**LEARNING OUTCOMES**

**AFTER STUDYING THIS CHAPTER, YOU SHOULD BE ABLE TO**

- **EXPLAIN** how employment-related issues are governed in Canada.
- **DISCUSS** at least five prohibited grounds for discrimination under human rights legislation, and **DESCRIBE** the requirements for reasonable accommodation.
- **DESCRIBE** behaviour that could constitute harassment, and **EXPLAIN** the employers’ responsibilities regarding harassment.
- **DESCRIBE** the role of minimums established in employment standards legislation and the enforcement process.

**REQUIRED HR COMPETENCIES**

- **20100**: Conduct human resources responsibilities and build productive relationships consistent with standards of practice with due diligence and integrity to balance the interests of all parties.
- **20300**: Adhere to legal requirements as they pertain to human resources policies and practices to promote organizational values and manage risk.
- **20400**: Recommend ethical solutions to the organization’s leadership by analyzing the variety of issues and options to ensure responsible corporate governance and manage risk.
- **20600**: Promote an evidence-based approach to the development of human resources policies and practices using current professional resources to provide a sound basis for human resources decision-making.
- **50200**: Interpret legislation, collective agreements (where applicable), and policies consistent with legal requirements and organizational values to treat employees in a fair and consistent manner and manage the risk of litigation and conflict.
- **90400**: Manage human resources information in compliance with legal requirements using appropriate tools and procedures in order to support decision-making and inform leaders about progress toward organizational objectives.
A 2011 survey conducted by Queen’s University in partnership with the Human Resources Institute of Alberta (HRIA) and the International Personnel Management Association (IPMA) asked 451 HR professionals to identify the top five critical pieces of knowledge required in their roles. While business acumen was identified as the most critical piece of knowledge, employment law/legislative awareness and talent management were tied for second position. While HR professionals are expected to provide guidance, training, programs, and policy developments that are legally defensible, the actions of supervisors and managers as agents of the organization must also abide by the bottom line through decreased productivity, and increased turnover and absenteeism.

II. Rather than appreciating the strategic and business benefits of managing HR issues, employers often use the legal system to reactively investigate a complaint. Employers need to consider a more proactive approach to developing policies, procedures, and decision-making within the legal framework.

III. Psychosocial factors that affect the health of the organization and its employees as well as the bottom line are often neglected. Recently, an initiative by the Mental Health Commission of Canada was created aimed at bringing awareness to these factors. The initiative suggests that we have to consider physical health and safety laws, and we also need to consider psychosocial factors, such as respect, engagement, and leadership. Consideration of psychosocial factors is voluntary. However, there is a Canada-wide case study project currently operating in which participating organizations are introducing measures to improve psychological health and safety in their workplaces. I’m working on this initiative because Bernardi Human Resource Law is the only law firm in Canada participating in the case study project.
legislated rules and regulations. The risk of expensive lawsuits and their impact on employer branding or reputation requires an awareness of employment law within the organization that extends well beyond just the HR professionals.

There are a number of distinct sets of responsibilities that exist between the employee and employer, including formal and informal expectations. There is a mutual expectation of each party to maintain the employment relationship by fulfilling their own responsibilities within the relationship. For example, there may be an implied, informal expectation from an employee’s point of view that as long as they attend work for the scheduled number of hours, they can expect job security and continued employment from the employer. Such informal and personalized expectations are difficult to manage and correct if one party feels that the other has violated the expectations within the mutual relationship. As a result, the influence and impact of formal expectations (largely established through legislation and the interpretation of it) play a significant role in the Canadian workplace.

The primary objective of most employment legislation in Canada is to prevent employers from exploiting paid workers, assuming that an implicit power imbalance exists in the employment relationship (in favour of the employer). While employers have a right to modify employee work terms and arrangements according to legitimate business needs, employees have a right to be protected from harmful business practices. In this regard, the government’s role is to balance employee and employer needs through the development and maintenance of employment legislation, as highlighted in Figure 2.1. While there is a large focus on legislation protecting employees, the legislation also protects employers, as outlined in the Expert Opinion box from the perspective of a leading employment law lawyer and author. The judicial system provides a forum for interpreting legislation according to the precedents that past judicial rulings have established.

**Figure 2.1** Government’s Role in Balancing Employer and Employee Needs

The government’s role is to balance employee and employer needs through the development and maintenance of employment legislation.

- Employers have a right to modify employee work terms and arrangements according to legitimate business needs.
- Employees have a right to be protected from harmful business practices.

Source: Data from Chhinzer, N. (2013).
**Hierarchy of Employment Legislation in Canada**

1. As highlighted in Figure 2.2, at the broadest level all persons residing in Canada are guaranteed protection under constitutional law, particularly the Charter of Rights and Freedoms. The regulations set forth in the Charter are not employment specific, but all employers must abide by them because they are fundamental, guaranteed rights to all persons residing in Canada.

2. Provincial/Territorial human rights codes ensure that the rights of every Canadian are protected and that all persons are treated with equality and respect. Discrimination based on protected grounds highlighted in the legislation is prohibited in not only the employment relationship but also the delivery of goods and services. Therefore, while the application of the Charter of Rights and Freedoms and human rights codes extends beyond just the employment relationship, they both have a significant impact on workplace practices.

3. In Canada, employers and employees must abide by a series of employment-specific legislation, such as employment standards acts, which vary slightly by jurisdiction. There is a great deal of commonality to the legislation across jurisdictions, but there are also some differences. For example, vacations, statutory holidays, and minimum wage standards are provided by all jurisdictions, but specific entitlements may vary from one jurisdiction to the next. Therefore, a company with employees in more than one province/territory must monitor the legislation in each of those jurisdictions and remain current as legislation changes. Ensuring legality across multiple jurisdictions can be complex, since it is possible for a policy, practice, or procedure to be legal in one jurisdiction yet illegal in others.

4. There are laws that specifically regulate some areas of HRM—occupational health and safety (occupational health and safety acts are reviewed in Chapter 14), union relations (labour relations acts are reviewed in Chapter 16), as well as pensions

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**FIGURE 2.2** Multiple Layers of Canadian Legislation Affecting Workplace Practices

- **Affects the General Population**
  - Canadian Charter of Rights and Freedom—Basic rights guaranteed to all persons residing in Canada
  - Human Rights Legislation—Protection from discrimination in employment relationships and the delivery of goods and services
  - Employment Standards Legislation—Establishes minimum terms and conditions of the employment relationship within each jurisdiction (e.g., minimum wages, hours of work, maternity leave)
  - Ordinary Laws—Protection under context- or content-specific laws affecting workplaces (like Occupational Health and Safety)
  - Collective Bargaining Agreement—A legally binding agreement establishing minimum terms and conditions of employment affecting unionized positions
  - Employment Contract—A contract between an individual employee and their employer regarding specified employment conditions in specified roles

- **Affects Specific Employees or Conditions**

*Source: Based on Chhinzer, 2011.*
and compensation (pay equity acts, the Income Tax Act, and others are discussed briefly in Chapters 11–12).

5. Even more specific is the issue of contract law, which governs collective agreements and individual employment contracts. Contract law imposes specific requirements and constraints on management and employee policies, procedures, and practices. For example, a collective bargaining agreement is a contract regarding the terms and conditions of employment that both employees and employers must abide by legally. In non-unionized situations, individual employment contracts are often signed prior to the commencement of the employment relationship and constitute individualized legal agreements that employees and employers must abide by.

