EMPLOYMENT LAW

FOR BUSINESS AND HUMAN RESOURCES PROFESSIONALS

FOURTH EDITION

KATHRYN FILSINGER

Employment Law for Business and Human Resources Professionals

FOURTH EDITION

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Preface

From the initial recruitment stage to the end of employment, the law potentially affects every aspect of the employment relationship. As a human resources professional, you will not be expected to become an expert in all areas of employment law. However, you will be expected to have sufficient understanding of employment law so that, wherever possible, you can minimize legal risks and liabilities, be aware of the implications of actions proposed or taken, and—most importantly—know when to seek expert legal advice.

The purpose of this book is to provide you with a fundamental and practical understanding of the key legal issues that arise between employers and non-unionized employees. The book contains an extensive review of the content and interpretation of relevant employment-related statutes. It also examines the underlying contractual relationship between the workplace parties and the implications of applying general principles of contract law to that relationship. Throughout the book, case summaries are used to help clarify and explain ideas and to provide you with a sense of how courts and administrative tribunals interpret the relevant laws.

This text focuses on non-unionized employees—individuals whose terms and conditions of work are based on an individual contract of employment. It does not, for the most part, cover unionized employees, whose terms and conditions of employment are collectively bargained for and governed by a collective agreement. Generally speaking, however, most employee rights contained in statutes apply to unionized and non-unionized employees alike, while common law (judge-made) rights and remedies, such as the right to sue for wrongful dismissal, apply only to non-unionized employees.

The text is divided into four parts. Part I (Chapter 1) provides an overview of the legal and judicial framework within which Ontario's employment laws are created and interpreted. It explains the sources of employment law, both statutory and judicial; the relevance of the *Canadian Charter of Rights and Freedoms*; and the issues related to constitutional jurisdiction in the employment area. It also provides an overview of current employment-related statutes that apply in Ontario. The chapter concludes by discussing the distinction between an employee–employer relationship and that of independent contractor–principal, and the legal implications of that distinction.

Subsequent chapters are organized according to the chronology of the employment relationship. Part II (Chapters 2 to 4) addresses key legal issues surrounding the hiring process. Chapter 2 focuses on the significant impact that Ontario's *Human Rights Code* has on selection and recruitment. Unlike most employment laws, the Code applies to pre-employment conduct as well as to all subsequent aspects of the

employment relationship, and an understanding of its requirements is crucial for anyone involved in the hiring process.

Chapter 3 examines common law issues related to hiring, including areas of potential liability for employers. It also discusses different categories of employees. Chapter 4 considers the benefits of written contracts of employment over oral ones, reviews common contractual terms, and examines the main enforceability issues that can arise.

Part III (Chapters 5 to 11) focuses on laws that apply during the course of an employment relationship. Chapters 5 to 10 provide an overview of the principal statutes that govern human rights, equity, employment standards, occupational health and safety, workplace safety and insurance (formerly known as workers' compensation), and privacy, respectively. Chapter 11 covers contractual issues, such as performance reviews and changes in the terms of employment agreements during the course of employment, as well as issues surrounding vicarious liability.

Part IV (Chapters 12 to 16) reviews the key legal issues that arise at the end of an employment relationship. Chapter 12 deals with resignation and retirement. Chapter 13 reviews dismissal with cause under the common law. Chapter 14 covers statutory termination and severance requirements under Ontario's *Employment Standards Act, 2000*. Chapter 15 reviews the common law concerning dismissal without cause and related issues. Finally, Chapter 16 looks at post-employment obligations.

In the four years that have passed since the third edition of this text was published, there have been a significant number of developments in the employment law field. These include several important legislative changes. The Bill 148 amendments to the *Employment Standards Act* brought unprecedented changes to that statute, including introducing new employer obligations related to employee scheduling, penalties for misclassifying employees as independent contractors, and a requirement to provide equal pay for equal work regardless of employment status. It also increased the minimum wage and vacation pay entitlements, modified several existing statutory leaves (e.g., first two days of personal emergency leave must now be paid), and introduced domestic and sexual violence leave. Previous to Bill 148, Bill 18's amendments removed the $10,000 cap on ministry orders, extended the time limits on recovery of wages, and made temporary help agencies and their clients jointly liable for unpaid wages owed to agency employees.

