AVOIDING FROSTBITE:

A PRIMER ON CANADIAN EMPLOYMENT, IMMIGRATION AND LABOUR LAWS

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Introduction

While Canada and the United States share very close bilateral ties, and there are many similarities in our governance and laws, there are also some very distinct and important differences that are relevant to cross-border business. One key difference exists in attracting, managing and retaining employees in Canada. Any company contemplating business north of the border should be made aware of these very significant considerations.

Immigration

There are restrictions on the employment in Canada of individuals who are not citizens or permanent residents of Canada. Subject to very limited exceptions, individuals must obtain a work permit.

Work is defined as any activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market. An individual need not be paid in Canada (e.g. if remuneration is paid by a foreign entity) for the activity to be considered work.

Work Permits

Usually work permits will be issued for periods ranging from a few months to three years. Renewals are available in appropriate circumstances.

Certain classes of persons (known as "business visitors") carrying on certain types of limited business activities, do not require a work permit. Such persons include the following:

- individuals coming into Canada to purchase goods for their country or corporation carrying on business outside of Canada, including individuals coming to Canada for the purpose of acquiring training or familiarization with the goods or services purchased;
- representatives of a foreign business or government coming to Canada for the purpose of selling goods, but not directly to members of the public.

In most other cases, where a work permit will be required, a visa officer located outside of Canada processing such an application must consider the opinion of a foreign worker officer at a Human Resources and Skills Development Canada ("HRSDC") office in the province where the employment is to take place.

Employers who wish to hire a foreign worker must apply for a job offer confirmation, which is also called a Labour Market Opinion, by submitting a Labour Market Opinion application to HRSDC. In order to obtain the job offer confirmation, employers must demonstrate to an HRSDC officer:

i. the efforts made to recruit and/or train willing Canadians/permanent residents;

ii. that they are unable to find Canadians/ permanent residents with the necessary training and experience available to fill the job, and;

iii. that as a result of employing the foreign worker, some potential benefits to the labour market in Canada will occur. Once HRSDC confirms the job offer, a foreign worker must apply for a work permit at a Canadian High Commission, consulate or embassy, or at the port-of-entry.

There are exemptions, however, from the requirement for employment confirmation by the HRSDC. Employees of a related business outside Canada who are transferred on a temporary basis to a Canadian branch, parent or subsidiary, to work at a senior executive or managerial level or who possess specialized knowledge, will be exempt from the requirement of obtaining HRSDC job confirmation, but will still require a work permit. If the documentation is in order, certain work permits may be issued by the Immigration Officer at the port of entry, upon payment of a regulated fee. For most other "foreign workers" of all categories, it is necessary to obtain the work permits in advance, before the employee leaves for Canada, by attending at the Canadian High Commission, embassy or consulate that serves the employee's country of nationality, or the country in which the employee is present and has been lawfully admitted.

Accompanying Family Members

An individual coming to Canada on a temporary work permit may be accompanied by his or her spouse, common-law partner and dependant children. The spouse or common-law partner of such an individual planning to attend school in Canada will need a study permit, but such permit may be obtained after entry into Canada. Although, generally, a spouse cannot work in Canada unless he or she obtains a work permit in the manner discussed above or below, legislation allows spouses to work in Canada if the other spouse has a work permit.

NAFTA

NAFTA contains reciprocal provisions intended to facilitate the temporary cross-border movement of business persons between Canada, the U.S. and Mexico. In order to gain entry to Canada as a business person pursuant to the NAFTA, business travellers must be either a U.S. or Mexican citizen; and qualify as:

- business visitors;
- intra-company transferees; and
- professionals.

Persons who fall within the business visitor category can engage in business activities temporarily in Canada, without being issued a work permit, provided that they do not receive remuneration in Canada, although the remaining categories must still obtain a work permit. Most NAFTA business persons who are citizens of the U.S. can apply to work in Canada at a port of entry. Mexican citizens must apply to work in Canada at a Canadian High Commission, embassy or consulate abroad, before departing for Canada.

The category of intra-company transferees includes managerial and executive personnel and personnel utilizing "specialized knowledge" (e.g. proprietary knowledge of a firm's product, service, research, techniques, etc.), who are not managers of any kind. The total term of a work permit for intra-company transferees is seven years for senior manager/executives, and the

total term of a work permit for intra-company transferees with specialized knowledge is five years.

Pursuant to the third classification, citizens of a treaty country who are engaged in professions of a kind described in the NAFTA, and who possess the qualifications as enumerated therein, may enter the other country on a temporary basis for a term of three years. This does not mean, however, that they would then be entitled, as of right and without holding any relevant federal or provincial certification, to carry out professional activities of such a nature and duration as to constitute professional practice in a Canadian jurisdiction.

