Legal**Spotlight**

Doing Business in Ontario – Second Edition

HOW DO YOU

Establish a business in Ontario? Purchase a manufacturing plant or lease office space? Hire employees? Decide on the type of business entity to operate as? Acquire a local business?

Houser Henry & Syron has developed a guide to provide business owners, both from within Canada and outside of the country, with an overview of important business and legal issues to consider to successfully establish and operate a business in Ontario.

We understand that there are many facets to starting a business in a new location. Our intention with this guide is to highlight the important information business owners should know as they begin the process. This publication examines the main areas critical to operating a business in the province: selecting the type of business entity, tax considerations, employment, and real estate. We hope it serves as a valuable primer to proceeding with your business plans.[1]

ABOUT ONTARIO

Ontario is Canada's most populous province with about 13 million people. It is home to Canada's federal capital, Ottawa. Ontario's provincial capital is Toronto, Canada's most populous city and its financial centre.

Economically, Canada has outperformed most other countries in recent years and Ontario has traditionally been its engine. Companies are often attracted by Ontario's well-educated and skilled workforce, its environment of innovation, and its central location within North America. Several studies have found that Ontario is a great place to do business. KPMG's 2012 "Competitive Alternatives" study of international business costs confirmed Canadian

[1] The information in this publication is current as of February 8, 2013. The content should not be taken as legal advice. It is not exhaustive and is subject to change. Please speak with us for information or advice specific to your situation.

business costs are among the lowest in the G7, and Forbes.com recently named Ontario a top destination for foreign direct investment in North America. Other advantages which Ontario offers to foreign investors or businesses seeking to expand include a sound banking sector, large and active capital markets, a simple and inexpensive process of incorporation, few import restrictions, and easy access to other North American markets. There are also government incentive programs which involve financial assistance and/or tax incentives, such as competitive corporate income tax rates, tax-free inter-corporate dividends, and reduced withholding tax rates for treaty countries.[2]

ABOUT OUR FIRM

Our firm is centrally located in the heart of downtown Toronto. Our business lawyers have been helping entrepreneurs and companies grow their businesses since 1934.

Simply put, we help businesses thrive, from incorporation onwards. Our services are tailored to an organization's business goals. This includes assistance with corporate and real estate transactions, commercial agreements, employment law, and a myriad of other issues that owners and entrepreneurs face every day.

We have gained extensive experience advising foreign companies looking to do business in Ontario. We have worked with clients in a wide range of industries setting up Ontario-based operations for manufacturing, distribution and sales of their products in Canada.

Our business clients are based both in Canada, as well as across Europe, the US and Asia. Our experienced team works seamlessly with all key stakeholders to navigate through both regulatory and cross-cultural business environments.

Creating a truly exceptional experience for our clients is the cornerstone of our service philosophy. Every client, regardless of their size or the complexity of their transaction, receives a high level of personal care, responsive service and expert legal advice delivered by an experienced lawyer, at a reasonable price.

ESTABLISHING A BUSINESS IN CANADA: BUSINESS PRESENCE AND FORM

EXPANSION METHODS

There are numerous methods available to foreign businesses looking to expand into Canada. Before committing to any one method, it is important to discuss the ramifications with both legal and tax counsel. As opportunities and

[2] For information on tax credits, please visit: www.sse.gov.on.ca/medt/investinontario/en/pages/government_programs_tax.aspx (for provincial tax credits), and www.canadabusiness.ca/eng/page/2738/ (for federal tax credits)

obligations evolve, the foreign entity can be adapted from one form to another to meet changing business needs. The methods of expansion include:

Licensing

Licensing is the simplest method of expanding into Canada. A company can avoid establishing a physical presence in a geographical area in which it wants to conduct business by way of license agreement. A license is a business arrangement where one party (the licensor) gives specific rights in some or all of its property, usually intellectual property (**IP**), such as its trade-mark, patent or industrial design, to another party (the licensee). The licensee is then allowed to use the IP or other property in exchange for a fee or royalty. License agreements protect the business interests and intentions of each of the parties. Some of the more important factors that should be considered in the negotiation of a license agreement are:

1. The term or length of the agreement, as well as any rights or options to renew the agreement, and rights to terminate the agreement;
2. The territorial or geographical boundaries that are covered by the agreement;
3. The specific IP or other property being licensed;
4. How payment will be made, including the amounts to be paid, as well as payment dates and bonuses and/or penalties;
5. Whether the license is to be exclusive or non-exclusive, the permitted uses and any limitations or exclusions with respect to how the IP or other property is used;
6. Any support or training provided by the licensor;
7. Whether the licensee is required to provide a warranty on the licensed goods, and any limitations on the licensor's responsibility;
8. How the licensed goods are to be marketed and sold, as well as how much money is to be spent in doing so;
9. The requirement for non-disclosure of confidential information, as well as non-compete conditions;
10. Who is responsible for defending potential IP infringement claims?
11. What happens when the agreement is terminated?
12. How and where disputes will be resolved.

Distributor and Agency Agreements

If a foreign company wants to sell goods in Canada, but wants to avoid establishing a physical presence, then a distributor or agency agreement may work. In an agency relationship, an agent acts on behalf of the principal (the foreign company). Agents may or may not have the ability to legally bind the principal for which they are acting.

Agency differs from a distribution relationship. A distributor is an independent party that typically buys the goods and then offers them for re-sale. Normally distributors cannot bind their suppliers. If engaging a distributor, the foreign company should enter into a written agreement with the distributor that sets out the parties' respective rights and obligations, including how the agreement can be terminated and what notice is required. For more information on supplier-distributor agreements, please see our article on *Supplier and Distributorships – Common Problems Can Be Avoided*.

Foreign Branch

A foreign company that wishes to establish a physical presence in Canada but avoid creating a separate legal entity may want to consider opening one or more foreign branch offices. The foreign branch will likely need a license in Ontario in order to carry on business in the province (an extra-provincial license) and may need to register its business name (discussed later).

This form of expansion can have tax advantages, as Canadian losses can be claimed by the parent company in its home jurisdiction. However, it also means the foreign company will be subject to Canadian income tax on its Canadian branch income and all the liabilities of the Canadian branch.

Canadian Subsidiary

Another option is to incorporate a Canadian subsidiary. Unlike a foreign branch, liabilities incurred would be limited within the subsidiary, and not imposed on the parent foreign company (except in the case of ULCs which are discussed below).

In Canada, companies can be incorporated at either the provincial or federal level. For most purposes, federal and provincial business corporations can conduct business anywhere within Canada and abroad. When choosing to incorporate provincially or federally, it is important to be aware of the differing rights and obligations that exist. These include requirements involving the location of the head office, Canadian residency requirements for directors, and shareholders rights. You should discuss your particular situation with legal counsel to ensure you choose the appropriate jurisdiction for incorporation.

An unlimited liability corporation (ULC) is a special type of corporation that currently only exists in three of Canada's provinces: Alberta, British Columbia and Nova Scotia (not Ontario). Unlike limited liability corporations (LLCs), the shareholders of a ULC can be liable for any liabilities of the company. However, ULCs also allow some flow-through tax benefits to shareholders.

Partnerships

A partnership involves two or more persons carrying on a business in common with a view to profit. Partnerships are either general partnerships or limited partnerships.

In a **general partnership,** each partner is entitled to participate in the ownership and management of the organization. Each partner also assumes unlimited liability for the debts and obligations of the partnership. This relationship can arise without a formal written agreement; however, it should be set out in a written partnership agreement. A **limited partnership** requires at least one general partner. The general partner is subject to unlimited liability for the debts of the partnership and manages the partnership's business. General partners can be, and usually are, corporations with no other purpose or assets. Limited partners, however, are only liable to the extent of their capital contribution and are not permitted to take part in the management of the business (or they risk losing their limited liability).

All forms of partnership can offer some flow-through tax benefits to partners which are not available to shareholders of corporations.

Buying a Canadian Business

Finally, another option is to buy an existing Canadian business. Buyers interested in acquiring a business in Ontario will need to complete due diligence on the potential acquisition, plan the financing required to complete the purchase, and determine how the business will be integrated with the buyer's other business or assets. For more information, please see our guide on *Buying or Selling a Business*.