Other legislative changes include the new *Pay Transparency Act*, which introduces obligations surrounding the treatment, tracking, and reporting of pay information by many Ontario employers. There have also been significant amendments to health and safety–related laws during this time period. Bill 132's amendments to the *Occupational Health and Safety Act* (OHSA) increased employers' responsibilities with respect to workplace harassment, while Bill 177's amendments lengthened OHSA limitation periods and increased fines. Under amendments to the *Workers' Safety and Insurance Act* (Bill 127), workers are now entitled to benefits for both *traumatic* and *chronic mental stress* arising out of and in the course of their employment.

This edition also examines key employment law–related decisions made over the past four years. These include *Howard v Benson Group Inc* (termination of fixed term contracts), *Wood v Fred Deeley Imports Ltd* (enforceability of a termination clause), and *Bottiglia v Ottawa Catholic School Board* (employer's right to request

independent medical examination). Other major developments include a series of cases related to human rights: *French v Selkin Logging* and *Calgary (City) v Canadian Union of Public Employees (CUPE37)* (duty to accommodate for the medical use of marijuana), *Misetich v Value Village Stores Inc* (duty to accommodate for family status), *Amalgamated Transit Union, Local 113 v Toronto Transit Commission* (drug and alcohol testing), and *Stewart v Elk Valley Coal Corp* (termination for a positive drug test). Significant recent cases related to dismissal from employment include *Michalski v Cima Canada Inc* (temporary layoffs), *Brake v PJ-M2R Restaurant Inc (mitigation income), Potter v New Brunswick (Legal Aid Services)* (what constitutes constructive dismissal), and *Papp v Stokes* (job references and defamation).

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Finally, I thank my husband, Nick, and our children, Caitlin, Rachel, and Francesco, for their patience and support through the many, many hours that it took to bring this book to completion.

This book is dedicated in loving memory to my parents, Norman and Ella Filsinger.

Kathryn J. Filsinger

About the Author

Kathryn J. Filsinger is a professor in Humber's Human Resources Management Degree Program. She teaches employment law in the HR degree and postgraduate HRM programs, as well as labour relations and human resources management. Previously, she taught employment law at both Ryerson and York universities. Kathryn holds a BA (magna cum laude) from Queen's University, an LLB from the University of Toronto, and an LLM from Osgoode Hall Law School.

PART I

Legal Framework

Understanding the legal framework through which employment-related laws are created, interpreted, and enforced is foundational for understanding specific legal requirements within the workplace.

Chapter 1 provides a brief historical overview of employment law—so we know how we got to where we are—and then explains how jurisdiction over employment law is divided between the federal and provincial governments. With a focus on Ontario, Chapter 1 provides a summary of key employment statutes and then explains the relevance of the two main areas of the common law (contract and tort) that affect the workplace. The impact of section 15 (equality rights) of the *Canadian Charter of Rights and Freedoms* on employment law, as well as the structures and legal processes through which legal disputes within the workplace are adjudicated, are also addressed.

Finally, Chapter 1 addresses the fundamental issue of how to distinguish between an employee and an independent contractor, who is in business for himself or herself, as well as the legal implications of that distinction.

Overview of Legal Framework

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CHAPTER OUTLINE

LEARNING OUTCOMES

After completing this chapter, you will be able to:

- Identify the three main sources of employment law and their respective roles.
- Understand how and why employment law changes.
- Understand jurisdiction over employment law.
- Identify key employment-related statutes, with a particular focus on Ontario and federal law.
- Understand the relevance of the *Canadian Charter of Rights and Freedoms* to employment law.
- Understand the judicial and administrative systems that interpret employment laws.
- Locate relevant statutes and case law.
- Distinguish between an employee and an independent contractor.