**Tort Law**

In addition to the legislation above, Canada has also inherited the English system of tort law. **Tort law** is primarily judge-based law, whereby the precedent and jurisprudences set by one judge through his or her assessment of a case establishes how similar cases will be interpreted. Tort law is often separated into two categories: intentional torts (for example, assault, battery, trespass, intentional infliction of mental distress) and unintentional torts (for example, negligence based on events in which harm is caused by carelessness).

To avoid flooding the courts with complaints and the prosecutions of relatively minor infractions, the government in each jurisdiction creates special regulatory bodies to enforce compliance with the law and aid in its interpretation. Such bodies, which include human rights commissions and ministries of labour, develop legally binding rules called **regulations** and evaluate complaints.

Within these various levels of legislation there is a sense of hierarchy, as per Figure 2.2. The more general the impact of the legislation, the more it supersedes lower levels of legislation. For example, a collective bargaining agreement cannot agree to wages less than the minimum wage established in the applicable provincial employment standards act. Likewise, an employment standards act cannot violate the minimums set forth in the Charter of Rights and Freedoms.

There are two opposing interpretations of Canadian legislation. Employees often choose to view the regulations as a statutory floor and expect to receive higher than the minimum requirements (more than the minimum wage, minimum entitlement for vacation days, minimum entitlement for severance pay, and so on). In contrast, employees often prefer to view legislated guidelines as a contractual ceiling and align maximum commitment levels to the minimums established in the guidelines. HR professionals play a critical role in balancing these divergent sets of expectations, with obligations toward both the employees and employers.

**LEGISLATION PROTECTING THE GENERAL POPULATION**

Human rights legislation makes it illegal to discriminate, even unintentionally, against various groups. Reactive (complaint driven) in nature, the focus of such legislation is on the types of acts in which employers should not engage. Included in this category are:

1. the **Charter of Rights and Freedoms**, federal legislation that is the cornerstone of human rights in Canada, and

2. **human rights legislation**, which is present in every jurisdiction.
Human Resources Management in Perspective

Part 1

The Charter of Rights and Freedoms

The cornerstone of Canada’s legislation pertaining to issues of human rights is the Constitution Act, which contains the Charter of Rights and Freedoms. The Charter applies to the actions of all levels of government (federal, provincial/territorial, and municipal) and agencies under their jurisdiction as they go about their work of creating laws. The Charter takes precedence over all other laws, which means that all legislation must meet Charter standards; thus, it is quite far-reaching in scope.

There are two notable exceptions to this generalization. The Charter allows laws to infringe on Charter rights if they can be demonstrably justified as reasonable limits in a “free and democratic society.” Since “demonstrably justified” and “reasonable” are open to interpretation, many issues challenged under the Charter eventually end up before the Supreme Court of Canada, the Charter’s ultimate interpreter. The second exception occurs when a legislative body invokes the “notwithstanding” provision, which allows the legislation to be exempted from challenge under the Charter.

The Charter provides the following fundamental rights and freedoms to every Canadian, including but not limited to:

1. freedom of conscience and religion
2. freedom of thought, belief, opinion, and expression, including freedom of the press and other communication media
3. freedom of peaceful assembly
4. freedom of association

In addition, the Charter provides Canadian multicultural heritage rights, First Nations’ rights, minority language education rights, equality rights, the right to live and work anywhere in Canada, the right to due process in criminal proceedings, and the right to democracy.3

Section 15—equality rights—provides the basis for human rights legislation, because it guarantees the right to equal protection and benefit of the law without discrimination, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.4

Human Rights Legislation

Every person residing in Canada is protected by human rights legislation, which prohibits intentional and unintentional discrimination in employment situations and the delivery of goods and services. Human rights legislation is extremely broad in scope, affecting almost all aspects of HRM when applied to the employment relationship.

An important feature of human rights legislation is that it supersedes the terms of any employment contract or collective agreement.5 For these reasons, supervisors and managers must be thoroughly familiar with the human rights legislation of their jurisdiction and their legal obligations and responsibilities specified therein.

Human rights legislation prohibits discrimination against all Canadians in a number of areas, including employment. To review individual provincial and territorial human rights laws would be confusing because of the many but generally minor differences among them, often only in terminology (for example, some provinces use the term...
**FIGURE 2.3** Prohibited Grounds of Discrimination in Employment by Jurisdiction

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As indicated in Figure 2.3, most provincial/territorial laws are similar to the federal statute in terms of scope, interpretation, and application. All jurisdictions prohibit discrimination on the grounds of race, colour, religion/creed, sex, marital status, age, disability, and sexual orientation. Some, but not all, jurisdictions further prohibit discrimination on the basis of family status, nationality or ethnic origin, and various other grounds.

**Discrimination Defined**

Central to human rights laws is the concept of **discrimination**. When someone is accused of discrimination, it generally means that he or she is perceived to be acting in an unfair or prejudiced manner within the context of prohibited grounds for discrimination. For example, if an employee was discriminated against based on his or her initials or if they wore a black top to work that day, this would fall outside the scope of
human rights legislation. The law prohibits unfair discrimination—making choices on the basis of perceived but inaccurate differences to the detriment of specific individuals or groups. Standards pertaining to unfair discrimination have changed over time. Both intentional and unintentional discrimination is prohibited.

**Intentional Discrimination**

Except in specific circumstances that will be described later, intentional discrimination is prohibited. An employer cannot discriminate directly by deliberately refusing to hire, train, or promote an individual, for example, on any of the prohibited grounds. It is important to realize that deliberate discrimination is not necessarily overt. In fact, overt (blatant) discrimination is relatively rare today. But subtle, indirect discrimination can be difficult to prove. For example, if a 60-year-old applicant is not selected for a job and is told that there was a better-qualified candidate, it is often difficult for the rejected job seeker to determine if someone else truly did more closely match the firm’s specifications or if the employer discriminated on the basis of age.

An employer is also prohibited from intentional discrimination in the form of differential or unequal treatment. No individuals or groups may be treated differently in any aspect of terms and conditions of employment based on any of the prohibited grounds. For example, it is illegal for an employer to request that only female applicants for a factory job demonstrate their lifting skills or to insist that any candidates with a physical disability undergo a pre-employment medical exam, unless all applicants are being asked to do so.

It is also illegal for an employer to engage in intentional discrimination indirectly through another party. This means that an employer may not ask someone else to discriminate on his or her behalf. For example, an employer cannot request that an employment agency refer only male candidates for consideration as management trainees or instruct supervisors that racial minorities are to be excluded from consideration for promotions.

**Discrimination because of association** is another possible type of intentional discrimination listed specifically as a prohibited ground in the legislation of several Canadian jurisdictions. It involves the denial of rights because of friendship or other relationship with a protected group member. An example would be the refusal of a firm to promote a highly qualified male into senior management on the basis of the assumption that his wife, who was recently diagnosed with multiple sclerosis, will require too much of his time and attention and that her needs may restrict his willingness to travel on company business.

**Unintentional Discrimination**

Unintentional discrimination (also known as constructive or systemic discrimination) is the most difficult to detect and combat. Typically, it is embedded in policies and practices that appear neutral on the surface and that are implemented impartially, but have an adverse impact on specific groups of people for reasons that are not job related or required for the safe and efficient operation of the business. Examples are shown in Figure 2.4.

The Expert Opinion box below highlights recent dialogue regarding gender-based unintentional discrimination in the workplace and the complex role and impact of legislation, from the perspective of a Canada Research Chair in Global Women’s Issues.
**FIGURE 2.4** Examples of Systemic Discrimination

- Minimum height and weight requirements, which screen out disproportionate numbers of women and people from Asia, who tend to be shorter in stature.
- Internal hiring policies or word-of-mouth hiring in workplaces that have not embraced diversity.
- Limited accessibility to company premises, which poses a barrier to persons with mobility limitations.
- Culturally biased or non-job-related employment tests, which discriminate against specific groups.
- Job evaluation systems that are not gender-neutral; that is, they undervalue traditional female-dominated jobs.
- Promotions based exclusively on seniority or experience in firms that have a history of being white-male-dominated.
- Lack of a harassment policy or guidelines, or an organizational climate in which certain groups feel unwelcome and uncomfortable.

