Employment Standards: Where Are We Heading?

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▪ Introduction

In most workplaces, employers are concerned with whether or not they are meeting their minimum obligations under various pieces of legislation. Employers have many obligations relating to employment standards, occupational health and safety, human rights, workers compensation and so on. For the purposes of this paper, we will look primarily at the obligations imposed on employers in Alberta pursuant to the *Employment Standards Code*, as well as the *Occupational Health and Safety Act*, and what it means for those employers engaged in the farming industry in Alberta.

▪ Employment Standards Code

The *Employment Standards Code* ("*Code*") establishes minimum standards for employment (and exceptions) in a variety of areas. Employees employed on a farm or ranch, and whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, honey, livestock, domestic cervids (within the meaning of the *Livestock Industry Diversification Act)*, poultry or bees, or as enumerated by the *Code* and its regulations, are exempt from the provisions of the *Code* dealing with hours of work, overtime, general holidays, vacation and the employment of minors. What that does mean, however, is that employers engaged in such activities remain subject to those portions of the *Code* dealing with the payment of earnings, maternity and parental leave, as well as termination of employment.

Payment of Earnings

Employees must be paid at least once per month. Most employers establish pay periods of a week, two weeks, or a month. Employees must be paid within 10 days after the end of each pay period, and may be paid in cash, by cheque or money order, or by direct deposit into an account of an employee's choice in any recognized financial institution.

Every employer must keep an up-to-date record of the following information for each employee (and provide a written statement of such to the employee each pay period): regular and overtime hours of work; wage rate and overtime rate; earnings paid showing separately each component of the earnings for each pay period; deductions from earnings and the reason; and time off instead of overtime pay provided and taken. The hours of work of an employee must be maintained by an employer daily. Employment records must be retained by an employer for at least three years from the date each record is made.

If an employer intends to reduce an employee's wage rate, overtime rate, general holiday pay, vacation pay, or termination pay, the employee must be notified before the start of the pay period in which the reduction is to take effect.

"**Minimum wage**" is the minimum amount employers must pay workers within the Province of Alberta. The government of Alberta outlines minimum wage within the *Regulation*. The minimum wage in Alberta is currently $8.40 per hour.

Employees must receive at least three hours at the minimum wage on each occasion they are required to report to work or come to work for short periods of time. Minimum compensation would not apply if an employee is unavailable to work long enough to earn an equivalent amount. If an employee is required to work a split shift and there is more than a one hour break between the two segments of the shift, an employee must be paid the minimum compensation of three hours for each segment of the shift.

If a compulsory meeting or compensable training occurs on an employee's regularly scheduled day off, the employee must receive at least three hours' compensation. If employees return to work to attend a meeting or training after completing their shift, they must be paid the wages agreed to or overtime, if applicable, whichever is greater. In addition, the rate of pay for meetings or training cannot be less than the minimum wage, and the compensation received by the employee must equal or exceed three hours' compensation.

Maternity and Parental Leave

Alberta employees are entitled to up to one-year of unpaid, job-protected leave in the event of a birth and up to 37 weeks on the adoption of a child:

- Birth mothers can take up to 52 consecutive weeks of unpaid job-protected leave. This is made up of 15 weeks maternity leave and 37 weeks parental leave.
- Fathers and/or adoptive parents are eligible for up to 37 consecutive weeks of unpaid, job-protected parental leave. Adoptive parents can take parental leave regardless of the age of the adopted child.

Parental leave may be taken by one parent or shared between two parents but the total combined leave cannot exceed 37 weeks.

Employees must have 52 consecutive weeks of employment with their employer to be eligible for maternity and/or parental leave under the *Code*. This requirement applies to both full-time and part-time employees. If a pregnant employee has less than 52 consecutive weeks of employment, an employer cannot arbitrarily lay her off, terminate her employment, or require her to resign because of pregnancy or childbirth.