BUSINESS REGISTRATIONS

Extra-Provincial License (**EXPL**)

A corporation that was incorporated in a jurisdiction outside of Canada must obtain an EXPL to carry on business in Ontario.[3] "Carrying on business" is defined broadly and covers most business/commercial activities. It includes, but is not limited to, having an agent, representative, warehouse, office, and/or an interest in real property (such as a land mortgage) in Ontario. For more information on obtaining an EXPL, please see our FAQ and worksheet on *Extra-Provincial Registration in Ontario*.

Canadian non-Ontario companies seeking to carry on business in Ontario do not need an EXPL, but will need to file information with the Ministry of Government Services.

[3] s. 4(2), *Extra-Provincial Corporations Act* (EPCA)

LLCs (familiar to many US businesses) cannot be created under Ontario law. They are a hybrid between a corporation (in that they offer limited liability to stakeholders) and a partnership (for some tax benefits). Foreign LLCs can carry on business in Ontario, but the requirements for them are different than for foreign corporations. While an LLC is usually regarded as an "unincorporated organization" for corporate purposes in Ontario, it may still be treated like a corporation for tax purposes.

Business Number (BN)

All businesses need to apply for a BN with the Canada Revenue Agency (**CRA**) if the business needs one or more of these CRA program accounts: (1) goods and services tax/harmonized sales tax (**GST/HST**); (2) payroll; (3) import/export; or (4) corporation income tax (discussed later). The BN acts as the business's single account number for dealing with the federal government.

Trade-marks

Registration under the federal *Trade-marks Act* is optional. However, registration will help a business protect its trade-name(s) and/or business name(s).

Business Name

Under the Ontario *Business Names Act* (***BNA***), if a business uses a business name that differs from the individual's name (in the case of a sole proprietorship), the names of the partners (in the case of a partnership), or from its corporate name (if a corporation), it must register that business name in Ontario.

Before deciding on a business name, you should make sure that the name is not already used by, or could be confused with the name of, another entity. The *BNA* does not grant any rights to the registered name in Ontario. However, a business may be able to protect a trade name by registering a trade-mark under the federal *Trade-marks Act*. The *BNA* also does not prohibit the registration of identical names. However, if a business decides to use a name that is the same as or confusingly similar to that of an existing business, it can result in a lawsuit.

Ontario Employer Health Tax (**EHT**)

Ontario's employers are required to pay tax on remuneration paid to its employees, known as the EHT. Some employers are exempt from EHT on the first $450,000 of their annual Ontario payroll.

Currently, the EHT tax rates range from 0.98% on total remuneration less than $200,000 to 1.95% for total remuneration over $400,000. This tax is intended to fund the Ontario Health Insurance Plan (OHIP).

Ontario Workplace Safety & Insurance Board (**WSIB**)

Most employers in Ontario must report the earnings of employees working in Ontario and pay WSIB insurance premiums on those earnings. The WSIB provides insurance for injuries and illnesses incurred in workplaces and supports early and safe return to work for injured workers. WSIB coverage also protects employers from lawsuits related to work injuries and from the direct cost of these injuries. Workers injured on the job cannot sue their employer, but they can be paid by the WSIB to replace lost earnings and health care costs resulting from work-related injuries and illnesses.

If a business employs people and does not register with the WSIB, it will face financial and legal penalties. This includes fines up to $100,000 and/or imprisonment. Workers are covered even if the employer is not registered, in this situation the employer will also have to pay the full costs of any workplace injury or illness claim. Some employers are exempt from WSIB premiums. Their employees are not entitled to WSIB benefits.

ESTABLISHING A BUSINESS IN CANADA: TAX

Tax Liability: Income Tax on Canadian Activity

Residents and non-residents with income from a taxable source in Canada are required to file a Canadian tax return and pay income tax.

A corporation will generally be considered a resident of Canada if (1) it was incorporated and carried on business within Canada; or (2) the "central management and control" of the corporation occurs in Canada (even if the business was incorporated in and/or has major operations in a foreign country).[4] Countries may enter into a bilateral tax treaty with the goal of reducing or eliminating double taxation and promoting international trade. Canada has entered into bilateral tax treaties with 90 different countries.[5]

Income Tax

Canada has a progressive tax system. Sole proprietors and partners in a partnership are taxed at the individual level. The rates of tax increase as the income of the individual increases. In 2015, the federal individual income tax

[4] For more information on determining the residency of a corporation, please visit the following website from the Canada Revenue Agency: www.cra-arc.gc.ca/tx/nnrsdnts/bsnss/bs-rs-eng.html.
[5] For more information on countries with which Canada has tax treaties, please visit: www.fin.gc.ca/treaties-conventions/in_force--eng.asp.

rates ranged from 15% for the first $44,701 of income to 29% for income over $138,586. The 2015 Ontario individual income tax rates were 5.05% on the first $40,922 of taxable income to 13.16% on taxable income over $220,000.