Introduction

Although most of this book looks at specific employment laws, Chapter 1 provides you with an overview of the legislative and judicial framework within which those employment laws are created. Knowing who makes, interprets, and enforces these laws is essential to understanding and applying them in the workplace. This chapter is intended to provide a context for everything else that you will learn in this book.

As an employment law text, the focus is on non-unionized employees—individuals whose terms and conditions of work are based on an individual contract of employment between them and their employer. Issues specific to unionized employees, whose terms and conditions of employment are collectively bargained for and governed by a collective agreement, are not, for the most part, covered.

Sources of Employment Law

statute law
law passed by a government legislative body

constitutional law
in Canada, a body of written and unwritten laws that set out how the country will be governed, including the distribution of powers between the federal government and the provinces

common law
law made by judges, rather than legislatures, that is usually based on the previous decisions of other judges

There are three main sources of employment law in Canada: **statute law** (legislation passed by the government), **constitutional law** (the *Canadian Charter of Rights and Freedoms*), and **common law** (judge-made law). The relative importance of each source depends on the particular area of law under consideration. Wrongful dismissal actions, for example, are based on the common law, while minimum employment standards and anti-discrimination laws are provided through statutes, though the common law gradually adopts many statute-based principles. A discussion of statute, constitutional, and common law is set out below.

Generally speaking, most employee rights contained in statutes apply to unionized and non-unionized employees alike, while common law (judge-made) rights and remedies, such as the right to sue for wrongful dismissal, apply only to non-unionized employees.

Statute Law

What Is a Statute?

A statute is a law passed by the federal or provincial government. Statutes are sometimes referred to as "legislation" or "acts." The Ontario *Human Rights Code*, is an example of a statute.

Why Are Statutes Passed? Why Are They Amended?

Employment statutes are usually passed because the government decides that employees require protections or rights beyond those that currently exist. Historically, employment legislation has provided minimum acceptable standards and working conditions, such as minimum wages and vacation entitlements. More recently, governments have implemented statutory requirements and protections, such as anti-discrimination legislation, that affect many facets of the employment relationship.

There is a wide range of factors that can lead to changes in employment law. One of these is a change in the political party in power. For example, in 2015 the new

federal Liberal government fulfilled an election promise by introducing legislation to return federally regulated industries back to a card-check system for union certification, thereby making certification easier. This replaced the system of mandatory secret ballot certification votes brought in by the previous Conservative government.

New legislative requirements also often relate to demographic shifts in society and changing social values. For example, the dramatic increase in the number of women in the paid workforce has led to significant new statutory requirements over the past 25 years, such as pay equity and increased pregnancy and parental leave. Similarly, changes in technology have led to enhanced privacy protection laws while shifts within the economy and the nature of work have resulted in laws to better protect workers in non-standard (e.g., temporary, part-time, casual), precarious work.

As various employment laws are discussed in this book, consider the policy issue that the law is meant to address, the goal of the legislation, and then the extent to which the law has been, or probably will be, effective in achieving that goal.

F Y I

How Ontario Obtained Pay Equity

The mid-1970s to the mid-1980s witnessed a dramatic increase in the number of women in the paid workforce. However, despite their increasing levels of education, working women found that they continued to earn considerably less money than working men. There was extensive public discussion and debate about this wage gap. Various lobbying groups, including many trade unions and organizations representing women, argued that existing laws ensuring "equal pay for equal work" were ineffective because men and women typically performed different jobs. The real problem was the historical undervaluation of "women's work." To remedy the situation, proponents of pay equity argued that Ontario needed "equal pay for work of equal value" legislation, requiring employers to evaluate totally different jobs within their organization and assess whether they were of equal "value."

Proponents of pay equity adopted an effective multi-pronged strategy, convincing the public through a media campaign and members of provincial Parliament (MPPs) through direct lobbying that such a change was desirable and necessary. In 1985, the Ontario government passed the *Pay Equity Act*, which requires Ontario employers with ten or more employees to provide equal pay for work of equal value. It is one of the most far-reaching pieces of legislation of its kind in the world. Pay equity is discussed more fully in Chapter 6.