Source: Based on material provided by the Ontario Women’s Directorate and the Canadian Human Rights Commission.

### Permissible Discrimination via Bona Fide Occupational Requirements

Employers are permitted to discriminate if employment preferences are based on a **bona fide occupational requirement (BFOR)**, defined as a justifiable reason for discrimination based on business necessity, such as the requirement for the safe and efficient operation of the organization (for example, a person who is blind cannot be employed as a truck driver or bus driver). In some cases, a BFOR exception to human rights protection is fairly obvious. For example, when casting in the theatre, there may be specific roles that justify using age, sex, or national origin as a recruitment and selection criterion.

The *Meiorin* case (Supreme Court of Canada, 1999) established three criteria that are now used to assess if the discrimination qualifies as a BFOR:

1. **Question of rationale:** Was the policy or procedure that resulted in the discrimination based on a legitimate, work-related purpose?
2. **Question of good faith:** Did the decision makers or other agents of the organization honestly believe that the requirement was necessary to fulfill the requirements of the role?
3. **Question of reasonable necessity:** Was it impossible to accommodate those who have been discriminated against without imposing undue hardship on the employer?

The issue of BFORs gets more complicated in situations in which the occupational requirement is less obvious; the onus of proof is then placed on the employer. There are a number of instances in which BFORs have been established. For example, adherence to the tenets of the Roman Catholic Church has been deemed a BFOR when selecting faculty to teach in a Roman Catholic school. The Royal Canadian Mounted Police has a requirement that guards be of the same sex as prisoners being guarded, which was also ruled to be a BFOR. 

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**bona fide occupational requirement (BFOR)** A justifiable reason for discrimination based on business necessity (that is, required for the safe and efficient operation of the organization) or a requirement that can be clearly defended as intrinsically required by the tasks an employee is expected to perform.

**HR Competency**

90400

**EVIDENCE-BASED HR**
reasonable accommodation
The adjustment of employment policies and practices that an employer may be expected to make so that no individual is denied benefits, disadvantaged in employment, or prevented from carrying out the essential components of a job because of grounds prohibited in human rights legislation.

undue hardship The point to which employers are expected to accommodate employees under human rights legislative requirements.

An important feature of human rights legislation is the requirement for reasonable accommodation. Employers are required to adjust employment policies and practices so that no individual is prevented from doing his or her job on the basis of prohibited grounds for discrimination. Accommodation may involve scheduling adjustments to accommodate religious beliefs or workstation redesign to enable an individual with a physical disability to perform a particular task.

Employers are expected to accommodate to the point of undue hardship, meaning that the financial cost of the accommodation (even with outside sources of funding) or health and safety risks to the individual concerned or other employees would make accommodation impossible. Failure to make every reasonable effort to accommodate employees is a violation of human rights legislation in all Canadian jurisdictions. The term “reasonable” is relatively vague and open to interpretation, which can be found in the precedent that has been established in the legal system. The Supreme Court of Canada recently clarified the scope of the duty to accommodate by stating that it does...
not require an employer to completely alter the essence of the employment contract, whereby the employee has a duty to perform work in exchange for remuneration. For example, if the characteristics of an illness are such that the employee remains unable to work for the foreseeable future, even though the employer has tried to accommodate the employee, the employer will have satisfied the test of undue hardship.9

Human Rights Case Examples

In claims of discrimination, it does not matter if the protected grounds were the primary or heaviest weighted factor in the decision being challenged, or if it was one of many considerations made in the decision. If there were 20 criteria used to make a decision, and even one of those criteria violated protection against discrimination as per the applicable human rights legislation, then the entire decision made by the employer can be deemed illegal. Figure 2.5 provides clarity as to the distribution of case type encountered by human rights commissions.

Disability

Claims of discrimination based on disability make up almost half of all human rights claims. A disability in human rights legislation includes a wide range of conditions, some which are visible and some which are not. In general, a distinction can be drawn between a physical disability and a mental one. A disability may be present from birth, caused by an accident, or develop over time and may include (depending on the jurisdiction) physical, mental, and learning disabilities; mental disorders; hearing or vision disabilities; epilepsy; drug and alcohol dependencies; environmental sensitivities; as well as other conditions. Temporary illnesses are generally not considered to be disabilities under human rights legislation (unless related to a workplace safety claim), but mental disorders, even temporary ones, are included in the definition of a disability. The intent of providing protection from discrimination based on past, present, or perceived disabilities is largely based on the principle of having an inclusive society with a barrier-free design and equal participation of persons with varying levels of ability.10 Because employers set standards or requirements, they therefore “owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace [or other] standards.”11

FIGURE 2.5 Types of Cases Encountered by Provincial/Territorial Human Rights Commissions

Source: According to Raj Anand, partner with WeirFoulds LLP and former chief commissioner of the Ontario Human Rights Commission. Presentation on “Equity, Diversity and Accommodation” at Osgoode Hall Law School, April 7, 2011.
According to the Supreme Court of Canada, the focus of a disability is not simply the presence of it, but the effect of the disability. In a case heard by the Supreme Court of Canada in 2000 against the City of Boisbriand and Communauté urbaine de Montréal, the city had dismissed an employee, Palmerino Troilo, from his position as a police officer because he suffered from Crohn's disease. Medical evidence presented in the case indicated that Troilo could perform normal functions of his job, but the city argued that the illness was permanent and could be interpreted subjectively as an indication of future job-related challenges. The judge found that the illness did not actually result in any functional limitations and held that Troilo had been a victim of discriminatory exclusion. In this case, it was not the presence of a disability that was of concern to employment-related legislation, but the impact of that disability on creating job-related functional limitations.

The Supreme Court of Canada has suggested three broad inquiries to determine if discrimination has taken place:

1. Differential treatment: Was there substantively differential treatment due to a distinction, exclusion, or preference or because of a failure to take into account the complainant's already disadvantaged position within Canadian society?
2. An enumerated ground (a condition or clause that is explicitly protected by legislation): Was the differential treatment based on an enumerated ground?
3. Discrimination in a substantive sense: Does the differential treatment discriminate by imposing a burden upon or withholding a benefit from a person? Does the differential treatment amount to discrimination because it makes distinctions that are offensive to human dignity?

Accommodation Although each situation is unique, there are general principles for accommodating persons with disabilities.

First, providing equal access to employment is largely based on removal of physical, attitudinal, and systemic barriers. These accommodations should be provided in a manner that most respects the dignity of the person, including an awareness of privacy, confidentiality, autonomy, individuality, and self-esteem. Each person's needs are unique and must be considered independently when an accommodation request is made. Persons with disabilities have the fundamental right to integration and full participation; therefore, barriers should be removed to the point of undue hardship. Workplace programs and policies should be designed by inclusion to combat “social handicapping,” in which societal attitudes and actions create non-inclusive thinking against people who have no or few limitations. Providing equal access to employment is largely based on the removal of physical, attitudinal, and systemic barriers. Even when all of these factors are considered, there might still be a need for accommodation.