Maternity leave can begin at any time within 12 weeks of the estimated date of delivery. Parental leave can begin at any time after the birth or adoption of the child but it must be completed within 52 weeks of the date a baby is born, or an adopted child is placed with the parent. The following conditions apply:

- If the pregnancy interferes with the employee's job performance during the twelve weeks before the estimated date of delivery, the employer can require the employee to start maternity leave. The employee must be notified in writing.
- An employee, who takes both maternity leave and parental leave, must take the leaves consecutively.
- An employee must take at least six weeks of maternity leave after the birth of her child, unless the employer agrees to early resumption of employment and the employee provides a medical certificate indicating that resumption of work will not endanger her health.
- If the employer employs both parents of a child, the employer is not required to grant leave to both employees at the same time.

An employee must give the employer at least six weeks written notice about when she intends to start maternity leave:

- The employer may demand a medical certificate certifying pregnancy and giving the estimated date of delivery.

- If the employee fails to give the necessary notice she is still entitled to maternity leave if she notifies the employer within 2 weeks of her last day at work and provides a medical certificate.

An employee who takes maternity leave is not required to give her employer notice before going on parental leave, unless she originally agreed only to take 15 weeks of maternity leave. An employee must give the employer at least six weeks written notice to start parental leave.

Parents will still be eligible for the leave if medical reasons, or circumstances related to the adoption, prevent the employee from giving this notice. When this happens, written notice must be given to the employer as soon as possible.

Employees who intend to share parental leave must advise their respective employers of their intention to do so. Employees must give at least four weeks written notice that they intend to return to work or to change their return date. This notice must be provided at least four weeks before the end of the leave. An employer does not have to reinstate an employee until four weeks after receipt of this notice. Where an employee fails to provide this notice, or fails to report to work the day after their leave ends, the employer is under no obligation to reinstate the employee unless the failure is the result of unforeseen or unpreventable circumstances.

Employees are required to provide four weeks written notice if they do not intend to return to work after the leave ends.

The *Code* does not require an employer to make any payments to the employee, or pay for any benefits, during maternity or parental leave, however, where an employer has benefit plans such as sick leave for employees, there may be obligations that arise under human rights legislation.

An employer cannot terminate an employee on maternity or parental leave, unless the employer suspends or discontinues the business. Employees returning from maternity or parental leave must be reinstated in the same or a comparable position with earnings and other benefits at least equal to those received when the leave began.

If the business has been suspended or discontinued during the employee's maternity or parental leave, the employee has hiring priority if the business starts up again within 12 months after the end of the leave.

Termination of Employment

As a general principle employees have a right to terminate their employment with an employer and employers have the right to terminate the employment of employees. These rights, however, come with responsibilities. The main responsibility in most cases is to provide notice of intention to terminate. The length of such notice is normally dependent on the duration of the employment with the employer.

Where an employer fails to give notice or to give adequate notice, the remedy will be pay for the period of notice that should have been given. Employees too, have a responsibility to provide notice, but failure to do so carries different consequences.

In Alberta, the *Code* sets out minimum responsibilities of employers and employees when employment is terminated, including situations where notice is not required. Enforcement of the minimum standards, where these are breached, is through the involvement of Employment Standards.

Neither the employer nor employee has a statutory obligation to give notice of termination during the first three months of employment. This is consistent with industry practice that generally treats the first three months of employment as a probationary period.

Where the termination of employment is initiated by the employer, the length of notice required depends on the duration of employment and must be in writing. The minimum notice requirements that employers must give are:

- one week - for employment of more than three months, but less than two years;
- two weeks - for employment of two years, but less than four years;
- four weeks - for employment of four years, but less than six years;
- five weeks - for employment of six years, but less than eight years;
- six weeks - for employment of eight years, but less than 10 years; and
- eight weeks - for employment of 10 years or more.

An employer may choose to give pay for the required notice period instead of providing what is generally considered as “working notice”. A combination of working notice and pay in lieu of notice (termination pay) is also acceptable.

The employer must pay all wages, overtime, general holiday pay and vacation pay due the employee within three days following termination of employment. Generally, the *Code* prohibits an employer from dismissing an employee because the employee's wages are garnisheed or when that employee is on maternity or parental leave.