Canadian corporations pay a flat rate of income tax. The current federal corporate tax rate is 15% and the Ontario corporate tax rate is 11.5%. The combined rate for incorporated businesses operating in Ontario is therefore currently at 26.5%.[6]

Capital Gains/Losses

A capital gain is the profit from the sale of an asset like real estate or securities such as stocks and bonds. This profit is taxable upon the sale or 'disposition' of the asset. In Canada, the buying and selling of property is given favourable tax treatment as only half of the capital gain is taxable at the taxpayer's marginal income tax rate. Where a taxpayer sells an asset at a price lower than the original purchase price, the resulting capital loss may be set off against taxable capital gains for the current year. Where capital losses exceed capital gains in the year, a net capital loss is generated which may be carried backwards to any of the three previous years or forward indefinitely. The application of such losses reduces the amount of capital gains tax payable.

Foreign investors are obliged to obtain a clearance certificate (under Section 116 of the *Income Tax Act*) from the Canadian taxing authorities when disposing of taxable Canadian property. Unless the foreign vendor has obtained a clearance certificate, purchasers have a duty to withhold and remit a portion of the purchase price to the Canadian taxing authority.[7] If the property is not treaty-protected, the non-resident vendor must generally forward an amount equal to 25% of the capital gain plus applicable tax to obtain the clearance certificate. If the property is treaty-protected, the clearance certificate will generally be issued without the prepayment of tax.

Other Types of Taxes

Land Taxes

In Ontario, if you buy land or an interest in land, you must pay provincial land transfer tax ranging from 0.5% to 2% depending on the type of land and its purchase price. Certain municipalities, such as Toronto, also levy a land transfer tax in addition to the provincial land transfer tax.

[6] Canada Revenue Agency. Corporation Tax Rates. <URL: http://www.cra-arc.gc.ca/tx/bsnss/tpcs/crprtns/rts-eng.html>
[7] Canada Revenue Agency. Information Circular. IC72-17R6. <URL: www.cra-arc.gc.ca/E/pub/tp/ic72-17r6/ic72-17r6-11e.pdf>

Municipalities charge annual property taxes on the assessed value of real estate. Assessments are made based on the current or average current value of similar properties. The applicable property tax rates are set by the municipality annually and vary depending on the class of property.

Payroll and Other Employment Taxes

Businesses which have employees have a number of payroll-related expenditures. Federally, employers are obliged to make contributions for income tax, Employment Insurance (**EI**) and Canada Pension Plan (**CPP**). Provincially, all employers in Ontario must pay the Employer Health Tax and, if applicable, make contributions to the WSIB to provide for workers who are unable to work due to an accident arising out of a work-related injury or disease.

Withholding Tax

Non-residents may be subject to Canadian withholding taxes on certain types of passive income. Income paid out to non-residents in the form of interest, rent, royalties, dividends and other specified amounts is subject to a default 25% withholding tax.[8] This amount may be varied by tax treaty. For example, under the tax convention between Canada and the United States, US residents pay a reduced tax on dividends issued from a Canadian business and are not required to pay any tax on interest generated from Canada unless it is tied to a permanent establishment.[9]

Non-residents who are paid a "fee, commission or other amount in respect of services rendered in Canada" (i.e. 'actively' earned income) are subject to a default 15% withholding tax.[10] Tax treaties do not exempt non-residents from having to pay this 15% withholding tax. However, Canadian tax authorities may nevertheless grant a waiver of withholding taxes upon application.