Second, if discrimination does exist, the company must demonstrate individualized attempts to accommodate the disability to the point of undue hardship. The Meiorin test discussed earlier is used to establish if the company reached the point of undue hardship. Employers have the legal duty to accommodate persons with disability, and the employees have a responsibility to seek accommodation, co-operate in the process, exchange relevant information, and explore accommodation solutions together. Examples of employer and employee responsibilities associated with the duty to accommodate disabilities are highlighted in Figure 2.6. Often, accommodations can be made easily and at minimal cost, such as increased flexibility in work hours or break times; providing reading material in digitized, Braille, or large print formats; installing automatic doors and making washrooms accessible; or job restructuring, retraining, or assignment to an alternative position within the company.
Third, the duty to accommodate requires the most appropriate accommodation to
be undertaken to the point of undue hardship. The principle underlying this condi-
tion is that accommodations are unique, numerous, part of a process, and a matter of
degree. Rather than an all-or-nothing approach, there may be many options available
to accommodate an employee’s disability with varying degrees of complexity, resource
demands, and effects on work processes. An accommodation can be considered appro-
priate if it results in equal opportunity to attain the same level of performance, benefits,
and privileges others experience, or if it is adopted for the purpose of achieving equal
opportunity and meets the individual’s disability-related needs. In cases where alterna-
tive options preserve the same level of dignity and respect, employers are entitled to
select the less expensive or less disruptive option.

Accommodation of employees with “invisible” disabilities, such as chronic fatigue
syndrome, fibromyalgia, and mental illnesses, is becoming more common. An employee
with bipolar disorder was terminated when he began to exhibit pre-manic symptoms
after waiting for a response from management regarding his request for accommoda-
tion. A human rights tribunal in 2008 found that the company had not investigated the
nature of his condition or possible accommodations and awarded the employee over
$80 000 in damages. 14

**Harassment**

The most historic battle for protection against harassment was initiated in 1982, at
a time when it was largely interpreted that sexual harassment was not a form of sex
discrimination (therefore, not illegal) and it was perceived that employers were not
responsible for the actions of their employees. As indicated in the Workforce Diversity

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**FIGURE 2.6 Duty to Accommodate Disabilities: Shared Responsibilities**

<table>
<thead>
<tr>
<th>As a person with a disability</th>
<th>As an employer or union</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Tell your employer or union what your disability-related needs are as they relate to your job duties.</td>
<td>• Accept requests for accommodation from employees in good faith.</td>
</tr>
<tr>
<td>• Provide supporting information about your disability-related needs, including medical or other expert opinions where necessary.</td>
<td>• Request only information that is required to provide the accommodation. For example, you need to know that an employee’s loss of vision prevents them from using printed material, but you do not need to know they have diabetes.</td>
</tr>
<tr>
<td>• Participate in exploring possible accommodation solutions.</td>
<td>• Take an active role in examining accommodation solutions that meet individual needs.</td>
</tr>
<tr>
<td></td>
<td>• Deal with accommodation requests as quickly as possible, even if it means creating a temporary solution while a long-term one is developed.</td>
</tr>
<tr>
<td></td>
<td>• Maximize confidentiality for the person seeking accommodation and be respectful of his or her dignity.</td>
</tr>
<tr>
<td></td>
<td>• Cover the costs of accommodations, including any necessary medical or other expert opinion or documentation.</td>
</tr>
</tbody>
</table>

Human Resources Management in Perspective

Part 1

Box on next page, perspectives on sexual harassment and employers' responsibilities toward protecting employees from sexual harassment have shifted significantly over the last three decades, largely due to a Supreme Court ruling on a case initiated by two young waitresses.

Some jurisdictions prohibit harassment on all prescribed grounds, while others only expressly ban sexual harassment. Harassment includes unwelcome behaviour that demeans, humiliates, or embarrasses a person and that a reasonable person should have known would be unwelcome. Examples of harassment are included in Figure 2.7. Minority women often experience harassment based on both sex and race.

One type of intentional harassment that is receiving increasing attention is bullying, which involves repeated and deliberate incidents of negative behaviour that cumulatively undermine a person's self-image. This psychological form of harassment is much more prevalent and pervasive in workplaces than physical violence. In 2004, a Quebec law prohibiting workplace psychological harassment came into effect with the intent of ending bullying in the workplace. In the first year, more than 2500 complaints were received, surpassing expectations to such a degree that the number of investigators was increased from 10 to 34. Saskatchewan also prohibits psychological harassment, in its occupational health and safety legislation.

Employer Responsibility The Supreme Court has made it clear that protecting employees from harassment is part of an employer's responsibility to provide a safe and healthy working environment. If harassment is occurring and employers are aware or ought to have been aware, they can be charged as well as the alleged harasser.

FIGURE 2.7 Examples of Harassment

Some examples of harassment include:

- unwelcome remarks, slurs, jokes, taunts, or suggestions about a person's body, clothing, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, physical or mental disability, sexual orientation, pardoned conviction, or other personal characteristics;
- unwelcome sexual remarks, invitations, or requests (including persistent, unwanted contact after the end of a relationship);
- display of sexually explicit, sexist, racist, or other offensive or derogatory material;
- written or verbal abuse or threats;
- practical jokes that embarrass or insult someone;
- leering (suggestive staring) or other offensive gestures;
- unwelcome physical contact, such as patting, touching, pinching, hitting;
- patronizing or condescending behaviour;
- humiliating an employee in front of co-workers;
- abuse of authority that undermines someone's performance or threatens his or her career;
- vandalism of personal property; and
- physical or sexual assault.

WORKFORCE DIVERSITY

The Evolution of Thought on Sexual Harassment in Canada

In August 1982, two young women named Dianna Janzen and Tracy Govereau secured waitressing jobs at Pharos Restaurant in Winnipeg, Manitoba. The women hardly knew each other and rarely worked together. The cook, Tommy Grammas, started groping the women and making sexual advances during each woman’s shift at work. As the women resisted the sexual advances, Tommy told them to “shut up or be fired.”

Janzen tried to make it clear to Grammas that his actions were inappropriate, which did not stop the unwanted behaviour. When Janzen approached the owner, Philip Anastasiadis, he commented that she “needed to get laid.” Feeling unsupported and embarrassed, Janzen continued working for two months before eventually quitting the job to remove herself from the continually hostile environment. Govereau was soon fired from her job, because of her “attitude.”

Both women filed complaints under the Manitoba Human Rights Code. They claimed that only females ran the risk of being harassed at Pharos, since none of the male waiters, cashiers, or busboys had ever been harassed; thus, sexual harassment was a form of discrimination based on sex.

After a series of appeals, in 1989 the case was reviewed by the Supreme Court of Canada. In this historic case, the Supreme Court agreed that the women were sexually harassed at work, that sexual harassment is a form of sex discrimination (and is therefore illegal), and that employers are responsible for their employees’ actions.

Up until the ruling, the terms of sexual harassment were not defined and the application of the law was unclear. The real impact of the precedent that this ruling set was that it gave employers and employees an unrestricted definition of sexual harassment that has since been instrumental in capturing a broader level of unwelcomed behaviours at work.


Sexual Harassment: Your Rights and Responsibilities

**sexual harassment** Offensive or humiliating behaviour that is related to a person’s sex, as well as behaviour of a sexual nature that creates an intimidating, unwelcome, hostile, or offensive work environment or that could reasonably be thought to put sexual conditions on a person’s job or employment opportunities.

**sexual coercion** Harassment of a sexual nature that results in some direct consequence to the worker’s employment status or some gain in or loss of tangible job benefits.

**sexual annoyance** Sexually related conduct that is hostile, intimidating, or offensive to the employee but has no direct link to tangible job benefits or loss thereof.