F Y I

Before There Were Employment Statutes . . . When Freedom of Contract Reigned Supreme

During the 19th and early 20th centuries, there were very few employment statutes; the relationship between an employer and employee was based almost entirely on the common law of contract. Under the common law, the parties were free to negotiate whatever terms of employment they could mutually agree on. But because

an employee typically has much less bargaining power than an employer, in practice this freedom of contract usually meant that the employer was free to set the terms it wanted. The employer was also free to select or discriminate against anyone it chose. Moreover, when legal disputes between an employer and employee arose, courts saw their role as strictly one of interpreting the existing employment agreement, not as one of trying to achieve a fairer balance between the parties' interests.

Over time, governments became convinced that leaving the employment relationship entirely to labour market forces (supply and demand, with an individual's labour treated as a commodity) was unacceptable, and they intervened by passing laws in a broad range of areas. These included laws setting minimum employment standards, outlawing child labour, regulating workplace health and safety, prohibiting discrimination based on key grounds, and creating a labour relations system that established the right of employees to join a union so that they could bargain with the employer collectively.

Photo 12 / Alamy Stock Photo.

Today, although the non-union employment relationship is still premised on the basic principles of the common law of contract, the relationship between employers and employees is a highly regulated one, with numerous statutes affecting that relationship.

SOURCE: Based on lecture notes by Professor David Doorey as part of his Employment Law 3420 course, 2009, York University, Toronto.

How Statutes and Regulations Are Made: The Legislative Process

A statute first takes the form of a written bill. (A bill is essentially an idea written into legal language and presented to the legislature for consideration.) In Ontario, a bill is introduced to the legislature by an MPP, while federally it is introduced by a member of Parliament (MP). To become a provincial statute a bill must pass three

readings in the provincial legislature. To become a federal statute, a bill must pass three readings in the House of Commons *and* must also be passed by the Senate in Ottawa. The following description of the legislative process concerns provincial legislation because the provinces pass most laws related to employment.

There are three main types of bills: public bills, private members' bills (both of which are general in application), and private bills (which deal with specific, non-public matters).

WEBLINK

See http://www.ontla.on.ca and click "Bills & Lawmaking" to view all three types of bills from past (since 1995) and current sessions of the Ontario legislature.

1. *Public bills*. Public bills are introduced in the legislature by the Cabinet minister who is responsible for the relevant subject matter. For example, bills concerning employment law are typically put forward by the minister of labour. A bill may contain either proposed amendments to a current statute or an entirely new piece of legislation. First reading introduces the bill. On second reading, members of provincial Parliament debate the principles of the bill. If the bill passes second reading through a vote in the legislature, it goes to a committee of the legislature. Committees may hear witnesses and consider the bill clause by clause before reporting back to the legislature. Sometimes the bill is revised (amended) before its third and final reading to take into account input from the public or from opposition parties. After third reading, there is a vote in the legislature, and if a majority of MPPs vote in favour of the bill, it is passed. Figure 1.1 outlines the steps of how a bill becomes a law in Ontario.
2. *Private members' bills*. Private members' bills may deal with matters of public importance, but they are put forward by a private member of the legislature, not by a Cabinet minister or the Speaker of the Legislature. Therefore, they typically do not have much chance of becoming law and are often tabled to stimulate public debate on an issue or to make a political point. They usually, but not always, "die on the order paper," which means that they don't become law.
3. *Private bills*. Private bills cover non-public matters, such as changing corporate charters, and so are of limited scope and relevance. (Private bills start with the prefix "PR"—e.g., Bill PR47.)