Branch Tax

Non-resident foreign corporations that carry on business in Canada through a branch rather than through a Canadian subsidiary are subject to a 25% branch tax.[11] This tax is in addition to income tax payable on all Canadian-source income. The branch tax serves as a stand-in for the withholding tax that would otherwise have been levied on dividends issued to the non-resident parent had the business instead been carried on through an incorporated

[8] Supra note 15 at s. 212
[9] *Supra* note 31 at Article XI.
[10] Canada Revenue Agency. International and Non-resident taxes: Common Topics – Rendering Services in Canada. <URL: www.cra-arc.gc.ca/tx/nnrsdnts/cmmn/rndr/pyr-eng.html>
[11] Canada. Natural Resources Canada. Canadian International Income Tax Rules. "Taxation of Foreign Investment in Canada: Branches". <URL: www.nrcan.gc.ca/minerals-metals/business-market/3854#b>

Canadian subsidiary.[12] The branch tax may be reduced by reinvesting branch profits in Canadian business assets or according to the terms of a tax treaty.[13]

CRA Program Accounts

Opening CRA program accounts is the first step for a business to meet its tax obligations. There are four major CRA program accounts:

GST/HST

The federal government and the Province of Ontario impose a sales tax on the consumption of goods and services in Canada. This tax is known as the **GST/HST** and is 13%. While the burden of paying this tax is borne by the consumer, businesses are obligated to collect and remit this tax to the Canadian taxing authorities.

Businesses that provide taxable goods and services must charge their clients GST/HST. Businesses can also claim input tax credits to recover the GST/HST they pay on goods and services consumed, used, or supplied in their commercial activities.[14]

A business must register for a GST/HST account if it (resident or non-resident) provides taxable goods or services in Canada and its revenues **exceed $30,000 a year.**

Payroll

Most employers need to register for a payroll account to deduct and remit the income tax of its employees. An employer must open the payroll account before the first remittance date, which falls on the 15th day of the month following the month one becomes an employer.[15]

Import/Export

If a business will be importing commercial shipments from a foreign country into Canada, or exporting commercial goods to other countries, it must register for an import/export account. The CRA will use the import/export account number to process customs documents.[16]

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[12] Ibid
[13] Ibid
[14] Pg. 10 BN CRA

[15] Pg. 20 BN CRA
[16] Pg. 18 BN CRA

Corporation Income Tax

All corporations operating in Canada must file a corporation income tax return within six months of the end of each tax year (its fiscal year).

When a business incorporates in Ontario or federally, the business will automatically be registered for a BN and a corporate income tax program account. Non-resident corporations will also be registered with a corporation income tax account when they apply for a BN with the CRA.[17]

ESTABLISHING A BUSINESS IN CANADA: EMPLOYMENT

The information in this section relates to non-unionized employees and their employers in Ontario. The rights and duties of unionized employees and their employers are governed by the agreement between the parties and Ontario's labour laws.[18] The relationship between employees who work for "federal undertakings or businesses" (which include banks, telecommunication companies, and transportation companies) and their employers is governed by federal laws. The fact that a company is federally incorporated does not necessarily mean that its employees will be governed by federal employment or regulatory laws.[19]

This section also does not apply to independent contractors, which differ from employees. Many people try to classify themselves as independent contractors, so they can deduct expenses for tax purposes, when they are in fact employees. Employers may also try to classify employees as independent contractors so that they are not obligated to provide termination pay or severance. These obligators will be discussed below in further detail. For information relating to an independent contractor, see our FAQ on *Employees and Independent Contractors in Ontario*.

The Employment Standards Act (the ESA) - Minimum Standards

The ESA and its regulations provide standards for employee wages, hours of work, overtime entitlement, and vacation entitlement, among other things. Some employees may be exempt from particular standards, and employers should discuss this issue with Ontario legal counsel.

The ESA also provides employees with certain protected leave of absence entitlements. An employee cannot be penalized by an employer for taking a protected leave of absence. These include pregnancy, parental, personal emergency, family medical, organ donor, declared emergencies (for emergency personnel), and reservist leaves

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[17] Canada Revenue Agency. *Corporation income tax program account.* Accessed at: www.cra-arc.gc.ca/tx/bsnss/tpcs/bn-ne/ndn/crprtns-eng.html
[18] If you would like more information about Ontario's labour laws, please visit the Ontario Ministry of Labour's website at: www.labour.gov.on.ca/english/lr/
[19] If you would like more information about federal employment and labour laws, please visit the federal Ministry of Labour's website at: www.hrsdc.gc.ca/eng/labour/employment_standards/index.shtml

(for members of the Canadian military). If employers have any questions as to whether an employee is entitled to a leave of absence, they should discuss this with Ontario legal counsel.

