The 10 Most Common Employment Standards Mistakes

And how employers can avoid these costly HR errors

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Introduction

With the long list of often confusing legal obligations to meet, it is inevitable that employers will make mistakes when it comes to complying with employment standards and labour relations law. In some groups of employers, up to 75 percent fail to meet the most basic employment standards requirements.

Adding to the difficulty, employment standards and labour relations law are undergoing constant change (e.g., Alberta and Ontario in 2017). These developments require employers to review and often make substantial revisions to their policies and practices to avoid legal problems.

Unfortunately, even the simplest mistakes can be costly if an employer faces a legal complaint, an official inspection, an enforcement order, a fine or other financial penalty.

Meet your compliance goals

Employers and HR managers who care about compliance need a resource they can trust to help them understand and implement the latest compliance and best practice requirements.

That’s why we publish The Human Resources Advisor™ (HRA)—to provide you with a comprehensive tool describing all your obligations for employment standards, occupational health and safety, labour relations, human rights and more, and outlining how to implement these requirements in your workplace, no matter the size.

HRA also comes with hundreds of sample forms, checklists and other HR documents—like our essential employment standards and OHS self-audits—and it’s available wherever you can connect to the Internet.
What does that mean in practical terms?

Labour ministries and departments across Canada may conduct employment/labour standards inspection blitzes and audits—either randomly, targeted at a specific group, or after a complaint has been filed. Inspectors look at many things, including employment status or classification, hours of work, overtime pay, vacation with pay, public holidays, unauthorized deductions, record-keeping and retention, payroll records, eating periods, minimum wage, and posting requirements.

Where workplace parties do not voluntarily comply with the employment/labour standards legislation and regulations, the Department or Ministry of Labour may exercise its administrative and/or regulatory enforcement powers. Inspectors may issue compliance orders, notices of contravention, tickets or orders to pay wages.

If the department or ministry of labour determines that an employer is non-compliant, the department or ministry can flag that employer for a self-audit (currently in Ontario and, effective January 1, 2018, in Alberta) or further inspection as a repeat offender, and can also share information with other government bodies, which means an unpaid overtime complaint could result in a visit from a health and safety inspector or a Canada Revenue Agency auditor.

In addition, employers who are not in compliance can have their names posted on the government’s website listing their transgressions for all to see.

What are these common employment/labour standards errors?

These official inspections reveal the common mistakes and violations employers make when complying with the minimum standards set out in law in their jurisdictions. (See references to legislation for each jurisdiction in Appendix A).

According to the Ontario Ministry of Labour, the most common monetary violations relate to public holidays, overtime and vacation with pay. The most common non-monetary violations include hours of work, record-keeping and vacation pay written agreements.

Moreover, employers may make mistakes that increase the odds of being subjected to employment-related complaints, lawsuits or inspection by the Department/Ministry of Labour in each Canadian jurisdiction. Below, we’ll discuss…
Mistakes related to employment standards and how to avoid them

Employers can and should avoid these 10 common employment standards mistakes.

Effective HR review

One of the most effective ways to avoid common (and uncommon) employment standards errors is to undertake a thorough review of your HR practices and make changes where you find deficiencies. You can use the comprehensive employment standards self audit checklist included with The Human Resources Advisor to guide your HR compliance efforts. If you come to a roadblock, you can Ask the Editor for a prompt expert response.

1. Employment status or classification

**Mistake:** Many employers seek to avoid the perceived hassle associated with source deductions, entitlements to statutory benefits or claims for wrongful dismissal by classifying an employee as an independent contractor. An independent contractor is paid as a vendor and not as part of the company’s payroll. This employment classification is a management risk for employers.

**Why?** Incorrectly classifying a worker as an “independent contractor” (i.e., self-employed, freelancers, consultants and contract workers) can result in the employer, its directors, its board members and other like officials being responsible for the source deductions, plus any interest or penalties, that were not withheld and remitted to the Canada Revenue Agency (CRA), Revenu Québec or Workers’ Compensation Board. This includes unpaid income tax, employment insurance and Canada Pension Plan payments and workers’ compensation premiums, among others.
Furthermore, classifying an individual as an “independent contractor” will not necessarily negate a claim for wrongful dismissal. The courts and the CRA will often review whether an individual should be classified as an employee rather than as an independent contractor, and can obligate the employer to comply with employment standards minimum wage, overtime, statutory leaves, vacation and public holiday pay, and more.

**Misconceptions and legal principles:** A contract describing an individual as an independent contractor does not necessarily mean that he or she is, at law, an independent contractor. When examining independent contractor misclassification in Canada, the courts have ruled that the contract and intent of the parties are only part of the equation. There are a number of other factors that have considerable weight in determining if a worker is an employee or an independent contractor. The specific weighting of these factors will vary depending on the circumstances.