Employer responsibility also includes employee harassment by clients or customers once it has been reported. In an Ontario case, Bell Mobility was ordered to pay an employee more than $500 000 after a supervisor assaulted her in the office and she developed post-traumatic stress disorder. The company was found vicariously liable for the supervisor’s aggressive behaviours and was found to have breached its duty of care to provide a safe and harassment-free working environment.21

**Sexual Harassment** The type of harassment that has attracted the most attention in the workplace is sexual harassment. Sexual harassment is offensive or humiliating behaviour that is related to a person’s sex, as well as behaviour of a sexual nature that creates an intimidating, unwelcome, hostile, or offensive work environment or that could reasonably be thought to put sexual conditions on a person’s job or employment opportunities.

Sexual harassment can be divided into two categories: sexual coercion and sexual annoyance.22 **Sexual coercion** involves harassment of a sexual nature that results in some direct consequence to the worker’s employment status or some gain in or loss of tangible job benefits. Typically, this involves a supervisor using control over employment, pay, performance appraisal results, or promotion to attempt to coerce an employee to grant sexual favours. If the worker agrees to the request, tangible job benefits follow; if the worker refuses, job benefits are denied or taken away.

**Sexual annoyance** is sexually related conduct that is hostile, intimidating, or offensive to the employee but has no direct link to tangible job benefits or loss thereof. Rather, a “poisoned work environment” is created for the employee, the tolerance of which effectively becomes a term or condition of employment. An Alberta court upheld the dismissal of a male employee who had used profane language, sexually
infused talk and jokes, and displayed pornographic and graphically violent images. The employee claimed that he was a misunderstood jokester who had never worked with a female engineer before and blamed the company for not training him on appropriate conduct. However, the court found that the company had embarked on a campaign to recruit women into trade positions many years earlier and that all employees had been provided with diversity training. In addition, the company had also implemented and widely publicized an antiharassment policy.

Harassment Policies

To reduce liability, employers should establish sound harassment policies, communicate such policies to all employees, enforce the policies in a fair and consistent manner, and take an active role in maintaining a working environment that is free of harassment. Effective harassment policies should include:

1. an antiharassment policy statement, stating the organization’s commitment to a safe and respectful work environment and specifying that harassment is against the law;
2. information for victims (for example, identifying and defining harassment);
3. employees’ rights and responsibilities (for example, respecting others, speaking up, reporting harassment);
4. employers’ and managers’ responsibilities (for example, putting a stop to harassment, being aware, listening to employees);
5. antiharassment policy procedures (what to do if you are being harassed, what to do if you are accused of harassment, what to do if you are a third-party employee, investigation guidelines, remedies for the victim and corrective action for harassers, guidelines for handling unsubstantiated complaints and complaints made in bad faith, confidentiality);
6. penalties for retaliation against a complainant;
7. guidelines for appeals;
8. other options such as union grievance procedures and human rights complaints; and
9. how the policy will be monitored and adjusted.

Race and Colour

Discrimination on the basis of race and colour is illegal in every Canadian jurisdiction. For example, the B C Human Rights Tribunal found that two construction companies had discriminated against 38 Latin American workers brought in to work on a public transit project; the Latin Americans were treated differently than workers brought in from European countries in that they were paid lower wages and provided with inferior accommodation. As a result, the Tribunal awarded each worker $100 000.

Religion

Discrimination on the basis of religion can take many forms in Canada’s multicultural society. For example, it is a violation of human rights laws across Canada to deny time to pray or to prohibit clothing recognized as religiously required (for example, a hijab for Muslim women or a turban for Sikh men). According to a recent survey in Toronto, discriminatory hiring practices and workplace racism toward Muslim women are quite common. Of the 32 women surveyed, 29 said that their employer had commented on their hijab, and 13 said they were told that they would have to stop wearing their hijab if they wanted the job.

A well-recognized case on religion involved Canadian National Railway (CN). An employee, Mr. Bhinder, worked as a maintenance electrician in the Toronto coach yard. As a practising Sikh, he wore a turban both on and off work premises. Four years
after Bhinder first started working for CN, the company introduced a rule requiring all employees working in the coach yard to wear a hard hat, citing safety reasons. Bhinder informed management that he was unable to wear the hard hat since his faith prohibited him from wearing anything other than the turban and there was no way he could wear anything under or over it. He was fired and subsequently launched a discrimination case against CN. In 1995, the Supreme Court of Canada found that the rule discriminated against Bhinder on religious grounds, but that the requirement was bona fide. Therefore, it was not considered to be a discriminatory process and CN did not have a duty to accommodate Bhinder.

An Ethical Dilemma

Your company president tells you not to hire any gay or lesbian employees to work as part of his office staff because it would make him uncomfortable. What would you do?

Sexual Orientation

Discrimination on the basis of sexual orientation is prohibited in all jurisdictions in Canada. As a result of lawsuits by same-sex couples, the Supreme Court ruled that all laws must define “common-law partners” to include both same-sex and opposite-sex couples. In a recent federal case, a lesbian employee alleged that she was harassed by a co-worker. She made a complaint to her supervisors but felt the complaint was not investigated properly. She alleged that she was given a poor performance review because of her complaint and that her request for a transfer to another work site was denied. The Canadian Human Rights Commission ordered her employer to provide a letter of apology, financial compensation for pain and suffering, and a transfer to another work site. The Commission also ordered a meeting with the employer’s harassment coordinator to talk about the complainant’s experiences with the internal complaint process.

Age

Many employers believe that it is justifiable to specify minimum or maximum ages for certain jobs. In actual fact, evidence is rarely available to support the position that age is an accurate indicator of a person’s ability to perform a particular type of work. For example, because of an economic downturn, an Ontario company was forced to lay off staff. The complainant, a foreman, had worked for the company for more than 32 years and was 57 at the time he was selected for termination along with another foreman who was aged 56. Both were offered a generous retirement package. The two foremen who remained were younger than the two released. The vice-president had prepared a note indicating that the two older workers who were terminated were told of the need to reduce people and that they “hoped to keep people with career potential.” The Ontario Human Rights Tribunal found that the company engaged in age discrimination on the basis of the good employment record of the complainant, the ages of those selected for layoff compared with those retained, and the vice-president’s statement, which was found to be a “euphemism; its meaning concerns age.”

Enforcement

Enforcement of human rights acts is the responsibility of the human rights commission in each jurisdiction. It should be noted that all costs are borne by the commission, not by the complainant, which makes the process accessible to all employees, regardless of financial means. The commission itself can initiate a complaint if it has reasonable grounds to assume that a party is engaging in a discriminatory practice. Challenges of human rights legislation are heard by the human rights tribunal. The tribunal’s primary role is to provide a speedy and accessible process to help parties
affected by discrimination claims resolve the conflict through mediation. Once a claim is filed with the human rights commission or tribunal, the organization is notified and given a relatively short period of time (for example, 30 calendar days) to prepare its case. Regardless of whether a formal complaint or an informal accusation has been filed against a company, the employer has a duty to investigate claims of discrimination. Fulfilling the duty to investigate starts with the selection of an appropriate investigator. A checklist to be reviewed when selecting an investigator is provided in Figure 2.8.

An employer’s obligations include the following:

1. demonstrating an awareness of the issues of discrimination or harassment, including having an antidiscrimination/antiharassment policy in place, a complaint mechanism, and training available for employees
2. fulfilling post-complaint actions, including assessing the seriousness of the complaint, launching an investigation promptly, focusing on employee welfare, and taking actions based on the complaint
3. resolving the complaint by demonstrating reasonable resolution and communication

If discrimination is found, two forms of remedies can be imposed. **Systemic remedies** (forward looking) require the respondent to take positive steps to ensure compliance with legislation, both in respect to the current complaint and any future practices. If a pattern of discrimination is detected, the employer will be ordered to cease such practices and may be required to attend a training session or hold regular human rights workshops. **Restitutional remedies** include monetary compensation for the complainant to put him or her back to the position he or she would be in if the discrimination had not occurred (this includes compensation for injury to dignity and self-respect). A written letter of apology may also be required.