Employers should have a written employment agreement with their employees and make signing of the agreement a condition of any job offer.

Occupational Health and Safety and Workers' Compensation

Employers must comply with Ontario's *Occupational Health and Safety Act* (**OHSA**). The OHSA seeks to keep workplaces healthy and safe for Ontario's workers. Ontario's Ministry of Labour will investigate when there is an accident involving workers, or if a complaint is made. As previously mentioned, most Ontario employers are required to obtain WSIB coverage for its employees. Employers who violate the OHSA can face severe penalties.

Depending on the size and nature of an employer's workforce, the employer may be required to have a "joint health and safety committee" or "health and safety representatives" which include employees. Employers must co-operate with the committee and/or representatives on health and safety matters.

The OHSA also imposes regulations regarding toxic substances and other dangerous work conditions. If a worker reasonably feels unsafe at work, he or she can stop working or refuse to work.

Importantly, the OHSA also addresses workplace violence and workplace harassment. Employers must have a written violence and harassment policy in place which clearly outlines unacceptable behavior, how a complaint can be made and investigated, and how violence or harassment will be dealt with by the employer.[20] If an employer fails to appropriately deal with violence or harassment in the workplace, the employer could be liable.

Human Rights Law and Pay Equity

Employers must also comply with the *Ontario Human Rights Code*, which stipulates that employers cannot discriminate against employees (or prospective employees) on any of the following grounds: race; ancestry; place of origin; skin colour; ethnic origin; citizenship; creed (religion); sex (includes gender identity and pregnancy); sexual orientation; age; marital status; family status; disability (includes perceived disability); or record of offences. If an employer discriminates against an employee (or prospective employee) on any of these grounds, that person could bring a complaint against the employer at the Ontario Human Rights Tribunal and the employer could be

[20] Section 32.0.1(1)(a) and (c) of OHSA.

ordered to pay compensation. In addition to the *Human Rights Code*, Ontario has pay equity legislation to address gender-based wage discrimination.

Disability and the Duty to Accommodate

Disability is defined very broadly under the *Human Rights Code*. A disability is not always obvious and must be handled with sensitivity. Employers are strongly encouraged to consult with Ontario legal counsel when dealing with an employee who has, or claims to have, a disability.

Employers in Ontario must accommodate employees with disability. Accommodation involves arranging the employee's workplace or duties to enable the employee to do his or her work, if this can be done without undue hardship to the employer.

Termination of Employment

The concept of "at will" employment does not exist in Canada. Employees are either employed for a specific period of time or for an indefinite period. If individuals are employed on an indefinite basis, they must generally be given notice (or pay in lieu of notice) if their employment is terminated without cause.

Whether or not an employee is entitled to receive notice of termination and/or other compensation depends on how and why their employment is being terminated.

Termination without Cause

Most terminations are done "without cause". This means that the termination is not because of any specific charge or problem in the employee's performance or behaviour. Compensation for this type of termination is established by the written employment agreement between the employee and the employer; if there is no such agreement, then by the common law and the ESA.

Under the ESA, an employee whose employment is terminated without cause is entitled to receive a minimum prescribed amount of notice of termination or, alternatively, pay in lieu of notice if the employer wishes to terminate the employee's employment immediately. The maximum ESA termination pay is eight weeks. This is generally a lump sum payment equivalent to what the employee would have been paid if he or she had worked for the employer during the notice period. The longer the employee has served, the longer the notice period will be.

Where a person's employment is terminated without cause, and the employee has served for five or more years, the employer may also be required to pay severance in addition to termination pay if one of the following applies:

- the employer has an annual payroll of $2.5 million dollars (CAD) or more; or
- the termination is in connection with the permanent discontinuance of all or part of the employer's business at an establishment, and 50 or more employees are terminated within a six-month period.

The ESA provides a formula for calculating severance pay. The maximum ESA severance pay is 26 weeks.

In addition to notice of termination (and severance pay, if applicable), the ESA also requires that employees be paid accrued and unpaid vacation pay. Vacation pay will vary depending on how much annual vacation the employee receives.