For example, the degree of control an employer has over the method of performing the work, whether the worker is subject to the employer’s company policies, and the economic dependency of a worker on one company are all factors to consider when classifying an individual as an employee or independent contractor. If control and other factors indicate an employment relationship, that initial classification of the worker as an independent contractor will be set aside, even if payments to the independent contractor were made to a corporation.

**Solutions:** Employers need to understand that if they want to hire self-employed individuals, they need to maintain an arm’s-length relationship with these contractors.

A well-crafted independent contractor agreement can go a long way toward eliminating any ambiguity regarding the status of a worker. Such a contract would establish responsibility for remittance of statutory deductions, the method of ending the relationship, any reporting requirements, the method of invoicing and payment and description of the services offered and for how long, among other things.

By protecting themselves with an enforceable independent contractor agreement, business owners can minimize the potential liability to their company before, during and after a relationship with an independent contractor.
2. Overtime pay entitlements

**Mistake:** Many employers believe that salaried employees are exempt from overtime compensation. Some choose to ignore the rules, arguing that paying overtime isn’t standard practice in their industry, while others will try to designate the majority of their workers as managers, who are generally exempt from receiving overtime entitlement in Canada. Others have trouble defining exactly the overtime threshold or where overtime begins under certain hours of work arrangements such as a telework situation.

**Why?** Not paying overtime entitlements properly can land a company in hot water with provincial/territorial employment standards inspectors. Companies can also face individual or class-action lawsuits which can result in fines and compensation for unpaid wages, damage to workplace morale and damage to a company’s reputation with the public.
Misconceptions and legal principles:

Overtime work is not mandatory. An employer cannot force an employee to work overtime, except in the rarest of circumstances. Of course, employees can agree to work overtime. If they do agree, they are entitled to the appropriate pay or time off in lieu thereof, but only after they have worked the daily and/or overtime threshold set in law or workplace policy.

Overtime does not have to be authorized in order to be compensable. If an employee legitimately works overtime, he or she is entitled to the appropriate pay or time off in lieu thereof. An employer cannot take the position that the overtime was not authorized and therefore refuse to pay for it. However, it’s advisable to put a policy in place stating that all overtime must be authorized. While the employer cannot refuse to pay for unauthorized overtime, where there is a policy in place it can discipline the employee for breaching that policy. Discipline can include dismissal in appropriate circumstances. This should discourage employees from working overtime without obtaining prior approval.

Employee exemption from overtime pay is mostly a myth. While provincial/territorial employment standards legislation and the Canada Labour Code do exclude some workers from overtime compensation, the vast majority of employees are entitled to extra pay for working overtime hours. Contrary to popular opinion, this has nothing to do with how individuals are paid or their employment status (salaried, hourly, part-time or full-time).

Also, determining whether employees are exempt from overtime pay takes much more due diligence than just giving them a management job title. In order to qualify as a true management position, the employee in that position must not only supervise other employees but must have other management type duties such as the authority to hire, fire, promote and discipline employees, as well as make decisions on the company’s behalf.

Take Note: Due diligence includes approving and tracking every hour of time employees work and having employees sign time sheets acknowledging their accuracy, where appropriate, even if attendance is honour-based or pertains to salaried employees.
**Solutions:** Employers must put in place and communicate clear and legally compliant HR policies and practices that establish expectations and guidelines for employee behaviour in relation to working and overtime entitlements. When a dispute arises, a judge or labour ministry/department official may ask to see an employer’s overtime policies, as well as evidence to ensure those policies have been enforced consistently and fairly.

Find the details here...

Use **The Human Resources Advisor** to find out what you should include in your overtime policy, how to keep meaningful records of overtime worked and overtime paid, what to do to prevent employees from checking email or performing work tasks while off-duty, and how to implement an averaging agreement to limit overtime pay liability. Subscribers can **log in here**.

3. **Entitlement to paid vacation**

**Mistake:** Employers often misunderstand the difference between vacation time and vacation pay. As well, employees commonly do not use all their annual vacation time and employers often wonder what happens to the unused vacation time and pay. Does it roll over to the next year? Is the time lost? Is there a monetary payout? Without knowledge of the minimum standard in employment and labour law or a specific vacation policy, employers tend to make mistakes when dealing with the above questions.

**Why?** Without knowledge of the law and policy implementation on managing vacation time and pay, the employer could create a risk of liability for unpaid vacation pay and potentially accrue a large contingent liability to the employee.
Misconceptions and legal principles:

Vacation time and vacation pay. In most jurisdictions, employers must provide employees with both vacation time and vacation pay. Vacation time and vacation pay provisions in legislation apply to all employees (i.e., full-time, part-time and temporary employees, among others) unless exempt under the legislation.