Where the termination of employment is initiated by the employee, the length of notice an employee is required to give also depends on the duration of employment and should be in writing. The minimum notice requirements that employees are required to provide are:

- one week - for employment of more than three months, but less than two years; and
- two weeks - for employment of two years or more.

If an employee gives proper notice, the employer must pay all earnings to the employee within three days following termination of employment. If an employee quits without proper notice all wages, overtime, holiday and vacation pay is due to the employee within 10 days after the date on which the notice would have expired if it had been given.

If a business is sold, and the employee continues to be employed by the new owner, the length of employment for the purpose of notice includes the period of employment both with the previous, as well as the current owner. Termination notice for both the employer and the employee must consider this total period of employment.

When breaks in employment with the same employer are less than three months, (e.g. an employee is terminated and re-hired within three months), the periods of employment are considered to be one period of employment for the purpose of determining the minimum amount of notice that is required.

There are a number of circumstances where an employer is not required to give notice of termination. The most common of these circumstances is termination for "just cause." Examples of just cause include:

- willful misconduct,
- disobedience, or
- deliberate neglect of duty,

where these actions are not condoned by the employer.

Other circumstances that permit an employer to terminate employment without giving notice include:

- the employee was hired for a definite term or task of less than 12 months, at the end of which the employment terminates (the 12-month limit for term or task does not apply to oil well drilling or geophysical exploration);
- the employee was laid off after refusing an offer by the employer of reasonable alternative work;
- the employee refuses work made available through a seniority system;

- the employee is not provided with work because a strike or lockout is taking place at the employee's place of employment;
- the employee is employed under an agreement by which the employee may elect either to work or not to work for a temporary period when requested by the employer;
- the contract of employment is or has become impossible for the employer to perform by reason of unforeseeable or unpreventable causes beyond the control of the employer;
- the employee was hired on a seasonal basis and at the end of the season the employment is terminated;
- the employee is on temporary layoff and does not return to work within seven days after being requested to do so, in writing, by the employer;
- the employee is in the construction industry; and
- the employee is employed in the cutting, removal, burning or other disposal of trees and/or brush for the primary purpose of clearing land.

When an employee's employment is terminated for “just cause”, the employer must pay all wages, overtime, general holiday pay and vacation pay due the employee within ten days following the date of termination. The employer must be able to support their position that there was just cause for dismissal.

An employee is not required to give termination notice if:

- his or her personal health or safety is at risk by continuing to work;
- continuing to work becomes impossible due to unforeseeable or unpreventable circumstances beyond the control of the employee;
- the employee is temporarily laid off;
- no work is provided to the employee because there is a strike or lockout at the employee's place of employment;
- the employee is employed under an agreement by which the employee may elect either to work or not to work for a temporary period when requested by the employer;
- the employer reduces the wage rate, overtime rate, vacation pay, general holiday pay or termination pay.

Farm and Ranch Employees

Given that many employers in the agricultural sector are finding it difficult to attract and retain qualified employees, it is not surprising that the vast majority of such employers remain dedicated to providing a safe and flexible workplace for their employees. There has been some support for government to

introduce restrictive rules and regulations (i.e. remove the exemption from the *Code*) to the agriculture industry which could deter investment and growth, particularly in the livestock sector, a significant contributor to Alberta's economy. Many employers in the farming and ranching sector firmly oppose the removal of this exemption.

While it has been suggested that certain types of farming operations may be included under employment standards rules, trying to define the difference between a family farm and an industrialized operation will not be easy and may very well end up including family farms in the end. For example, if a family farm hires a dozen or so non-family employees to assist with harvest, does that make them an "industrialized operation"? Further, if a family farming operation hires a non-family member to manage the farm's operations, does that make it an "industrialized" operation?