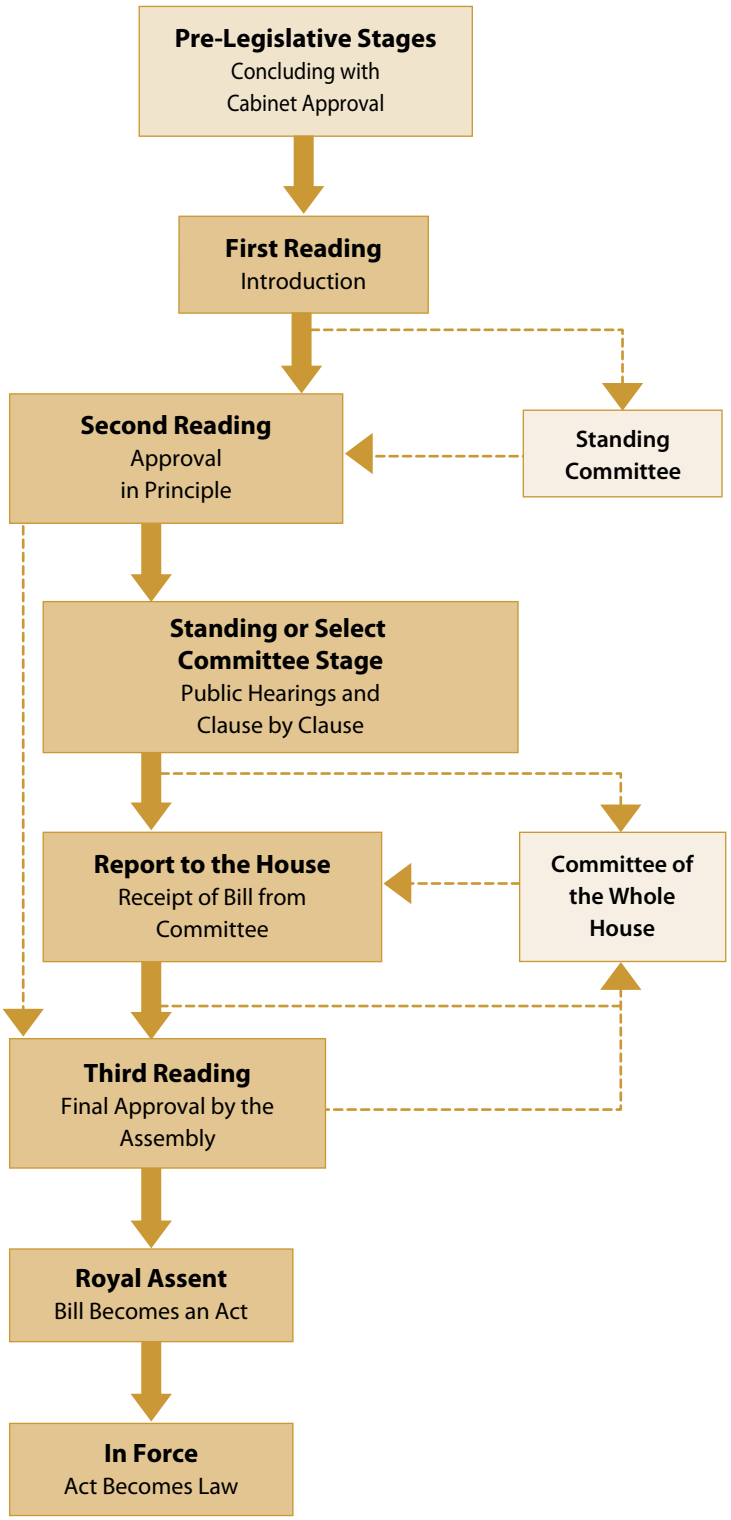
A bill becomes a statute once it receives **royal assent**. A statute may come into force in one of three ways:

royal assent
a largely symbolic process through which the English sovereign (the "Crown") or his or her representative formally approves a new law passed by a Canadian Parliament

- on royal assent: the statute comes into force without the need for additional steps;
- on a particular date: the statute itself names the date on which it comes into force; or
- on proclamation: the statute comes into force on a date to be announced later. Different sections of the statute may come into force at different times. For example, when additional time is required to prepare the regulations necessary to implement certain provisions of the law, those provisions may be proclaimed at a later date or the date may be set out in the statute.

When you are reading a statute, make sure that you have the current version. Statutes can be amended extensively, and sometimes entire sections are repealed

FIGURE 1.1 How an Ontario Bill Becomes Law



SOURCE: Adapted from http://www.ontla.on.ca/lao/en/media/laointernet/pdf/bills-and-lawmaking-background-documents/how-bills-become-law-en.pdf.