In some jurisdictions, vacation time and vacation pay are two distinct concepts. For example, there are jurisdictions where employees may earn a minimum of two weeks’ vacation time for every completed 12-month period (a vacation entitlement year). Since vacation time is only earned after completion of a 12-month period of work, employees are not entitled to vacation time during their first year of employment. However, vacation pay is earned starting on the first day of work. Employees are entitled to receive a minimum of four percent of the gross wages they earn in every vacation entitlement year. This applies even in the first year of employment.

Vacation pay is not calculated using only base salary. Many employers mistakenly do not calculate vacation pay on bonuses or commissions. In general and in most jurisdictions, vacation pay is calculated on wages including base pay, commissions, non-discretionary bonuses, overtime pay, holiday pay, termination pay, allowances for room and board, etc. However, tips and gratuities, discretionary bonuses and some expenses are not included as part of base salary.

Vacation accrual and the “use it or lose it” policy. Many employers fall into the trap of allowing their employees to accrue vacation time year after year. The employer ends up providing an employee with an extensive vacation entitlement that the employer cannot afford to provide or the employee cannot take. In addition, since the employee cannot lose the vacation pay, the employer will potentially accrue a large liability to the employee.

To deal with this problem, sometimes employers implement a “use it or lose it” policy. However, with respect to the statutory minimum amount of vacation set in law, employees must be compensated for time not taken. Therefore, a “use it or lose it” policy can only apply to any entitlement to vacation beyond the statutory minimum. Employers must communicate this clearly in a written policy.

Regardless, employees may still challenge employers if they believe that the vacation entitlement is an integral part of their compensation package.
Solution: The potential liability can be easily resolved by putting a vacation provision in the employment contract or by implementing a vacation policy with clear rules regarding:

- Vacation time and pay entitlements under the law and any greater benefit you provide
- Accrual of vacation time year after year
- Options for paying vacation pay — for example, with every paycheque, only at vacation time or as a lump sum
- Leaves of absence that count as time employed for the purposes of accruing vacation (if applicable in your jurisdiction)
- Statutory holidays that fall during an employee’s vacation for which the employee is entitled to a substitute day off with holiday pay, unless he or she agrees otherwise
- Termination of an employee and the employee’s entitlement to any earned vacation pay that has not already been paid

All organizations should review their vacation practices to ensure they are both complying with the applicable legislation and also acting in a way that is efficient and cost-effective.

Find the details here...

Let The Human Resources Advisor guide you as you review the ins and outs of vacation time and pay. Subscribers can log in here and look in the Statutory Holidays and Leaves Chapter under Statutory Holidays and Vactations for more information.

4. Entitlement to statutory (public) holidays

Mistake: Employers often wonder, is the employee eligible for holiday pay? If so, how much should he or she be paid for the statutory holiday? Can I require an employee to work on the statutory holiday? If they work the holiday, what is their entitlement to pay? When these
questions are not answered properly, mistakes in overpayments or underpayments can occur that can cost the company a lot of money or can expose it to the risk of lawsuits, grievances and penalties.

**Why?** Statutory (public) holiday pay laws are complicated and vary widely from jurisdiction to jurisdiction; therefore, it is easy to make mistakes.

**Misconceptions and legal principles:** Employees must meet certain criteria to be eligible for statutory holiday pay or may disqualify themselves from holiday pay by their actions. Here are some instances:

- In most jurisdictions, employees are only entitled to a statutory holiday if they’ve completed a minimum period of service with the employer before the holiday takes place. However, in certain jurisdictions, any employee who has worked any time in the previous four workweeks before the week of the holiday qualifies for some holiday pay.

- Some jurisdictions require employees to “earn wages” for at least a minimum number of days in the period before the statutory holiday.

- Most jurisdictions also provide that employees aren’t eligible for statutory holiday pay if they fail without reasonable cause to work the closest scheduled workday immediately before or after the holiday. The test is a “scheduled workday.”

- In some jurisdictions, employees aren’t subject to the statutory holiday pay rules under employment/labour standards if their collective agreement or individual contract provides for a more generous statutory holiday pay package.

The common assumption is that employees get whatever they would have gotten if they had actually worked on the statutory holiday, but it’s not as simple as that. There are several ways to calculate holiday pay and the one you choose depends on your jurisdiction. Each method precludes using the other; in other words, if a method applies to the employee, it’s the only way to calculate the employee’s holiday pay.
Under certain employment standards laws, a day of holiday pay for a statutory holiday that an employee doesn’t work is based not on a day of wages, but on the average daily pay the employee received in the period before the holiday took place. In addition, depending on the jurisdiction, holiday pay calculations may consider up to 14 types of earnings (e.g., basic wage, commission, non-discretionary bonuses, etc.).

Statutory holiday provisions of the Employment/Labour Standards Acts apply to all employees in each jurisdiction (i.e., full-time, part-time, casual and temporary employees, among others), unless exempt under the Acts.

Even full-time employees have no guarantee of being paid for a full eight hours of work for a public holiday. If employees are sick or absent for other reasons for which they were not paid, this will cause adjustments to the amounts for the calculation.

