGING THE LANGUAGE IN YOUR BONUS PLANS

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SO LONG, GOODBYE – NOW GIVE ME THE MOON AND THE SKY

Incentive Payments on Termination?

- What are Employees Entitled to?
- Starting Point:
  - Employees who are terminated without cause are entitled to damages which are intended to put the employee in the same position that he or she would have been in had he worked to the end of the period of reasonable notice
  - This includes all incentive compensation an employee would have received under applicable bonus or incentive plans

What if the relevant plan states that an employee must be “actively employed”, to receive a bonus?

- Many held the view that this was good enough to rebut the presumption of employee entitlement
- Language found in many existing plans

Paquette v. TeraGo Networks Inc., 2016 ONCA 618 (August 9, 2016)

Facts:

- Mr. Paquette had 14 years of service
- Director, Billing and Operation Support Services
- No termination clause – ONSC determines reasonable notice is 17 months
- Due to timing of termination, Mr. Paquette would have been entitled to two more bonus payments over 17 month notice period
- Bonus plan stated employees must be “actively employed” at time of payout to receive bonus payment

Lower Court Decision:

- Integral part of Mr. Paquette's employment
- Had employment continued he would be entitled to the two additional bonus payments
- Relied on the fact that employee had to be "actively employed" by TeraGo and found that the bonus plan was not ambiguous
- Therefore, Paquette not eligible for a bonus

Ontario Court of Appeal Decision:

- ONSC got it wrong
- Starting point is presumption employee is entitled to all compensation he or she would have received had notice been given (including bonus)
- Lower Court erred by considering whether he was “notionally” or “actively” employed during notice period
- Had he been given proper notice, he would have been “actively” employed at time of payment
- Second error was looking at the term “active employment” and determining it was unambiguous, therefore Mr. Paquette could not be entitled to a bonus
- What the Trial Judge should have done was start from presumption of entitlement to all compensation over notice period, then ask whether the words of the Bonus Plan “were sufficient to limit the appellant’s common law right to compensation in lieu of notice”

In summary: The question … was not whether the bonus plan was ambiguous, but whether the wording of the plan was effective to limit his right to receive compensation for lost … bonus during period of reasonable notice

<u>Takeaways</u>:

- Terms specifying employee is actively employed are likely no longer good enough
- In line with recent movement towards more employee friendly landscape
- *Bhasin v. Hrynew*, 2014 SCC 71
- *Styles v. Alberta Investment Management Corporation*, 2015 ABQB 621 (being appealed)
- What Can We Do?: Amend all plans that are in any way ambiguous, especially if they contain “must be actively employed” language

HIRING A FOREIGN WORKER

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CANADIAN WORK PERMIT STRATEGIES

- **Questions asked before engaging a foreign worker?**
  - Do you need a work permit?
  - Do you need a visa?
  - Do you need an eTA?
  - Do you need a Labour Market Impact Assessment?

KEY HIGHLIGHTS

- **Key Highlights of 2017 Immigration Levels Plan - In 2017, economic immigration programs will see an overall increase of 7% over 2016**
- **In June 2014, the TFW program was recognized as two separate programs to reflect differences between program streams**
- **International Mobility Program (IMP) – refers to foreign nationals who are exempt from LMIA requirements due to the broad economic and cultural benefits they bring to Canada**
- **Temporary Foreign Worker Program (TFWP) – includes streams require LMIAs, and seek to address short-term labour shortages in the absence of Canadians and PRs**

DO YOU NEED A WORK PERMIT?

- **Common misconceptions about work permit requirements**
  - Short visits = no work permit needed
  - No direct pay in Canada = no work permit needed
- **What matters is the purpose of entry/activity**
  - No intent to enter the Canadian labour market
  - The activity must be international in scope, e.g. after sales service
  - Remuneration/place of employer/accrual of profits – outside Canada

BUSINESS VISITORS

- **Meetings / Board of Directors' Meetings**
- **After-Sales Services**
  - Include services provided by persons repairing and servicing, supervising installers, and setting up and testing commercial or industrial equipment (including computer software).
  - "Setting up" does not include hands-on installation generally performed by construction or building trades.