(deleted) or added. The Ontario Ministry of Labour's website (http://www.labour.gov.on.ca) and the Canadian Legal Information Institute (CanLII; http://www.canlii.org) are two good places to find the most up-to-date version of employment-related statutes and Canadian cases.

While statutes contain the main requirements of the law, detailed rules on how to implement or administer a statute, or on exemptions, are often found in its regulations. **Regulations** (also known as delegated legislation) are rules made under the authority of a statute. For example, Ontario's *Employment Standards Act, 2000* states that there is a minimum wage for most occupations in Ontario. However, the exact dollar amount of that minimum wage for various occupations is found in the regulations that accompany the Act.

Although regulations are as legally binding as the statute that enables them, they are not made by a legislature. They are made by government officials and published (e.g., in Ontario in the *Ontario Gazette*) to ensure public awareness. Therefore, they are more easily made and amended than the actual statute itself.

Statutory Interpretation

Judges or members of administrative tribunals (adjudicators appointed pursuant to a statute) interpret legislation while adjudicating cases. They have developed a number of rules—such as the mischief rule—to help them. When using the mischief rule, they examine the problem or mischief that a statute was intended to correct and apply the corrective rationale to the issue. *Jantunen v Ross* provides a good example of this approach to statutory interpretation.

Courts and tribunals also use "internal aids" found in the statute itself to assist in its interpretation. Sections of a statute that define important terms, or an introduction

CASE IN POINT

Court Uses Mischief Rule to Interpret Statute

Jantunen v Ross (1991), 85 DLR (4th) 461 (Ont Sup Ct J (Div Ct))

Facts

Ross, a waiter, borrowed money from the Jantunens, the plaintiffs. He never paid it back. The plaintiffs sued for repayment and obtained a judgment in their favour. Under Ontario's *Wages Act*, the plaintiffs had the right to garnishee (seize) 20 percent of Ross's wages; the other 80 percent was exempt from garnishment. Because Ross earned minimum wage, tips constituted a large portion of his earnings. The plaintiffs argued that they should be able to garnishee his tips, without regard to the 20 percent limit, since tips were not wages paid by his employer and therefore were not covered by the *Wages Act*. Ross argued that he needed his tips to pay his living expenses.

Relevant Issue

Whether tips qualify as wages for the purposes of the *Wages Act*.

Decision

Although tips are not mentioned in the *Wages Act*, they qualify as wages and are therefore protected. The court interpreted the term "wages" in accordance with the "underlying intent and spirit" of the *Wages Act*—that is, to allow debtors to pay off creditors while still being able to support themselves. Since tips were a significant portion of Ross's earnings, garnishing them entirely would undermine Ross's ability to support himself. Thus, the court's decision to include tips in the definition of "wages" addressed the mischief that the legislation was aimed at.

or preamble that explains a statute's purpose, can help the court in its interpretive role. For example, the broad preamble to Ontario's *Human Rights Code*, which includes as its aim "the creation of a climate of understanding and mutual respect for the dignity and worth of each person," has led to an expansive interpretation of the rights contained in that statute.

"External aids," such as legal dictionaries and scholarly articles, are also used in interpreting statutes.

regulations
rules made under the authority of an enabling statute

What Levels of Government Can Pass Employment-Related Statutes?

Canada is a federal state with three levels of government: federal, provincial, and municipal. Municipalities have no jurisdiction over employment, although they can pass bylaws on matters that affect the workplace, such as smoking.

The federal government has authority over only about 10 percent of employees in Canada. This is because in 1925 the court ruled in *Toronto Electric Commissioners v Snider* that the federal government's legislative authority was limited to industries of national importance, such as banks and interprovincial communications. As a result of this decision, approximately 90 percent of employees in Canada are covered by provincial employment legislation. For this reason, this text focuses primarily on provincial employment legislation (with particular emphasis on Ontario) rather than on federal employment laws.