Employment

Businesses with employees working in Canada should be aware of some of the key differences between U.S. and Canadian human resources laws.

In Canada, employment laws are provincially based, except for federal undertakings such as aviation, transportation and broadcasting. Each province has its own employment legislation which sets out minimum employment standards in respect of hours of work requirements, leaves of absence, notice and/or severance on termination, vacation and holiday entitlement, and enforcement mechanisms.

No “at-will” Employment

Beyond employment standards legislation is the common law. Canadian courts have firmly decided that “at-will” employment is not permitted in Canada. Accordingly, any “at-will” employment clause in an employment contract will be void, and absent cause for dismissal (which is a high threshold to meet), the employee will be entitled to reasonable notice of termination or a payout in lieu of reasonable notice. There is no formula to determine the appropriate period of notice. Instead, Courts look at certain factors in fashioning a reasonable notice period, specifically: age; length of service; nature or character of employment; availability of alternative employment; and any or other factor the Court considers relevant. Notice periods are typically measured in months, as opposed to weeks under most provincial employment statutes, so liability can be quite significant. However, employers with well- drafted termination provisions in their employment contracts can avoid these common law obligations. Thoughtful and careful drafting of employment agreements is essential at the time of hire.

Overtime

A frequent source of confusion for employers operating in Canada is the law relating to overtime entitlement. Many U.S. based companies assume that hourly employees are entitled to overtime, and salaried employees are not. This is not necessarily true. The manner of payment of employment income bears no weight in the determination of overtime entitlement. All employees are entitled to overtime unless specifically exempted from provincial employment legislation. Typically “managers” are exempt from entitlement, though there is a plenitude of case law on the issue of what constitutes a manager. Other exemptions vary by province. For example, in B.C., high technology professionals are exempt from overtime. This may not be the

case in other provinces, so due diligence requires that employers familiarize themselves with the exemptions applicable to the province in which they do business.

Leaves of Absence

Canadians are known for the generous leaves of absence provided to employees. The most notable are job-protected maternity and parental leave. Most birth mothers in Canada are entitled to a combined maternity and parental leave of one year. Employees typically apply for and receive reemployment insurance benefits from the Canadian government for the period of leave, but many employers in Canada "top up" employees for some period of the leave. Other statutory job-protected leaves include compassionate care leave, emergency leave and family medical leave.

Drug and Alcohol Testing

Drug and alcohol testing is a source of much frustration for many U.S. based businesses operating in Canada. Testing for drug and alcohol consumption in Canada is not nearly as permissible as it is in the U.S. Although rules on drug and alcohol testing vary from province to province, pre-employment testing and random testing are rarely allowed, except in highly safety-sensitive work environments in some provinces (such as the Oil Sands in Alberta). Otherwise, drug and alcohol testing is allowed only when accidents or "near misses" occur and there is a reasonable suspicion of impairment. Testing may also be allowed from time to time as part of a "last chance" type of agreement where an employee has a past history of drug and alcohol abuse that the employer has accommodated. Accommodation, up to the point of undue hardship, is required by provincial human rights commissions and tribunals where an employee has, or is perceived to have, a drug or alcohol addiction. Such addiction is considered to be a disability, just like other physical or mental impairments, and employers cannot terminate employees on the basis of such an addiction.

Successor Employer

Finally, any U.S. business seeking to acquire or merge with a unionized company in Canada ought to be aware of the successor employer provisions under provincial labour legislation. Generally, a purchaser steps into the shoes of a vendor and becomes bound to any collective agreement in effect. Before signing off on any purchase agreement, a prudent purchaser will want to understand the collective agreement and get a handle on the company's labour-management relations.

Governing Bodies

Employers in Canada may be required to defend their actions before Employment Standards Tribunals, Human Rights Commissions or Tribunals, Labour Relations Boards, Workers Compensation Boards, Grievance and Interest Arbitrators, Privacy Commissioners and Supreme/Superior Courts or Courts of Queen's Bench. The nature of an employee's complaint will determine which administrative body or Court has jurisdiction over the matter, but often there is overlapping jurisdiction. Employers can therefore find themselves answering to two or more decision-making bodies in respect of the same dispute.

Conclusion

Consulting appropriate local counsel early on in the process of establishing a business in Canada is prudent for employers to be strategic in managing employment law issues and risks. To keep abreast of changes in the law, we invite you to visit FMC's labour and employment blog at http://www.employmentandlabour.com/ or our website at www.fmc-law.com.

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