CANADIAN WORK PERMITS

- To work in Canada, TFW must usually obtain a work permit
- A work permit is a document that sets out the occupation, work location and employer in Canada
- Citizens of countries that require a Temporary Resident Visa must apply at a visa office for a work permit
- Must have properly prepared and documented supporting documents for any application

CANADIAN WORK PERMITS

- **Types of main work permit categories under the *IRPR***
  - LMIA-Exempt
    - Intra-Company Transferees
    - NAFTA Professionals for Citizens of America and Mexico
  - LMIA (formally known as LMO) based work permits
- **Visa Offices vs. Port of Entry**

INTRA-COMPANY TRANSFEREE CATEGORY

- For employees at “executive” or “managerial” level, or who have “specialized knowledge”
- Must: 1) be currently employed by; 2) have worked full-time for at least 12 consecutive months in preceding 3 years for, a properly related foreign entity outside Canada
- Must prove proper ownership relationship between foreign employer and Canadian (e.g. Parent-Subsidiary; two affiliates owned by common parent company etc.)
- Initial work permit granted for up to 3 years

INTRA-COMPANY TRANSFEREE CATEGORY

- **Time cap of 7 years for managers/executives, 5 years for specialized knowledge workers**
- **Special rules for start-up companies**
  - Generally, must secure physical premises to house the Canadian operation
  - Must furnish realistic plans to staff the new operation
  - Must have the financial ability to commence business in Canada and compensate employees

NAFTA PROFESSIONALS

- **Types of Professionals (for example)**
  - Engineers
  - Accountants
  - Management consultants
  - Scientific Technicians
  - Computer Systems Analyst
- **Duration of NAFTA-Professional WPs**
  - Initial work permit – up to 3 years
  - No limit on the number of extensions providing the individuals to comply with the requirements for professionals

WHAT IS eTA?

- **Starting November 10, 2016, visa-exempt travellers will need an Electronic Travel Authorization (eTA) to board their flight to Canada**
- **Canadian citizens, including dual citizens, will need a valid Canadian passport to fly to or transit through Canada**
- **Exemption - Citizens of the U.S. are exempt from the eTA requirement. U.S. lawful permanent residents need an eTA and must present a valid U.S. permanent resident card (Green Card) and a valid passport when they check in for their flight to Canada**

LABOUR MARKET IMPACT ASSESSMENT

- **Labour Market Impact Assessment "LMIA" (formerly known as the Labour Market Opinion "LMO") – Review of the impact of hiring a foreign national on the Canadian labour market**
- **Canadian or foreign employer may apply for permission to hire a TFW in Canada by applying to Service Canada**
  - Employer must demonstrate that no qualified Canadians can be found
  - Must meet strict recruiting rules (content, placement and duration of job listings)
  - 2-16 weeks for the process (may vary) (including the job advertising for a minimum 30 days available to the public)
  - If LMIA is granted, the TFW may then apply for a work permit

LMIA APPROVAL-REFUSAL RATES IN 2015

The approval and refusal rates on Labour Market Impact Assessments (LMIA) issued by wage streams (Low-wage versus High-wage) by Service Canada processing offices across Canada from January 1, 2015 to July 22, 2015

Processing Office Province	Processing Office City	High-wage LMIA		Low-wage LMIA	
		Approval Rate	Refusal Rate	Approval Rate	Refusal Rate
Alberta	Edmonton	82%	18%	58%	42%
British Columbia	Vancouver	92%	8%	61%	39%
New Brunswick	Saint John	81%	19%	68%	32%
Ontario	Toronto	79%	21%	74%	26%
Quebec	Montreal	96%	4%	80%	20%
Grand Total		**87%**	**13%**	**65%**	**35%**

Notes:

1. The source for all information in this report is Employment and Social Development Canada (ESDC)'s Foreign Worker System (FWS).
2. The approval and refusal rates on issued Labour Market Impact Assessments (LMIA) by wage streams (Low-wage versus High-wage) by Service Canada processing offices across Canada from January 1, 2015 to July 22, 2015, based on the date the LMIA were issued.
3. Wages on LMIA applications are not always reflected on an hourly basis. In such cases, a calculation was made based on the information in such LMIA applications in order to express the wage on an hourly basis. This was then compared with the province or territory median hourly wage. In the instance where the wage offered on the LMIA application is a ("Fee for Service" or "Other"), the LMIA application was excluded from rate calculation.
4. The information appearing in this table may slightly differ from those reported in previous ESDC releases. These differences are adjustments to administrative data files as normally occur over time and reflect refinement in methods of calculation.

