



Lippes
Mathias

U.S. Employment Law:

*Critical HR Considerations for Canadian Businesses Before, During
and After the Pandemic*

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- > Partner with Lippes Mathias Wexler Friedman LLP and Team Leader for the firm's Employment Practice Team..
- > Concentrates her practice in employment and general business law and litigation.
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Vincent M. Miranda, Partner

- > Partner with Lippes Mathias Wexler Friedman LLP focused on all aspects of employment litigation and counseling for employers and executives.
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- > Performs sexual harassment and other misconduct investigations and drafts, negotiates, and litigates employment, separation, and restrictive covenant agreements.
- > Practice limited to U.S. law

Understanding the Legal and Regulatory Framework

>Canada

Federal

Provincial

Quebec

>U.S.

Federal, State and Local Laws

Overlapping Regulatory Agencies: Federal and State (Discrimination, Unemployment, Workers' Compensation)



The Employment Life Cycle

> Pre-Employment

Background Checks, Worker Classification, Employment Agreements, Compensation & Benefits

> Employment

Job Protections (Discrimination and Leave), Alcohol & Drugs

> Post-Employment

Termination, Enforcing Restrictive Covenants and Employee Mobility



Pre-Employment: Hiring

>Background Checks

Canada

- Human Rights Legislation
- Privacy Legislation

U.S.

- Fair Credit Reporting Act
- State Laws
- Ban the Box



Pre-Hiring: Worker Classification

- > How do I determine if my worker is an employee or independent contractor?
Canada: additional classification of dependent contractor
- > What are the consequences?
- > What can I do to move the needle toward an independent contractor relationship?
- > U.S. & Canada have a similar approach



Pre-Hiring: Employment Agreement?

> One of the biggest differences in employment practice in U.S. v. Canada (non-unionized workplaces)

> U.S.

At-will

Employment Agreement – Why?

> Canada

Reasonable notice coupled with Employment standards

Employment Agreement-Why?

- Critical to limit/control employee rights and obligation on termination



Pre-Hiring: Compensation & Benefits

> Compensation

U.S.

- Exempt v. Non-Exempt
- Minimum Wage

Canada

- Employment Standards

> Benefits

Vacation and Sick Time

Healthcare



On the Job: Discrimination protections

> Discrimination/Human Rights

- U.S.: Federal and State
- Canada: significant overlap between jurisdictions on protected grounds

> Sexual Harassment

- U.S.: States take Action
- #Metoo



On the Job: Leave and Drugs/Alcohol

>Leave Laws

U.S. & Canada – myriad of different laws

- FMLA, ADA, State Protections
- Human Rights Legislation, Employment Standards

>Drugs/Alcohol

U.S. & Canada

- Testing
- Accommodating



Post-Employment: Termination and Employee Mobility Issues

> Restrictive Covenants and Trade Secrets

- In what form are they imposed?
- Non-Solicit and/or Non-Compete?
- Protecting Trade Secret Information

> Firing

U.S v. Canada

- At-will v. Reasonable notice
- Compensation



U.S. Employment Law Changes since March 2020

- >The CARES Act:

 - Families First Coronavirus Response Act: Paid Federal sick and family leave

 - Pandemic Unemployment Assistance (PUA)

- >State Remote Work and Return to Work Executive Orders and Regulations

- >State Travel Quarantine Executive Orders and Regulations

- >Termination/Layoff Considerations



The Families First Coronavirus Response Act (FFCRA)— H.R. 6201

- > Enacted March 18, 2020—took effect April 1, 2020
- > Divisions of the Final Law
 - Appropriations
 - Nutrition Waivers
 - Emergency Family and Medical Leave Expansion Act (“FMLA”)**
 - Emergency Unemployment Insurance Stabilization and Access Act of 2020
 - Emergency Paid Sick Leave Act (“EPSL”)**
 - Health Provisions**
 - Tax Credits for Paid Sick and Paid Family and Medical Leave**
 - Budgetary Effects
- > DOL published a model notice, issued FAQs, and a temporary rule



Overview of Paid Leave Provisions

> FFCRA

> Emergency Paid Sick Leave: Up to 80 Hours (first 10 days)

6 different reasons

Full pay or 2/3 pay depending on reason subject to caps

> Emergency Paid Family Leave: Up to 12 weeks (Days 11-60)

1 reason

Weeks 1-2: unpaid; Weeks 3-12: 2/3 pay subject to cap



Emergency Paid Sick Leave (EPSL)

Paid Time Off for the First 80 Hours

Which Private Employers are Covered?