Trying to categorize the wide variety of farms within Alberta would be fraught with difficulties and would only cause confusion. There are challenges in applying employment standards in a farm situation. For example, dairy cows still require milking on statutory holidays and harvesting can often only be conducted in a very short period of time before frosts, requiring farmers and ranch hands to work extra hours. Many farmers across the province agree that additional rules and regulations would not help foster a more healthy and vibrant agricultural industry.

▪ Occupational Health and Safety

Workplace health and safety issues are governed by the *Occupational Health and Safety Act* ("*Act*"). Workplace health and safety issues in farming are unique in that much like the *Employment Standards Code*, the *Act* specifically exempts farmers and their employees from coverage. Although farm employers are therefore free from much of the regulation that other employers face, they still must address many of the same issues. In fact, farm employers are more vulnerable to lawsuits from employees and others injured at the workplace because they are not covered by the *Workers' Compensation Act*. Instead of liability under statutes, farm employers face potential liability under the common law.

It is useful for farm employers to understand how the *Occupational Health and Safety Act* works for two reasons. First, common law responsibilities will likely be guided by the principles set out in the *Act*. Second, it is always possible that the exemption of farmers and their employees could be removed, especially as farm operations become more industrialized and health and safety becomes more of a priority for government.

Duties of Employers

Every employer has a duty to ensure the health and safety of all workers on its work site, as far as it is reasonably practicable to do so. An employer must also ensure that its workers are aware of their responsibilities and protections under the *Act.*

Employers must implement safe work practices at work sites and make sure that these practices are followed. Safe work practices not only include practices that comply with legislation but also general common sense safe practices. Employers must monitor workers to ensure they are following the safe practices and provide them with the training, knowledge, and equipment to allow them to follow proper procedures.

Employers should also make sure that employees are aware of any dangers or hazards on the work site. An example of hazardous conditions on a farm operation might relate to dangerous equipment or the exposure to dust, endotoxins, and gases. If employees work in hazardous conditions, special precautions may be required. For instance, employees may be required to have regular medical examinations, during normal working hours, which are paid for by the employer.

In addition to ensuring the health and safety of workers and the work site, an employer should provide and maintain certain first aid services, supplies, and equipment for its workers. This responsibility not only arises under the First Aid regulation of the *Act*; it is also just a sensible business practice.

Although the above requirements arise specifically under the *Act* or case law dealing with the *Act*, similar responsibilities exist at common law. Employers have a duty of care to safeguard their employees from harm at work. They must exercise a reasonable standard of care towards employees. Taking reasonable steps to ensure safe work practices will reduce both the risk of incidents occurring and employer liability being found if incidents do occur. These practices are what due diligence is about. Due diligence involves the following:

- taking steps to identify and remove hazards from the workplace (or at least contain and safely store hazards);
- taking steps to prevent or avoid safety incidents from arising;
- properly training, equipping, and supervising workers;
- appropriately dealing with and investigating incidents;
- implementing necessary changes to the workplace or personnel as circumstances dictate.

It is helpful to keep in mind that employees also have duties to take reasonable care to protect the health and safety of themselves and other workers. Employees must cooperate with the employer to achieve reasonable safety objectives. Cooperating includes participating in required safety and health training, following workplace safety practices, and using protective and safety equipment. Employers should ensure that workers are informed of these safety responsibilities. Ideally, a safety program should be in writing, and employees should be required to sign their understanding of the program and agreement to follow it.

Employees may also have the right to refuse unsafe work. Under the *Act*, there must be imminent danger to the worker or others before the worker can refuse work. Imminent danger is a danger not normally encountered in the worker's work. A similar standard would likely apply to farm operations. Conduct will be assessed based on what a reasonable operator would do in the circumstances. Certainly, it can be helpful to have employees identify hazards, although that may not entitle them to refuse work. If reports of hazards do arise, employers should investigate them.

Defences against Liability

Offences under the *Act* are strict liability offences. This means that liability can arise even though there was no intention to cause any harm or create a risk of harm. The existence of an incident that causes injury may be enough to create liability. Aside from the *Act*, liability to farm employers will depend on establishing that the employer breached the reasonable standard of care owed to employees in the circumstances. It is an objective test.