**Solutions:** All organizations should review their practices to ensure they are both compliant with the applicable legislation and also acting in a way that is efficient and cost-effective for the organization.

To simplify the process and to avoid inefficiencies, employers should identify:

- Applicable statutory holidays
- The dates the holidays are officially celebrated, and
- The employees who are eligible to be paid for them and how

Employers should make sure they keep records of how statutory holiday pay is provided to each employee, how the statutory holiday pay is calculated and what exceptions applied to disqualify an employee from receiving holiday pay. As well, employers should ensure that any substituted day off provided to employees is in writing.

Find the details here...

Statutory holiday pay is often a massive payroll expense and knowing how to manage it can lead to significant savings. Search for “Public Holidays” in The Human Resources Advisor for the details. Subscribers can log in here.
5. Unauthorized deductions from wages

Mistake: One of the most common mistakes made by employers is unauthorized deductions from employee wages.

Why? Many employers prefer to take unilateral measures when employees have been overpaid, have stolen funds or have caused damage to company property. However, employers are often uncertain about what they can deduct or withhold from employees’ wages.

Misconceptions and legal principles: Most provinces prohibit employers from making deductions from employee’s wages unless the deductions have been specifically authorized in law (i.e., statutory deductions) or are to pay for something that is a direct benefit to the employee (e.g., union dues, employee benefits plan).

Even if employees agree in writing to pay for something that employment and labour legislation does not allow, employers may be ordered to pay the money back to the employees. In these instances, the employer’s only recourse is to pursue the claim against the employee in court or through other means. However, there is an understanding that deductions can be made to compensate for any cash advances or payroll errors.

Unauthorized deductions also include:

- Fees to cash cheques
- Cost of damage to company property and vehicles (i.e., insurance deductible, parking tickets, or other violations, with the exception of photo radar ticket or red light camera tickets)
- Cost of lost, stolen or broken tools, equipment, products or faulty service
- Cost of cash or inventory shortages, dine-and-dashes or drive-offs
Cost of a uniform: Employers can require employees to wear a uniform; however, they cannot make employees pay for it. Uniforms are usually clothing that is unique to a business, identified with the employer’s logo, symbol, name or colours, making it of no practical use outside of that workplace.

Cost of personal safety equipment: Safety equipment is an employer’s responsibility. There are exceptions for safety headwear and some safety footwear.

For deductions related to cash advances or payroll errors, employers can only deduct the amounts an employee has agreed to or amounts that are allowed by law. For example, if an employee agreed that the employer can deduct $50 per pay and the employee’s employment ends before the full amount is recovered, the employer can only deduct $50 from the employee’s last pay.

Any additional money owed beyond that may only be deducted from an employees’ final pay if the employee consents. If the employee does not agree, the employer cannot deduct any additional amount. This does not change the fact an employee may owe money to the employer; it only restricts the employers’ ability to deduct the money from the employees’ wages.

Solution: This problem can be easily avoided. Employers in each jurisdiction should ensure they regularly perform audits on their employment standards compliance and address any blanket authorizations concerning deductions from wages, including any repayment plans or other agreements.

Find the details here...

You can find out everything you need to know about deductions from pay in The Human Resources Advisor. Subscribers can log in here.

Learn more about HRA here and get unlimited access free for 30 days!
6. Hours of work

Mistake: One of the most fundamental tasks of managing human resources and payroll is keeping track of and recording the hours employees actually work. Mistakes in tracking and recording hours of work can lead to payment inaccuracies and liability for the employer.

Whether it’s done on paper, through a punch clock or by having employees record their own time (print or electronically), the resulting records are typically referred to as time sheets or time cards and it is crucial that these time sheets or time cards are accurate and free from mistakes to avoid liability.

Why? With tracking and recording employees’ hours of work, mistakes can happen in various areas. Some of these include:

- Using time sheets that track weekly but not daily hours
- Not tracking overtime on a daily basis
- Not tracking changes in rates of pay
- Incorrectly recording EI insurable hours for a statutory holiday
- Not allocating time to the right week for EI purposes
- Not keeping time sheets long enough or keeping time sheets for too long

Beyond the tasks of tracking and recording, employers will also run into issues in the area of hours of work where they disregard standard or maximum daily or weekly hours allowed in law and require their employees to work more without proper prior approval and employee agreement.

Misconceptions and legal principles:

In some jurisdictions, employers must record actual hours worked by employees on a daily basis. In others, there are two kinds of employees for whom employers don’t have
to record actual work hours on a daily basis: employees who are not entitled to overtime under the law and employees who work only regular hours.

Time sheets are often used to track employee’s hours, but are often misused when tracking overtime hours on a weekly but not daily basis. This isn’t a problem in jurisdictions like Ontario that doesn’t require overtime to be tracked on a daily basis. But it’s a major problem in jurisdictions like Alberta that has both a daily and weekly threshold for overtime. Unless you track overtime on a daily basis, you may be unable to determine if employees have hit their overtime thresholds.