Private employer with fewer than 500 employees;

- Why 500?
- Who do you count?
- Single Enterprise under FLSA
- Integrated Employer under FMLA



Who is Eligible to Take EPSL?

- > Who is an Eligible Employee?
Eligible on DAY ONE of employment
- > How about:
Part-time/full-time employees?
Temporary or seasonal employees?
Staffing companies?



What Are The Reasons?

- > As to all six—the employee is unable to work OR TELEWORK—who gets to decide whether the employee is “able” to telework?
- > Reason #1: Employee subject to a quarantine or isolation order related to COVID-19
- > Reason #2: Employee advised by a health care provider to self-quarantine because of COVID-19
- > Reason #3: Employee experiencing symptoms of COVID-19 and seeking a medical diagnosis



What Are The Reasons, cont'd

- > **Reason #4:** The employee is caring for an individual subject or advised to quarantine or isolation
- > **Reason #5:** The employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precaution
- > **Reason #6:** The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury



What About Documentation?

- > Medical-related absences
- > Non-medical absences
- > IRS Guidance



How Much EPSL Leave is Provided, and How is it Paid?

> How long

Full-time employees: 80 hours

Part-time employees: the number of hours that the employee works, on average, over a 2-week period

How do employers deal with a varying work week?

> How much?

EPSL Reasons 1/2/3: 100% of regular rate, max of \$511 per day (\$5,110 in total)

EPSL Reasons 4/5/6: Two-thirds of the employee's regular rate, max of \$200 per day (\$2,000 in total)

Regular rate: <https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate>



Sequencing Leave – Paid Sick Leave, Then Employer Policy

- > Employer must allow the employee to first use EPSL provided for under this new leave law
- > The employer *cannot* require the employee to use accrued leave under an employer policy first
- > What you already have provided doesn't count against new law's requirement—no matter how generous



Emergency Family and Medical Leave Act (FMLA+)

Could Be Weeks 1-12, *But Only Pays for Weeks 3-12*

Employer Coverage/Employee Eligibility EFMLA

- > Which Private Employers are Covered?

 - A private employer with fewer than 500 employees; and

- > Which Employees are Eligible?

 - Any full-time or part-time employee that has been on the employer's payroll for 30 calendar days



EFMLA: One Reason, Up to 12 Weeks

- > Just ONE reason
- > Employee can take leave for “a qualifying need related to a public health emergency”—but there is only one qualifying need: when an employee is unable to work (or telework) to care for a minor child if the child’s school or place of child care has been closed or is unavailable due to a public health emergency

Up to 12 weeks of EFMLA leave

This still means 12 weeks combined for all FMLA reasons in the employer’s 12-month period

What is your 12-month period—does the employee even have any FMLA available right now?



How Do the 12 Weeks Work?

- > The first 80 hours (two weeks) are unpaid EFMLA, but an employee has EPSL #5 for $\frac{2}{3}$ wages during that time (both are running concurrently)
- > The remaining 10 weeks:
 - Paid at $\frac{2}{3}$ of the employee's regular rate, for the number of hours the employee would otherwise be scheduled to work
 - Maximum payment of \$200 per day and \$10,000 total



Potential Relief for Employers Under 50

- > The law currently exempts employers with fewer than 50 employees from civil damages in FMLA litigation

That means no back pay, front pay, liquidated damages

Based on FMLA statutory language referenced in H.R. 6201 in this provision, we're pretty sure that means attorney's fees, too

So does this mean just private enforcement—what about DOL action?

- > EPSL + EFMLA Child Care Carve-Out: Don't have to provide paid sick or paid family leave due to school or child care unavailability if it would jeopardize business as an ongoing concern.

Authorized officer of the business must make determination based on 1 of 3 factors.



State WFH, Return to Work, and Travel Quarantine Considerations

- > State Remote Work Executive Orders and Regulations
- > State Return to Work Executive Orders and Regulations
- > State Travel Quarantine Executive Orders and Regulations



Termination/Layoff Considerations

- > Federal WARN and State Mini-WARN
- > Employment Agreements
 - Potential Breach of Contract



Fall 2020: US Employment Law Looking Forward

- > Work from Home
- > FFCRA Extension
- > Election Ramifications





Questions?



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Exceptional legal counsel,
proactive business advice.



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