The minimum standards in the ESA are absolute minimums and cannot be lowered by employment agreements. Ontario courts typically award longer notice periods than those provided for under the ESA. Under Ontario common law, an employer must give an employee "reasonable notice" of termination (or pay in lieu of reasonable notice), unless the employee is terminated for just cause. The amount of notice required depends on various factors, which usually include:

- the character or nature of the employment (e.g. was the employee a management or non-management employee?);
- the length of the employee's service;
- the employee's age;
- the availability of similar employment, having regard to the experience, training, qualifications and the responsibilities of the employee;
- the circumstances surrounding the hiring of the employee; and
- any written employment agreement between the employee and employer.

Employers should consult with Ontario legal counsel to ascertain what reasonable notice would be in each particular circumstance. For more information, please see our FAQ on *Employee Terminations*.

Termination for Cause

In a termination for cause, an employee must be guilty of significant misconduct. Where that exists, there is no entitlement to notice or compensation and the employee can be terminated without notice. Employers are advised to seek legal counsel before terminating someone's employment when they believe there is cause for termination.

Constructive Dismissal

An employer cannot unilaterally change a material term of a person's employment unless the employee agrees to the change, or the change is specifically permitted by a written employment agreement. The law treats the employer's implementation of a material change as a "constructive dismissal" of the employee. Constructive dismissal usually occurs when an employer significantly reduces an employee's salary or changes the employee's work location, hours, authority, position or benefits (e.g. extended health insurance) in a negative way. It may also occur if an employer harasses an employee or condones such conduct by other employees. Constructively dismissed employees are entitled to the same notice (or pay in lieu of notice) and other compensation as if their employment was terminated without cause.

Fixed Term Employees

If an employee is hired for a fixed period of time, but let go before the end of that term, the employer must pay the employee for the balance of the term, unless an employment agreement provides otherwise or unless the person's employment is terminated as a result of a breach of the agreement. An employee who agrees to a fixed employment period is not entitled to notice (or pay in lieu of notice) or other compensation which extends beyond that term. However, if an employee continues to be employed after the fixed term has expired without a new or extended agreement, he or she can become an employee for an indefinite term of employment and be entitled to notice (or pay in lieu of notice) if his or her employment is later terminated without cause.

Mandatory Retirement

There is no mandatory retirement age in Ontario. An employer cannot force an employee to retire or quit at a particular age. Employers cannot discriminate against employees on the basis of age. If they do so, they could face allegations that they have violated the *Human Rights Code*.

Non-Competition and Non-Solicitation Agreements

Non-solicitation agreements and non-competition agreements contain "restrictive covenants" that restrict what a person may do. A restrictive covenant must meet certain criteria in order to be enforceable. It must be reasonable between the employer and employee, and reasonable with reference to the public interest in having a free and competitive marketplace.

Non-solicitation Agreements

Non-solicitation agreements should only serve to prevent a former employee from attempting to "hire away" other employees, and from attempting to "take business" from his or her former employer by approaching existing (or recent) customers of the employer with offers of similar goods or services. A non-solicitation agreement should have time and/or geographic limits (e.g. valid for a two-year period after employee's employment ends, valid within the Province of Ontario). If a non-solicitation agreement is too broad, then it may be deemed to be a "non-competition agreement."

Non-competition Agreements

Non-competition agreements can severely limit an employee's ability to find similar work after his or her employment ends. In Ontario, courts are generally very reluctant to enforce non-competition agreements, because they often lessen competition generally. A non-competition agreement will generally only be upheld if there are exceptional circumstances. For example, if there is a sale of a business, the key person(s) involved in that business can be prevented from starting a competitive business for a certain period of time after closing. Further, if someone is a manager or otherwise very senior in an organization, then a non-competition agreement may be upheld against that person.

Courts have made it clear that they will only enforce restrictive covenants when they are reasonable in their entirety. Courts will not sever overreaching terms or interpret ambiguous terms. For this reason, it is very important for employers to review their proposed restrictive covenants with Ontario legal counsel.

For more information, please see our article on *Confidentiality Clauses and Restrictive Covenants – Be Careful What You Include in an Employment Agreement*.

ESTABLISHING A BUSINESS IN CANADA: REAL ESTATE AND LEASING

Foreign businesses looking to set up a physical location in Ontario will either purchase or lease commercial property. Any person purchasing commercial property in Ontario will be required to pay land transfer tax on the purchase price of the property (as discussed in the "Other Types of Taxes" section). The purchase will also be subject to GST/HST.