Most jurisdictions require employers to keep the history of each rate change for hourly employees and show the date on which each new hourly wage rate becomes effective. When a rate change falls within a single pay period, the hours at each rate must also be recorded separately; otherwise, the company will probably end up paying its employees the wrong amount.

Normally, the hours an employee works are fully insurable for EI purposes. The same applies for any hours the employee takes as paid leave. But what happens if an employee actually works and then receives paid time off for the same hours? This can happen when an employee works on a statutory holiday and gets paid his or her entitlement under employment standards for that day. The pitfall here is that it’s easy to record all of these hours as insurable. In fact, though, only the hours worked or normal hours of work are insurable, whichever is greater.

If the employer records too few hours as insurable, the employee may miss out on EI benefits for which he or she qualifies. If the employer records too many hours as insurable, it is overstating the employee’s EI entitlement, exposing the employer to penalties for making false statements to Service Canada.

An employee’s daily hours, entered by day, should be recorded against the date they were actually worked. But EI complications can arise when hours earned in an earlier period are only recorded in another. In some cases, such hours must be allocated to the period in which they’re earned; in others, they get allocated to the period in which they’re paid. Which is correct? The answer depends on the type these hours represent.
Without processing these correctly off a time sheet, employers could be exposed to heavy penalties for wrongly stating an employee’s entitlement to EI on ROEs filed with Service Canada.

**Solution:** To ensure you get payments right and avoid violations under employment standards law, employers must have some way to indicate the correct week or pay period for insurable hours and earnings reported to Service Canada. In addition, you should make sure:

- Time sheets are designed to record the daily hours that employees work
- The time sheets used enable tracking of employee hours at more than one rate at a time within a single pay period
- If from a jurisdiction where overtime can be accrued by exceeding either a daily or weekly threshold, that the time sheets are designed to keep track of overtime hours worked on both a weekly and daily basis

Find the details here...

Refer to the discussions listed in the **Hours of Work and Overtime** section in the **Pay and Working Conditions Chapter** of **The Human Resources Advisor** for commentary on the different types of working and insurable hours. Subscribers can [log in here](#).

**7. Record-keeping**

**Mistake:** A common mistake made by employers is a lack of appropriate record-keeping. Often, employers are unaware of the records they are required to maintain and for how long the records should be kept. They either forget to document some things or simply choose not to document certain things because they don’t think it is important.
**Why?** Making the wrong decisions about record maintenance and destruction can trigger compliance violations, penalties and fines that could guarantee the employer would face a losing legal battle in court or during a complaint investigation.

**Misconceptions and legal principles:**

First, most Canadian jurisdictions require that employers document certain aspects of the employment relationship, especially with respect to time-keeping records, leaves of absence and compensation.

Second, failure to document certain policies and terms and conditions of employment can create ambiguity that will play out in favour of an employee in most disputes because the burden of proof is almost always with the employer. For example, providing an employee with written notice regarding the employer’s expectation as to duties, performance and other obligations is essential when later justifying an adverse employment decision based on the employee’s failure to meet those expectations. Documentation of pre-existing performance issues, as well as proper documentation of leave of absence administration will help employers to avoid or defend against claims for wrongful termination and discrimination when an employee subsequently goes on a “stress leave” to avoid termination.

Finally, in most cases, if a negative act, unpleasant conduct or poor performance is not documented, then, for all intents and purposes, it didn’t happen.

All employers in Canada are required to keep written records about each person they hire for a certain period of time with a triggering point for record retention, meaning the point at which the document retention schedule begins. A legal retention period is the period of time specified by law for how long an organization must legally keep records.

However, which records should be kept and for how long depends on the jurisdiction’s employment or labour standards legislation. There is no harmonized triggering event across Canada for records retention except in the Atlantic provinces. For example, in British Columbia, the triggering event is the employment termination date; for Alberta and
Manitoba, it is when the record was made; for Ontario and Saskatchewan, it is either the termination date or when the record was made depending on the type of record.

All of the jurisdictions do not mandate maximum retention periods. Nor do they require destruction of employee records after the legal retention period expires.

Also, different legislation has different requirements. While employment and labour standards require employers to keep records for two years (depending on the jurisdiction), for example, after termination, the CRA, under a number of federal laws, requires employers to retain such records for seven years. Record-keeping and retention laws vary widely from jurisdiction to jurisdiction; therefore, it is easy to make mistakes.

In addition, employers who fail to keep records securely (under lock and key) can also face liability. Employment records should only be accessible by those with a need to know.

Leave of absence documentation is another type of documentation employers need to pay attention to. If an employer has to offer Family Medical Leave or Compassionate Care Leave among others, it needs to be on top of that documentation because that’s a direct cost in respect to benefits and people taking time off from the organization.

