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# *Around the World and Back Again: Employment Considerations for Employees Working Internationally*

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Languages Canada

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# Introduction

- Many Canadian language school employees will spend some time working in another country
  - What laws apply?
  - What potential liability exists?
  - How can we minimize risk?

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# Agenda

- Employee secondment
- Compensation for travel and hours of work
- Health and safety and workers compensation
- Human rights and harassment

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# **EMPLOYEE SECONDMENTS AND INDEPENDENT CONTRACTORS**

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# Employee Secondment

- Consider these scenarios:
  - International employees seconded into Canada
  - Canadian employees seconded internationally
  - Canadian employees contracted to work solely in an international jurisdiction
  - Classification of employees as Independent contractors

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# Secondments - What laws apply?

## E.G – Ontario

3 (1) Subject to subsections (2) to (5), the employment standards set out in this Act apply with respect to an employee and his or her employer if,

(a) the employee's work is to be performed in Ontario; or

(b) the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.

*Ontario Employment Standards Act, 2000 (ESA)*

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# Does Ontario employment law apply?

- Factors that are not relevant the *ESA*'s application include:
  - ❑ Where the offer of employment was made or accepted
  - ❑ Where the contract of employment was signed
  - ❑ Where the employee resides
  - ❑ Where the wages are paid
  - ❑ Where the employer is incorporated
  - ❑ Where head office is located

# Secondments - What laws apply?

## E.G – British Columbia

- The *Employment Standards Act* does not apply to employment contracts that are performed entirely in another jurisdiction
- The *ESA* may apply when the work is performed partly in another jurisdiction if the employment relationship has a “sufficient connection” to British Columbia based on factors such as:
  - ❑ Whether the employee’s residence and usual place of business is in British Columbia
  - ❑ Whether the terms of employment require the employee to work both inside and outside of British Columbia
  - ❑ Whether the employment of a worker outside the province immediately followed employment with the same employer in British Columbia



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# Why does this matter?

- Provincial employment standards legislation may apply to:
  - Employees seconded into Canada
  - Employees seconded outside of Canada
- Canadian employees contracted to work solely in a foreign jurisdiction will likely be subject to the laws of that jurisdiction

# Practical Considerations

- Examine the nature of the work to determine if provincial employment standards legislation applies
  - Consider factors such as:
    - Is it a continuation of the work performed in your jurisdiction?
    - How permanent is the arrangement?
    - Is the work in one jurisdiction incidental to the work in the other?
    - Does the employment contract specify what law applies to the employment relationship?
- Consult with your international partners and local counsel regarding the applicable foreign employment standards

# Practical Considerations

- Create a secondment agreement that:
  - Be specific as to what jurisdiction applies
  - Provides for the minimum entitlements under the applicable provincial legislation
  - Contains a provision that expressly contemplates termination in Canada and governs the employee's entitlement
    - In most cases, include a provision limiting the employee's entitlements to the minimums under the applicable provincial legislation

# Practical Considerations

- Independent Contractor v employee
  - ❑ What laws apply?
  - ❑ Is the individual only working for your language school or college or can he or she work for anyone they want?
  - ❑ Does the individual owe a sense of loyalty to your business?
  - ❑ How much of the individual's revenue comes from your business
  - ❑ Quacks like a duck.....

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# **COMPENSATION FOR TRAVEL AND HOURS OF WORK ISSUES**

# Is Travel Time Working Time?

## ■ General rules

□ Travel time may be considered “work time” if:

- the employer exercises control and direction over the employee (i.e. I need you to attend meeting in Hong Kong or I need you to go to conference in Miami)
- the time spent travelling is for the benefit of the employer

□ Ordinary commuting time is not included in hours of work

# Is Travel Time Working Time?

- In most Canadian provinces, the following travel will generally be recognized as work time:
  - ❑ Travel conducted for business purposes between the start and end of the work day
  - ❑ Travel to a work location that is not the employee's usual place of work
  - ❑ Travel to a work location that is not the employee's usual place of work that involves a “measurable inconvenience”
  - ❑ Travel from a meeting location to a remote worksite

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# Is Travel Time Working Time?

- Why does this matter?
  - Travel time can count as hours of work
  - Hours of work impact numerous employee benefits, such as:
    - Overtime pay
    - Vacation pay
    - Statutory holiday pay



# Hours of Work Issues

Legislated Standard	Ontario	British Columbia
Standard work week (overtime threshold)	44 hours	40 hours
Maximum weekly hours	48 hours, unless written the employee signs a written agreement (max. 60 hours)	Employer must not require or allow employee to work excessive hours or hours detrimental to the employee's health or safety
Rest period between shifts	8 hours, unless total time worked during shifts does not exceed 13 hours	8 hours, or pay 1½ times regular rate for hours work in this period
Consecutive hours off work each week	24 hours each week, or 48 hours every 2 weeks	32 hours, or pay 1½ times regular rate for hours work in this period

# Compensation for Travel Time

## ■ General rules

- An employee does not need to be paid their usual hourly rate for travel time, but must be paid at least minimum wage
- An employee is entitled to overtime based upon the number of hours work, but the amount of pay is reduced by the lower travel rate

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# Practical Considerations

- How will you be recording hours of work during a travel period?
- How are you managing hours of work during a travel period?
- How are you compensating an employee for travel time?

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# Practical Considerations

- What are some of the tools we have available?
  - Averaging agreements
  - Time off in lieu of overtime pay
  - Establishing a lower rate of pay for travel

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# **HEALTH AND SAFETY & WORKER'S COMPENSATION**

# Worker's Compensation Coverage

- Canadian workers injured while employed outside of Canada, may, under certain conditions, claim benefits under the *Workers' Compensation Act/Workplace Safety and Insurance Act*
- Eg - A worker who is an Ontario resident, and whose usual place of employment is in Ontario, is automatically covered for up to six (6) months while temporarily working outside Ontario
- Coverage may be extended on application from the employer

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# Worker's Compensation Coverage

## ■ Dual jurisdiction

- An Ontario worker injured outside the province may be entitled to benefits in more than one jurisdiction
- Although workers may have a choice of claiming benefits in either jurisdiction, the WSIB policy provides that a worker may claim benefits in only one

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# **HUMAN RIGHTS: DISCRIMINATION AND HARASSMENT**



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# Ontario Human Rights Code

## **Discrimination in employment**

5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

## **Harassment in employment**

5 (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

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# British Columbia Human Rights Code

## Discrimination in employment

13 (1) A person must not

- (a) refuse to employ or refuse to continue to employ a person, or
- (b) discriminate against a person regarding employment or any term or condition of employment because of

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

# Expanding Scope of Potential Liability

- In 2017, the Supreme Court expanded the scope of an employer's liability for discrimination in the workplace
  - ❑ The Code is not limited to protecting an employee solely from discrimination by their employer
  - ❑ The Code protects against discriminatory conduct if it has a sufficient nexus to the workplace – relevant factors include:
    - ❑ Was the respondent integral to the workplace?
    - ❑ Did the conduct occur in the workplace?
    - ❑ Was the claimant's performance of work environment negatively affected?
  - ❑ This may include discrimination by their co-workers, even when those co-workers have a different employer

*British Columbia Human Rights Tribunal v. Edward Schrenk (2017 SCC 62)*

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# Practical Considerations

- Work with international partners to confirm their policies and procedures for addressing harassment and discrimination
- Provide employee education if there is a concern about significant cultural differences in the jurisdiction in which the employee is seconded
- Develop a procedure for reporting an issue if it arises



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