In our experience, initially, most new businesses choose to lease space. For that reason, we have limited the information in this section to commercial leasing. If your business decides to purchase property in Ontario, please consult with us and we will guide you through the process.

Commercial Tenancies Act (Ontario)

Commercial leases are governed by the *Commercial Tenancies Act* (Ontario), the common law and the lease agreement. The application of the *Commercial Tenancies Act* (Ontario) is somewhat limited because landlords and tenants in Ontario are treated as sophisticated commercial parties. As sophisticated commercial parties, landlords and tenants are free to negotiate most of their own terms. A written lease agreement signed by the parties can take precedence over the *Commercial Tenancies Act*.

Offers to Lease

Landlords will usually require tenants to enter into an offer to lease to secure the location. Such offers to lease will set out the main terms of the lease agreement – the location, the term, the rent, the extra costs, the options to renew, the use of the space, whether a security deposit is required, insurance requirements, assignment and subletting rights. It will also usually provide that the tenant will sign the landlord's standard form lease so long as the terms set out in the offer to lease are incorporated into the lease. Therefore, it is important that any offer to lease be reviewed by legal counsel and negotiated thoroughly before it is signed. If a tenant does not negotiate specific requirements at the offer to lease stage, it will have a difficult time negotiating changes to the landlord's standard form of lease.

Real Cost of the Lease

To determine the total cost of a lease, tenants need to know whether the lease is a gross lease or a net lease. A **gross lease** is one in which the tenant pays a single amount which covers both rental of the tenant's leased premises and all other costs associated with the leased premises and the tenant's portion of the common elements. With a gross lease, a tenant has certainty and knows what the total rent of the lease will be.

A **net lease** is one in which the tenant pays a predetermined amount for rental of the tenant's leased unit (usually called "base rent") and another variable amount for all other costs associated with the leased unit and the tenant's portion of the common elements (usually called "additional rent"). Base rent is usually based on the square footage of the leased unit. Additional rent, however, fluctuates and such fluctuations can be substantial, particularly if property taxes increase or if the common elements undergo a major upgrade (e.g. a parking lot is re-paved). Because landlords want to be fully reimbursed for the costs associated with the property, most commercial lease agreements are net leases. In net leases, "rent" is generally defined as base rent and additional rent. Net leases do not provide tenants with certainty regarding the total cost of the lease. The rent will change as the costs incurred by the landlord change.

GST/HST is charged on rent for all commercial properties. As discussed earlier, GST/HST is charged at a rate of 13%. This cost should be budgeted by tenants.

Landlord's Remedies in Ontario

If a tenant fails to pay rent, Ontario landlords have several options. These options are:

1. Do nothing to alter or terminate the lease, but insist on performance of the lease and make a claim for outstanding rent or damages on the basis that the lease remains in force;
2. Terminate the lease, and make a claim for outstanding rent or damages incurred to the date of termination;
3. On proper notice to the tenant, re-enter the unit(s) in order to re-let the unit(s) on the tenant's behalf; or
4. On proper notice to the tenant, terminate the lease and claim damages for the breach of the lease, including for future losses.[21]

If the Landlord chooses not to terminate the lease, landlords have the right under Ontario law to distress seize against the assets of the tenants. This means that they can seize and sell the tenant's assets and set off the profit from the sale against the rent owed.

If a foreign business is entering into a lease in Ontario, it is important that the business fully understand its obligations under the lease and know the consequences of failing to meet those obligations. As a result, a foreign business negotiating a lease in Ontario would benefit from the counsel of an Ontario lawyer experienced in Ontario commercial leasing law.

For more information, please see our article titled *Renting the Space that's Right for Your Business: Things for Tenants to Consider in a Commercial Lease*.

CONCLUSION

If you have made the decision to establish a business in Ontario or to expand your existing business into Ontario, we congratulate you on embarking on this exciting journey. We hope the topics discussed in this guide on methods of carrying on business, tax considerations, employment law and real estate, have provided you with a basic understanding of some of the key legal issues to be considered when operating a business in Ontario.

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[21] *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.* [1971] S.C.R. 562.

We invite you to access related articles on the topics we have covered in this guide, available on our website, www.houserhenry.com.

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