Employers must be aware of all areas where appropriate documentation is crucial because it could potentially save you money and protect you from legal pitfalls.

**Solution:** Implement a record-retention policy that describes the organization’s guidelines to create, preserve and access records. A company’s record-retention schedule must be based on legal and regulatory requirements.

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**Find the details here...**

Find out what you should include in your record-retention policy in order to meet your legal obligations. Look in *The Human Resources Advisor* in the Payroll and Benefits Chapter under Payroll Reporting and Records Retention. Subscribers can log in here.
8. Minimum wage and commission payments

Mistake: A mistake that often ensnares employers is the failure to ensure that commission payments made to their employees comply with the minimum wage requirements of their jurisdiction.

Why? While employer errors of this kind may be innocent or unintentional, significant financial liability can accrue as a result.

Misconceptions and legal principles: Commission payments are, by their very definition, variable. They seek to incentivize hard work by the recipient through sharing in the profits (and hardships) of the business. Yet there are limits in terms of how much pain an employee must bear as a result of poor sales.

Most workers in all Canadian jurisdictions are afforded the protection of the minimum wage. This protection also applies to qualifying employees compensated on a commission basis. If a commission-based employee’s wages for a pay period are less than what he or she would have earned based on the relevant minimum wage, the employer is obliged to top up the employee’s earnings to meet this minimum standard.

Solution: Employers must take care to monitor commission employees’ hours of work and reconcile these with commission earnings per pay period. Furthermore, it is not permissible to offset pay from one period to another. Commission pay provides a useful and flexible means of employee compensation. Just be sure to implement with care.

Find the details here...

Learn all about wages and commissions in the Pay and Working Conditions Chapter in the Establishing Proper Compensation and Work Practices section of The Human Resources Advisor. HRA Subscribers can log in here.
9. Statutory leaves

**Mistake:** At some point, nearly everyone needs time away from a job to recover from a serious illness or care for a sick loved one or new child. Canadian jurisdictions under employment/labour legislation allow a minimum number of leaves of absence for differing reasons and to meet a personal or family need.

Leaves of absence can cause significant challenges in managing the workplace. When an employee takes an unpaid leave of absence, an employer must arrange for coverage, rearrange service deadlines and, depending on the length of the leave, even recruit and hire a replacement. During that process, employers often make mistakes when managing statutory leaves of absence including dismissing an employee who is on a protected leave.

**Why?** Dismissing an employee when the employee is on a protected leave (pregnancy/parental, compassionate care leave, personal emergency leave, among others) or when the employee is off work because of a disability or workers’ compensation claim can be a costly mistake for an employer if it is not well thought out and done properly.

**Misconceptions and legal principles:** There is an unfortunately widespread perception that employees cannot be dismissed when they are on a medical or disability leave, a pregnancy/parental leave or even when they have given notice of their intention to take such a leave.

Employees on leave, or who are planning to take leave, can be dismissed like anybody else. However, they cannot be dismissed because of the leave or the underlying reason for it.

Employees should understand that taking a leave, whether it be stress-related, pregnancy-related, or otherwise, does not provide them with “immunity” from a dismissal that is otherwise inevitable. It is unfortunate but true that some individuals, knowing their employer is unhappy with their performance and that dismissal is likely, will find a sympathetic doctor and obtain a note allowing them to go on stress leave.
They do with the idea that it will prevent them from being let go. Unfortunately, employers also share the same belief. When the employer receives the doctor’s note, they assume that their plans to dismiss an underperforming or otherwise unsatisfactory employee must be put on hold, often indefinitely.

The reason for this confusion is, perhaps, understandable. Employment standards and human rights legislation prohibit dismissal or other adverse consequences as a result of the taking of a leave provided for by statute or related to disability or other protected grounds. When an employee on leave is dismissed, it is easy to jump to the conclusion the decision to dismiss was made as a result of the leave in question.

If such an allegation is made, the practical reality is that the employer will have to prove a negative; in other words, they will need to adduce evidence demonstrating that the decision to dismiss was not related to the leave. Providing that they can do so, they will not be subject to liability on that basis. However, if a court or tribunal concludes the leave was even a tiny part of the reason for the dismissal, the employer will be in breach of its legal obligations and be ordered to compensate the dismissed employee. The leave does not have to be the only reason for dismissal in order to support a finding of liability; it only has to be part of the reason.

**Solution:** If an employer needs to dismiss an individual who is taking leave or has announced his or her intention to do so, the employer should ensure that there is ample documentation of the timing of, and reasons for, the decision to dismiss despite the leave request, and that it is unequivocally clear that the decision is unrelated to the leave. Doing so will help the employer successfully defend any claim that is brought after the request for the leave.