**FIGURE 2.8** A Checklist for Employers when Selecting a Workplace Investigator

- **Internal or external investigators:** Many employers select trained internal HR experts to conduct workplace investigations, while others rely on external investigators. Selection is dependent on the resources (time and money) of the firm, the complexities of the case (potential conflicts of interest), the expertise of the in-house staff, and the severity of the case.
- **One investigator or two:** The nature of the case may warrant the need for more than one investigator (e.g., one male and one female in the case of a sexual harassment claim).
- **Respecting the mandate:** Investigators should be able to maintain the role within the mandate of the task they have been assigned (e.g., fact finder or adviser) and not stray too far off track. Assigned investigators are perceived as agents of the organization; therefore, the organization can be held partially accountable for investigator actions.
- **Impartiality or neutrality:** Investigators should have no conflict of interest vested in the conditions, persons, or context of the case they are handling.
- **Reliable, thorough, and professional:** Although these qualities should go without saying, an investigator is expected to be a competent, effective, and professional communicator throughout the investigation, and must be capable of making credible assessments.
- **Quality of the written report:** The details and word selection in the written report can become evidence in a case. Therefore, a high-quality report details “what happened” and assists counsel in their defence.
- **Respects confidentiality:** The investigator should only discuss the investigation when required and respect the confidentiality of all parties affected by the investigation.

The most common reason for restitutional remedies is compensation for lost wages; others include compensation for general damages, complainant expenses, and pain and humiliation. The violator is generally asked to restore the rights, opportunities, and privileges denied the victim, such as employment or promotion. The total compensation received by the complainant is generally between $0 and $20,000, with a general range of $10,000 to $20,000 for cases where evidence confirmed discrimination occurred and a restitution was ordered.

Figure 2.9 highlights examples of common remedies issued by human rights tribunals.

## Systemic Remedies (forward looking)
- cease and desist the discriminatory practice
- change a program to eliminate discriminatory elements, such as offering same-sex benefits under an employee benefit plan
- make physical modifications to work places as mandated
- develop non-discriminatory action plans
- develop employment equity plans
- post notices regarding provisions and protection offered to employees under the human rights code
- develop information-sharing practices for future programs to allow monitoring of progress toward antidiscrimination goals

## Restitution Remedies (penalties for past events)
- payment of retroactive benefits
- reinstatement of employment
- payment for lost wages
- compensation for insult to dignity, mental anguish, or infringement of rights under the human rights code
- a public apology


The most common reason for restitutional remedies is compensation for lost wages; others include compensation for general damages, complainant expenses, and pain and humiliation. The violator is generally asked to restore the rights, opportunities, and privileges denied the victim, such as employment or promotion. The total compensation received by the complainant is generally between $0 and $20,000, with a general range of $10,000 to $20,000 for cases where evidence confirmed discrimination occurred and a restitution was ordered. Figure 2.9 highlights examples of common remedies issued by human rights tribunals.

### Legislation Specific to the Workplace

The Charter of Rights and Freedoms legalizes employment equity initiatives, which go beyond human rights laws in that they are proactive programs developed by employers to remedy past discrimination or prevent future discrimination. Human rights laws focus on prohibiting various kinds of discrimination; however, over time it became obvious that there were certain groups for whom this complaint-based, reactive approach was insufficient. Investigation revealed that four identifiable groups—women, Aboriginal people, persons with disabilities, and visible minorities—had been subjected to pervasive patterns of differential treatment by employers, as evidenced by lower pay on average, occupational segregation, higher rates of unemployment, underemployment, and concentration in low-status jobs with little potential for career growth. An example of occupational segregation is that the majority of women worked in a very small number of jobs, such as nursing, teaching, sales, and secretarial/clerical work. Advancement of women and other designated group members into senior management positions has been hindered by the existence of a glass ceiling, an “invisible” barrier caused by attitudinal or organizational bias.
that limits the advancement opportunities of qualified individuals. As you can see in Figure 2.10, a survey from 2012 confirmed that the glass ceiling is still intact.

Employment equity legislation is intended to remove employment barriers and promote equality for the members of the four designated groups. Employers under federal jurisdiction must prepare an annual plan with specific goals to achieve better representation of the designated group members at all levels of the organization and timetables for goal implementation. Employers must also submit an annual report on the company’s progress in meeting its goals, indicating the representation of designated group members by occupational groups and salary ranges, and providing information on those hired, promoted, and terminated. In addition, the Federal Contractors Program requires firms bidding on federal contracts of $200 000 or more to implement an employment equity plan.

In contrast, mandatory employment equity programs are virtually non-existent in provincial and territorial jurisdictions. Some provinces have employment equity policies that encourage employers to implement employment equity plans in provincial departments and ministries. Quebec has a contract compliance program under which employers in receipt of more than $100 000 in provincial funding must implement an employment equity plan.

An employment equity program is designed to achieve a balanced representation of designated group members in the organization. It is a major management exercise because existing employees must become comfortable working with others from diverse backgrounds, cultures, religions, and so on, and this represents a major change in the work environment. A deliberately structured process is involved, which can be tailored to suit the unique needs of the firm. The employment equity process usually takes six months. The first step is the demonstration of senior management commitment and support, which leads to data collection and analysis of the current workforce demographics. Following that, there is an employment systems review, which leads to plan development and eventual plan implementation. The last step is monitoring, evaluating, and revising the plan.

Although embracing employee equity or diversity offers opportunities to enhance organizational effectiveness, transforming an organizational culture presents a set of challenges that must be handled properly. Diversity initiatives should be undertaken slowly, since they involve a complex change process. Resistance to change may have to be overcome, along with stereotyped beliefs or prejudices and employee resentment.

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**FIGURE 2.10** The Catalyst Pyramid—Canadian Women in Business

![Catalyst Pyramid](image-url)


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employment equity program
A detailed plan designed to identify and correct existing discrimination, redress past discrimination, and achieve a balanced representation of designated group members in the organization.
Women accounted for 47 percent of the employed workforce in 2012. Two-thirds of all employed women were working in teaching, nursing and related health occupations, clerical or other administrative positions, or sales and service occupations. There has been virtually no change in the proportion of women employed in these traditionally female-dominated occupations over the past decade. Women continue to be under-represented in engineering, natural sciences, and mathematics, a trend unlikely to change in the near future because women are still under-represented in university programs in these fields.

Every jurisdiction in Canada has legislation incorporating the principle of equal pay for equal work. In most jurisdictions, this entitlement is found in the employment (labour) standards legislation; otherwise, it is in the human rights legislation. Equal pay for equal work specifies that an employer cannot pay male and female employees differently if they are performing the same or substantially similar work. Pay differences based on a valid merit or seniority system or employee productivity are permitted; it is only sex-based discrimination that is prohibited. This principle makes it illegal, for example, for the Canadian government to employ nurses (mostly women) as “program administrators” and doctors (mainly men) as “health professionals” to do the same job adjudicating Canada Pension Plan disability claims and pay the men twice as much.

Aboriginals

Most Aboriginal employees in the workforce are concentrated in low-skill, low-paid jobs such as trades helpers. The unemployment rate for Aboriginal people is significantly higher than the rate among non-Aboriginals, and their income is significantly lower.

People with Disabilities

About 45 percent of people with disabilities are in the labour force, compared with almost 80 percent of the non-disabled population. Although 63 percent of people with a mild disability are in the workforce, only 28 percent of those with a severe to very severe disability are working. The median employment income of workers with disabilities is 83 percent of that of other Canadian workers.