LMIA OCCUPATIONS

- **Occupations – 10-business day processing**
  - Highest demand - Major infrastructure and natural resources projects
  - Highest paid - Wage is at or above the top 10% of the wages – indicates highest-skilled
  - Shortest duration - 120 calendar days or less; Wage above median wage; and including repairs and warranty work

THE “REGULAR” LMIA PROCESS

- **Job postings**
  - Job Bank/WorkBC + 2 additional sources national in scope
  - 4 weeks (and continued posting on the Canada Job Bank/WorkBC after the filing and until issuance of the LMIA)
  - Strict requirements for postings, including company operating name; business address; title; job duties; terms of employment; benefits; wages; location of work; skill requirements and contact

MANAGING YOUR GLOBAL WORKFORCE

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JURISDICTIONAL ISSUES IN EMPLOYMENT LAW

- **Some of you may employ in more than one jurisdiction, some may not**
- **For those that think they do not, and who think this too niche of a topic, consider this:**
  - Each province is its own jurisdiction, with its own unique laws
  - If your business falls under a provincial head of power under the constitution, the employment relationship will probably be governed by the province with the closest ties to the employment relationship

JURISDICTIONAL ISSUES IN EMPLOYMENT LAW

- **Example 1**
  - A business operates in the Lower Mainland. All employees live and work in BC, including the CFO. These employment relationships are governed by BC law. CFO, for personal reasons, must indefinitely relocate to QC
  - Business wants to continue employment relationship. Wants to amend employment contract to allow for CFO to work from home office in QC, with some limited travel to HQ in BC. There's a jurisdictional issue here, what is it?

JURISDICTIONAL ISSUES IN EMPLOYMENT LAW

- **Example 1 (cont.)**
  - If CFO merely going to QC for temp 1 month project, employment relationship remains governed by BC law; insufficient ties to QC. However, when we are talking about an indefinite relocation to QC, with CFO living and working in QC, ties to QC become stronger than ties to BC, and QC law will apply to employment relationship. Hence, in amending the employment contract, you are going to want to be mindful of QC law; you will want a law firm that has offices in QC. We have offices in QC

JURISDICTIONAL ISSUES IN EMPLOYMENT LAW

- **Example 2**
  - A business has central offices in BC. The business has some manufacturing facilities in Peru. If the mgr. of the Peru facility travels to the BC offices from time-to-time, while this may require proper immigration status (business traveller), such periodic attendance/work in BC is unlikely to be subject to BC employment law, or even Cdn tax law
  - However, if the business wishes to have the Peruvian manager live and work in BC indefinitely, even if just half the time, this aspect of the employment is likely going to be subject to BC law, not Peruvian law, with income likely being subject to Cdn tax law

JURISDICTIONAL ISSUES IN EMPLOYMENT LAW

- **Example 3**
  - A business has offices in BC. The business hired an individual in 1999; lived and worked in BC; made her way up the ranks; getting quite high in the organization. Business decides to set up manufacturing facility in China, tasking this individual with setting that up. She starts spending some time in China to do this, but not 100% of time. Not any form of indefinite relocation to China at this point, so parties do not turn their minds to need for new employment contract or jurisdictional issues
  - However, time passes and the individual spends more and more time in China: gets apartment in Beijing, splits from spouse who lives in BC. Eventually, the individual lives and works in China pretty much FT, and has been doing so for years. Employment contract never updated. Employment relationship sours; and is terminated. What law applies? BC? China? Two very different legal regimes

JURISDICTIONAL ISSUES IN EMPLOYMENT LAW

- **Example 4**
  - BC business hires someone in BC, but position is based out of China. Employee sues in BC ESB for OT and vacation pay. Does the BC ESA apply?

JURISDICTIONAL ISSUES IN EMPLOYMENT LAW

- **Example 5**
  - Business, incorporated in BC, runs online business, with customers in all provinces and in many countries. Let's say for the sake of argument that business is a provincial undertaking, not federal. Ontario customer sues at BCHRT alleging discrimination in province of service, on basis of disability
  - Employment, human rights etc. statutes generally cannot have extra-territorial impact. This means that if the province with the most significant ties to complaint is Ontario, then the BCHRT and BCHRC will not have jurisdiction

JURISDICTIONAL ISSUES IN EMPLOYMENT LAW

- I just wanted to get you thinking about jurisdictional issues in employment law. These issues are not as esoteric as you might first think
- In commercial contracts, most developed nations allow (to some degree) for the parties to select the forum and law they want to apply
- Employment contracts are form of commercial contract, but are unique. Hence, in employment contracts there is a limited ability to choose forum/law. This ability is limited because, in my view, most jurisdictions treat employment contracts as being special, something deserving of extra-statutory attention, i.e., ESA, income tax, human rights. Generally, parties cannot simply contract out of such legislation

QUESTIONS?

GOWLING WLG

Maxwell J. Brunette

Partner
Employment & Labour

max.brunette
@gowlingwlg.com

604-443-7635

Michael Schalke

Partner
Employment & Labour

michael.schalke
@gowlingwlg.com

604-891-2282

Marcus Ostrowerka

Associate
Employment & Labour

marcus.ostrowerka
@gowlingwlg.com

604-443-7630

Amy-Lynn Smith

Associate
Employment & Labour

amy-lynn.smith
@gowlingwlg.com

403-298-1875


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