In managing leaves of absence generally, employers should consider re-examining their policies that provide for automatic termination where an employee is absent from employment without notice. Employers should also establish a protocol to ensure that managers understand whether an employee’s absence falls within the broad scope of the statutory leaves, even where an employee does not specifically indicate that his or her absence relates to a statutory leave.
10. Failing to properly administer a termination

**Mistake:** Several mistakes happen under this topic. They include among others:

- Only paying statutory minimums
- Not continuing benefits and other “fringe benefits” during the notice period
- Taking the position that cause exists for the dismissal
- Not requiring an employee to sign a release

**Why?** Dismissing an employee is never an easy exercise for an employer and all too often employers dismiss employees without fully appreciating the obligations and liabilities associated with their decision. The decision to dismiss can bring any number of additional liabilities if an employer is not aware of the full extent of the obligations and of employee entitlements. Once the dismissal has taken place, it is often too late to fix the situation or take steps to minimize liability.

**Misconceptions and legal principles:**

**Only paying statutory minimums:** One of the most common misconceptions employers have is that statutory entitlements are the extent of their obligations owed to a dismissed employee.
The reality is that unless the employee signed an employment agreement when they started employment that clearly limited their entitlement at the point of termination to the statutory minimums, employees are entitled to common law reasonable notice.

This is a court-determined notice period that considers the employee’s length of service, age, position held and prospects of re-employment. While there are no “hard rules” with respect to how much an employee may be entitled—as each dismissal is fact-specific—in all cases the common law will be significantly more than the statutory entitlements.

**Not continuing benefits and other “fringe benefits” during the notice period:** With few exceptions, the common law reasonable notice period will include continuation of group benefits, pension contributions, car allowances, bonuses and profit-sharing. These obligations can significantly increase the costs of the dismissal and are often overlooked by employers when assessing the pros and cons of letting someone go.

As well, the failure to continue group benefits can lead to significant liability if the employee dies or is permanently disabled during the notice period. Employers who fail to continue group benefits essentially step into the role of insurer if entitlement to benefits is triggered during the notice period.

**Taking the position that cause exists for the dismissal:** While many employers believe that they have “cause” to dismiss an employee—be it poor performance, an inability to get along with co-workers or repeated absences—legal “cause” is considered to be the exception rather than the norm by courts and tribunals.

Taking a cause position has significant consequences for employees—typically they will be denied EI benefits, will have a much more difficult time getting a new job and can face dire financial challenges because the employee would not receive a severance package in the case of a dismissal with cause.

For these reasons, courts will often come down hard on employers who take a cause position that cannot be defended at trial or before an adjudicator. Damages for mental distress and punitive damages will often be awarded to employees, and the courts tend to be more generous with the notice period assessment where employers cannot make their cause case.
All this, plus the costs of the litigation itself, means that employers should carefully consider the risks associated with taking a cause position at the time of dismissal.

**Not requiring the employee to sign a release:** An employer who pays out a severance package that exceeds an employee’s statutory entitlements should always get a full and final release from the employee. This will allow an employer to negotiate and pay out a severance package with the peace of mind of knowing that the employee cannot come back at a later time seeking additional salary or compensation for the loss of group insurance coverage, pension contributions or other fringe benefits. A comprehensive release can even protect an employer from allegations of discrimination and/or harassment being made at a later date.

However, mistakes are made when the employer tries to get the employee to sign a release when the employer has only offered the minimum statutory notice of termination entitlements. Termination pay and severance pay (where applicable) are statutory obligations on an employer. It is not appropriate to require an employee being dismissed without cause to sign a full and final release as a condition of being paid the minimum employment/labour standards entitlements. If offering more to the employee than the minimum entitlements, then the employer is justified in asking the employee to sign a release, but only for those amounts in excess of the minimums.

**Solution:** A properly worded employment agreement and clear, unambiguous bonus/profit-sharing plans can reduce or eliminate an employer’s obligations on termination—as long as the contract complies with applicable employment standards legislation.

Furthermore, absent “just cause,” an employer must always provide notice to an employee you wish to terminate. The right to notice differs from jurisdiction to jurisdiction and we recommend you consult The Human Resources Advisor for the specific details that apply to your organization. Outside of theft, there is very little likelihood that an employer will have just cause to terminate the employment of an employee. The courts have consistently held that just cause is an extremely difficult standard to meet and that it is up to the employer to prove that it exists to justify that the employee should be terminated without notice.
Whether or not you have just cause, employers must handle terminations professionally and in good faith, including considering how the termination may affect the employee’s mental health.

An employer who acts without considering these protections may find themselves not only paying more “severance” than they expected, but also paying additional damages and incurring significant legal fees.

**Find the details here...**

Find out what you have to do to terminate employees for bad behaviour or performance-related issues in the **Terminations Chapter** under **Involuntary Separations: Termination of Employment Termination** ⇒ **Termination With Cause** in The Human Resources Advisor. Subscribers can log in here.