Visible Minorities

According to the federal Employment Equity Act, a visible minority is defined as “persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour.” Often the terms “visible minority” and “immigrant” are used interchangeably, but these two terms are actually distinct. An immigrant represents a person who was not born in Canada, but resides in Canada for the purpose of settlement. In the 2011 Canadian census, there were almost 6.2 million immigrants in the Canadian population. There were almost 6.8 million persons who self-identified as visible minorities, with the largest representation among South Asians and Chinese, followed by persons who self-identified as black, Filipino, and Latin American. In 1981, 55.5 percent of new immigrants to Canada were visible minorities, but by 2001 that proportion reached 72.9 percent. This suggests that almost three out of every ten
immigrants in the last decade were not visible minorities, while there are millions of people born in Canada who are visible minorities, but not immigrants.

Traditionally, visible minorities were typically unable to obtain employment that took full advantage of their knowledge, skills, and abilities (KSAs), and thus faced underemployment. As a result, visible minorities were included as a designated group. A recent study on diversity in the Greater Toronto Area (GTA) highlighted the continuing disadvantaged status of visible minorities. The study looked at 3257 leaders in the GTA in all sectors and found that just 13 percent were visible minorities (even though visible minorities make up half of the GTA population).40

**EMPLOYMENT/LABOUR STANDARDS LEGISLATION**

All employers and employees in Canada, including unionized employees, are covered by employment (labour) standards legislation. The intent of an employment standards act (ESA) is to establish minimum terms and conditions for workplaces pertaining to such issues as wages; paid holidays and vacations; maternity, parental, or adoption leave (or some mix thereof); bereavement leave; compassionate care leave; termination notice; and overtime pay. They also set the maximum number of hours of work permitted per day or week; overtime pay is required for any work in excess of the maximum.

While employer and employee agreements or practices can exceed minimums established in an ESA, neither party can choose to opt out of or waive the rights established in the applicable ESA. For example, if the ESA minimum requirement establishes a minimum vacation rate of 4 percent of pay, an employment agreement cannot have a provision for only 3 percent of pay as vacation pay, even if both parties consent.
In contrast, the minimums established in an ESA can be exceeded in employment contracts, through collective bargaining agreements (in unionized positions), or based on common law (precedent established by the judicial system). The HR in the News box above highlights metrics associated with minimum wage pay in Canada. An employer or employee can agree to 5 percent of pay as vacation pay without violating the ESA, for example.

If there is a conflict between the applicable ESA and another contract, the principle of greater benefit is applied. For example, an employment policy or contract is communicated to employees stating that in the case of a layoff, employees will be provided with one month notice for every year that they worked if they are laid off. The applicable ESA minimum requires the provision of only one week notice per year that an employee worked, up to an eight-week maximum. In this example, an employee who worked for 10 years would be given the greater benefit (10 months of notice before a layoff), not the minimum under the ESA, to preserve the greater benefit to the employee.

While ESAs provide minimum terms and conditions of employment, they are not totally inclusive. Often, students on work exchange programs, inmates on work projects, police officers, independent officers, and others are explicitly excluded from protection under an ESA. In addition, regulations for specific occupations such as doctors, lawyers, managers, architects, and specific types of salespersons modify the applicability of certain sections of ESAs.

**Enforcement of ESAs**

Governed by federal, provincial, or territorial employment standards acts (ESAs), enforcement is complaint based, and violators can be fined. This occurs through the filing of a formal written or electronic complaint against the violator to the appropriate authorities (often the provincial or territorial ministry of labour). A person, union, or corporation can file a complaint with the ministry for violations, given that ESAs have an interest in mitigating the employment relationships between employee and employers.
Employees are required to give up their rights to sue an employer in civil court once a claim is filed with the ministry of labour. This protects employers from dual proceedings on the same issue, and protects courts from being overwhelmed with duplicate cases. There are also strict limitation periods, establishing the maximum amount of time that can elapse between the violation and the filing of a complaint, with these limits differing based on the violation (unpaid wages, vacation pay, and so on). There is also a general maximum claim limit (for example, $10,000 under the Ontario ESA) for unpaid wages. Under ESAs, employees have been awarded compensation for actual unpaid wages and direct earnings losses, time required to find a new job and expenses to seek a new job, benefit plan entitlements, severance pay, and loss of “reasonable expectation” of continued employment.

Enforcement of employment standards legislation and human rights legislation (both of which are jurisdictional) can be especially challenging in Canada, as a number of organizations operate in multiple jurisdictions. Therefore, these organizations are subject to multiple and sometimes varying human rights legislation rules (as highlighted in the HR by the Numbers box).

**RESPECTING EMPLOYEE PRIVACY**

Today’s employers are grappling with the problem of how to balance employee privacy rights with their need to monitor the use of technology-related tools in the workplace. Employers must maintain the ability to effectively manage their employees and prevent liability to the company, which can be held legally liable for the actions of its employees. They want to eliminate time wasted (on surfing the web, playing computer games, and so on) and abuse of company resources (such as use of the Internet and email at work for personal and possibly illegal uses, such as gambling or visiting pornographic sites). For example, one employee used workplace computers to access hundreds of pornographic websites, to surf Internet dating sites for hours at a time, and to maintain personal files with sexually explicit images. The employee was dismissed and an arbitrator upheld the dismissal, stating that the employee had engaged in serious culpable misconduct.

Another concern is employee blogging, as a posting intended to be seen by a few friends that includes confidential company information or comments about management can easily make its way to a national media outlet without the author even knowing it.

Employees are concerned with privacy—their control over information about themselves and their freedom from unjustifiable interference in their personal life. The **Personal Information Protection and Electronic Documents Act (PIPEDA)** governs the collection, use, and disclosure of personal information across Canada, including employers’ collection and dissemination of personal information about employees. Any information beyond name, title, business address, and telephone number is regarded as personal and private, including health-related information provided to insurers. Employers must obtain consent from employees whenever personal information is collected, used, or disclosed.

Some employers have resorted to electronic monitoring, which is becoming easier and less expensive as new software is developed, that can track websites visited by...
workers and the time spent on each. In general, courts in Canada have permitted electronic surveillance as long as there is proper balancing of opposing interests. Employers are given substantial leeway in monitoring their employees’ use of the internet and email, and they are in an even stronger position if there is a written policy in place. The policy should be updated regularly to reflect changes in technology and should address the use of all company technological equipment away from the employer’s premises, including laptops, smartphones, tablets, and so on.

**Video Surveillance**

Some employers install video surveillance equipment to prevent employee theft and vandalism and to monitor productivity. Employees must be made aware of the surveillance. Unions often file grievances against video surveillance, and arbitrators have been reluctant to support such surveillance because of privacy concerns. Courts typically assess whether the surveillance was reasonable and whether there were reasonable alternatives available. Generally, they have decided that video surveillance is not reasonable and that other means could be used.

An Ethical Dilemma

Is it ethical to use video surveillance of employees? Do you think employees need to be told of surveillance tools if they are used?

**CHAPTER SUMMARY**

1. The legal framework in Canada attempts to balance employee and employer rights using multiple overlapping legislative pieces, including legislation aimed at protecting the general public (the Charter of Rights and Freedoms, human rights legislation) as well as more specific legislation (employment equity legislation, employment standards acts, and privacy legislation).

2. The responsibility for employment-related law resides with the provinces and territories; however, employees of the federal civil service, Crown corporations and agencies, and businesses engaged in transportation, banking, and communications are federally regulated. So there are 14 jurisdictions for employment law in Canada—ten provinces, three territories, and the federal jurisdiction. Ninety percent of Canadians are covered by provincial/territorial employment legislation, and 10 percent are covered by federal employment legislation.