In either case, due diligence is a valuable defence. Employers have to show that they exercised all reasonable care to avoid the breach. In exercising reasonable care, you must do what a reasonable person would do in the same circumstances.

What is reasonable? It depends. For example, it may be reasonable to rely on consultants with specialized knowledge in dealing with a safety issue rather than making independent inquiries, however, if the objective evidence is clearly contrary to the consultant's recommendations, you may be required to go farther.

In one case, the employer had witnessed a dangerous event occurring on several occasions. Although no one was injured (until the accident), the court found that this should have been an indicator to the employer that the activity was not safe and that it was reasonable that someone may become injured as a result of the dangerous event. Therefore, reasonable conduct may require employers to invoke preventive measures to avoid future incidents. If a future incident does occur, and the evidence shows the employer was aware of an

increased risk without having taken precautions, liability will be more easily established.

Another defence against liability is if the employer believed in a mistaken set of facts, which, had they been true, would have rendered acts or omissions innocent. This, however, is a narrow defence that is difficult to prove:

- The defence cannot be based on the “unforeseeable and peculiar way in which an accident unfolds”;
- The employer cannot argue “blissful ignorance of whether the hazard exists or not;” there must actually be belief that the hazard was not there; and
- The defence may only be available when arguing a latent defect.

Examples of Due Diligence

Court cases have shown the following factors to be helpful to employers in demonstrating due diligence and reasonable conduct:

Employee training including:

- videos
- booklets, and
- written safety procedures

An employer’s safety history including:

- rapport with Workplace Health and Safety officers
- safety inspection reports
- safety ratings
- participation in the Workplace Hazardous Materials Information System program

The company’s overall attitude towards safety including:

- an established program of safety consciousness
- a clear policy that puts safety ahead of other considerations
- a policy of hiring personnel with training and experience in safety-related procedures
- resources allocated to ensure proper training of new employees, and
- the knowledge of safety supervisors.

Courts have been impressed by employers who have safety procedures in place prior to an incident occurring. These steps should be taken not only to prevent an accident but to limit your exposure if there is one.

Due diligence may even occur after an accident, although its use is more related to the amount of liability (or future liability) than avoiding liability for the incident in question. Courts may look at the remorse of an employer, any changes that were made to the workplace, and any changes to safety requirements. These are all useful considerations in dealing with damage control, but their benefits will depend on the circumstances.

Investigating Safety Incidents

An important element to any safety program is effectively investigating safety incidents and infractions. It is important that investigations are conducted as soon as possible after an incident to ensure that critical evidence is not lost or destroyed. Photographs, sketches, and measurements should be taken of the site to preserve any relevant evidence.

The next step is to interview potential witnesses. Two members of management should conduct the interviews. One person should act as the interviewer, and the other should take detailed notes. Every witness statement should be reduced to writing. This can either be done by having the witness write out a statement or by having the witness sign the notes of the interviewer.

The suspected wrongdoer, if there is one, should be interviewed last. Depending upon the information given, witnesses may need to be interviewed more than once. Be prepared for that eventuality.

The due diligence required in the investigation portion of an accident would require clarification of any inconsistencies that may arise from the various witness statements. Additionally, if there are any leads that arise because of the interviews, it is necessary to follow up on them.

In response to the information gathered, it is important to make the required changes in order to avoid future accidents (discussed above). Employers should continue to follow up on the workplace changes that result.

■ Conclusion

Health and safety issues are important considerations in any business, including farm operations. Although farming may be exempted from the *Occupational Health and Safety Act*, farm operations face the same issues.

The importance to farms may be even greater because of the potential for lawsuits. It is essential that due diligence is exercised to prevent and deal with safety incidents on farms.

While most farming operations are exempt from certain portions of the Alberta *Employment Standards Code*, it must be remembered that certain portions do apply, namely payment of earnings, maternity and parental leave, and termination provisions. Employers engaged in such activity should be mindful to comply with such minimum standards.