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**Not keeping up with changing legal requirements can also be a mistake**

Frequent changes in Canadian employment and labour law present a significant challenge for employers doing business. That challenge is compounded by the fact that employers with operations across Canada may be subject to differing employment and labour laws in each province or territory. Not keeping up with changing legal requirements is also a mistake employers should avoid.

For example, previous to the Ontario **Employment Standards Act** revised in 2000, part-time employees were not entitled to statutory holidays and any employee with less than three months of employment did not have to be paid statutory holiday pay. In 2000, every employee became entitled to public holiday pay—full-time, part-time, casual, temporary, newly hired—every single employee.

In addition, the method of calculating holiday pay was changed to basing it on wages earned in the four workweeks prior to the week of the holiday divided by 20.
Some employers were not aware of these changes and continued to apply the previous method of statutory holiday entitlement and pay calculation in their workplaces. These employers were recently found to be non-compliant with the law.

The reality is that as social attitudes evolve, the law adapts through the introductions of new legislation and changing judicial interpretation, and employers must stay on top of legislative changes in order to understand their rights and obligations and comply by the due dates of new legislation coming into force.

**Ontario** and **Alberta** are in the process of introducing significant changes to employment standards in their respective provinces.

**Ontario Bill 148, The Fair Workplaces, Better Jobs Act** would:

- Mandate equal pay for part-time, temporary, casual and seasonal employees doing comparable work to full-time employees
- Increase employee vacation entitlements
- Modernize the rules for creating a union in the workplace
- Increase compassionate care leave
- Require all employers to offer employees 10 days (two paid days) of personal emergency leave per year

**Alberta Bill 17, The Fair and Family-friendly Workplaces Act**, is aimed at aligning Alberta’s laws with best practices across Canada and makes sweeping changes for employment standards compliance for provincial employers. These changes include:

**New job protected leaves and increased maternity, parental and compassionate care leave entitlements:**

- Maternity leave will increase from 15 weeks to 16 weeks and the amount of time an employee must be employed to be entitled to parental leave will decrease from 52 weeks to 90 days
Compassionate care leave will increase from eight weeks to 27 weeks and will have more employee-friendly qualification conditions, including a reduction in the period of employment required to qualify for this leave and expanding coverage to individuals other than the primary caregiver.

New job protected leaves will be implemented, including Long-term Illness and Injury Leave (up to 16 weeks), Domestic Violence Leave (up to 10 days per year), Critical Illness of Child Leave (up to 36 weeks), Death or Disappearance of a Child Leave (up to 52 weeks or 104 weeks), Personal and Family Responsibility Leave (up to five days per year), Bereavement Leave, and Citizenship Ceremony Leave (up to 1/2 day per year).

**Overtime and hours of work:** Overtime agreements that provide for time off with pay instead of overtime pay will bank overtime at a rate of 1.5 hours for each overtime hour rather than banking hours at straight time. Hours billed pursuant to an overtime agreement will be able to be taken within six months of when they were banked, as opposed to the current three month limitation. If applicable to a group of employees, compressed workweek agreements must be part of a collective agreement or be implemented with the consent of the majority of the employees.

**Expanding employee eligibility for statutory holiday pay:** Employee eligibility for general holiday pay will be relaxed by eliminating the previous requirement of a specified period of employment prior to the holiday and the requirement that the holiday fall on a normal work day for the employee.

**Youth employment:** Increases in the restrictions in employing youth and stronger enforcement mechanisms for contraventions of the Employment Standards Code.

Most of the above changes will become effective January 1, 2018. In the months to come, employers will need to consider these new employment standards and implement any necessary changes or new requirements to their HR practices, policies and procedures, collective agreements and payroll systems to ensure compliance.
## Appendix A: Employment Standards by Jurisdiction

<table>
<thead>
<tr>
<th>Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta Employment Standards Code</td>
</tr>
<tr>
<td>British Columbia Employment Standards Act</td>
</tr>
<tr>
<td>Federal Canada Labour Code Part III</td>
</tr>
<tr>
<td>Manitoba The Employment Standards Code</td>
</tr>
<tr>
<td>New Brunswick Employment Standards Code</td>
</tr>
<tr>
<td>Newfoundland and Labrador Labour Standards Act</td>
</tr>
<tr>
<td>Northwest Territories Employment Standards Act</td>
</tr>
<tr>
<td>Nova Scotia Labour Standards Code</td>
</tr>
<tr>
<td>Nunavut Labour Standards Act</td>
</tr>
<tr>
<td>Ontario Employment Standards Act</td>
</tr>
<tr>
<td>Prince Edward Island Employment Standards Act</td>
</tr>
<tr>
<td>Quebec Act Respecting Labour Standards</td>
</tr>
<tr>
<td>Saskatchewan Employment Act</td>
</tr>
<tr>
<td>Yukon Employment Standards Act</td>
</tr>
</tbody>
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