3. Harassment includes a wide range of behaviours that a reasonable person ought to know are unwelcome. Employers and managers have a responsibility to provide a safe and healthy working environment. If harassment is occurring and they are aware or ought to have been aware, they can be charged along with the alleged harasser. To reduce liability, employers should establish harassment policies, communicate these to employees, enforce the policies, and play an active role in maintaining a work environment free of harassment.

4. All jurisdictions prohibit discrimination on the grounds of race, colour, sexual orientation, religion/creed, physical and mental disability, sex, age, and marital status. Employers are required to make reasonable accommodation for employees by adjusting employment policies and practices, so that no one is disadvantaged in employment on any of the prohibited grounds, to the point of undue hardship. Employers are allowed to put in conditions related to employment that may discriminate, provided that these conditions are bona fide occupational requirements.

5. Employment standards legislation establishes minimum terms and conditions for workplaces in each jurisdiction, and violations of these terms are identified in a complaint-based process, whereby the ministry of labour will investigate violations once an employee files a complaint.

6. Privacy legislation focuses on how to balance employee privacy rights with an employer’s need to monitor the use of technology-related tools in the workplace. The Personal Information Protection and Electronic Documents Act (PIPEDA) governs the collection, use, and disclosure of personal information across Canada.
MyManagementLab

Study, practise, and explore real business situations with these helpful resources:

- **Interactive Lesson Presentations**: Work through interactive presentations and assessments to test your knowledge of management concepts.
- **PIA (Personal Inventory Assessments)**: Enhance your ability to connect with key concepts through these engaging self-reflection assessments.
- **Study Plan**: Check your understanding of chapter concepts with self-study quizzes.
- **Videos**: Learn more about the management practices and strategies of real companies.
- **Simulations**: Practise decision-making in simulated management environments.

**KEY TERMS**

- bona fide occupational requirement (BFOR) (p. 33)
- Charter of Rights and Freedoms (p. 30)
- differential or unequal treatment (p. 32)
- discrimination (p. 31)
- discrimination because of association (p. 32)
- employment equity program (p. 44)
- employment (labour) standards legislation (p. 46)
- equality rights (p. 30)
- equal pay for equal work (p. 45)
- glass ceiling (p. 43)
- harassment (p. 38)
- human rights legislation (p. 30)
- KSAs (p. 46)
- occupational segregation (p. 43)

Personal Information Protection and Electronic Documents Act (PIPEDA) (p. 48)
- reasonable accommodation (p. 48)
- regulations (p. 29)
- restitutionsal remedies (p. 42)
- sexual annoyance (p. 39)
- sexual coercion (p. 39)
- sexual harassment (p. 39)
- systemic remedies (p. 42)
- tort law (p. 29)
- underemployment (p. 46)
- undue hardship (p. 34)
- unintentional/constructive/systemic discrimination (p. 32)

**REVIEW AND DISCUSSION QUESTIONS**

1. Describe the impact of the Charter of Rights and Freedoms on HRM.
2. Differentiate among the following types of discrimination and provide one example of each: direct, differential treatment, indirect, because of association, and systemic.
3. Provide five examples of prohibited grounds for discrimination in employment in Canadian jurisdictions.
4. Explain the purpose of employment standards legislation, and the concept of “the greater good” when assessing these minimums.
5. Define “sexual harassment” and describe five types of behaviour that could constitute such harassment.
6. Define the concepts of occupational segregation, underemployment, and the glass ceiling.
7. What is the test to define if a bona fide occupational requirement exists? What are the three elements of this test?
8. What is the role of privacy legislation in Canada? Describe the act that protects employees’ privacy.

**CRITICAL THINKING QUESTIONS**

1. Go to your provincial or territorial employment (labour) standards website and determine the following:
   - minimum legal age to work in this jurisdiction
   - minimum hourly wages
   • maximum number of hours that can be worked in a week before overtime must be paid

How does this information apply to you and your friends and family? Did you notice anything else that caught your interest that you were previously unaware of?
2. Prepare a report outlining legally acceptable questions that may be asked at a selection interview with a young female engineer applying for the job of engineering project manager at an oil field in rural northern Alberta with an otherwise all-male group. (Refer to Appendix 7.1 on page 179 for help.)

3. Working with a small group of classmates, search the web for a company in your community that has an antidiscriminatory employment program. Contact the company’s HR manager and request more information on the program. Prepare a brief report summarizing its key features.

**EXPERIENTIAL EXERCISES**

1. While organizations can hold employees responsible for behaviour in the workplace, the perception that employees are not accountable for their social media presence outside of the workplace is changing. For example, a crane operator at Tenaris Algoma Tubes Inc. posted about a co-worker (a “stocker”), making suggestions of a physically aggressive act and a violent and humiliating sex act that the crane operator claimed could be inflicted on the stocker. When the stocker heard about the comments, she contacted the company, who investigated the matter and subsequently dismissed the crane operator. The union grieved the dismissal, but an Ontario arbitrator upheld the dismissal, highlighting that the act was in violation of workplace policies and a form of workplace harassment. Research this case and highlight what other companies can learn from this. What policies should organizations consider given this experience? What challenges would an organization have to overcome in order to make the policies you recommend realistic, fair, and legally defensible?

2. An employee who has been off for two months with a stress-related ailment has just contacted you indicating that she would like to return to work next week but won’t be able to work full time for another month or so. How would you handle this?

3. A supervisor has just approached you to indicate a concern she has with an employee. The supervisor indicates that the employee is often surfing the Internet while at work and fears that not only is this affecting productivity negatively, but it is also a violation of the company’s rules for Internet surfing using a company computer. The supervisor would like you to ask the IT team to investigate how many hours a day are logged to non-work-related activities for that employee and also asks for a list of websites that the employee visits. What is the role of privacy legislation from both the employer and the employee perspectives? What additional information would you need to make a decision about next steps? What recommendations can you make to the supervisor to deal with the situation in the short term?

**RUNNING CASE**

**Running Case: LearnInMotion.com**

**Legal Issues**

One of the problems that Jennifer and Pierre are facing at LearnInMotion.com concerns the inadequacies of the firm’s current human resources management practices and procedures. The previous year had been a swirl of activity—creating and testing the business model, launching the site, writing and rewriting the business plan, and finally getting venture funding. And it would be accurate to say that in all that time, they put absolutely no time into employee manuals, HR policies, or other HR-related matters. Even the 25-page business plan has no information in
Human Resources Management in Perspective

Part 1

Case Incident

A New HR Professional’s First Workplace Dilemma

Laura, a recent graduate from a human resources diploma program from a local community college, has just landed her first role as a human resources coordinator at a small bottling company. Upper management has made it clear that they want Laura to make the updating of the current human resources manual her first priority. During her second week on the job, Laura was strolling down the hallway toward the break room to get herself a cup of coffee when she passed the director of marketing’s office. As she passed she noticed an inappropriate picture of a woman visible on his computer. Shocked at what she had just seen, Laura continued down the hall, not sure what to do next. Upon returning to her office, Laura decided the best way to start revising the manual was to introduce a policy on appropriate computer use. She felt this would address the problem as she didn’t want to start her new job on a negative note by reporting the director of marketing to the CEO without a clear policy in place.

Questions

1. Do you agree with how Laura handled this situation? If so, why? If not, what would you have done differently?

2. Is it important for this company to have such a policy in place? If so, how can the Employment Standards Act in your province/territory help in drafting a policy on appropriate computer use?