

***Hiring to Firing Podcast — From Suits to Statutes: A US Employer's Guide to Canadian Employment Law***

**Hosts: Tracey Diamond And Emily Schifter**

**Recorded: August 6, 2025**

**Aired: November 2, 2025**

**Emily Schifter:** Tracey, on this episode of our podcast, we are delving into some of the similarities and differences between US law and Canadian law. I had to ask, what is your favorite Canadian sport?

**Tracey Diamond:** Hi, Emily. I have to say, if I were to pick a Canadian sport, immediately what comes to mind is curling. I have never had the opport– well, that's not true. I did have the opportunity to try out curling when we had our partners retreat in Montreal two years ago, but unfortunately did not take them up on that opportunity. But it has always been my dream to wield a broomstick and see what it's like to brush some ice.

**Emily Schifter:** It's always been one of my favorite Winter Olympic sports to watch, too. I'm right there with you.

**Tracey Diamond:** Stay tuned for this episode as Emily and I speak with our colleague in Canada about the differences between US and Canadian employment laws.

[INTRO]

**Tracey Diamond:** Welcome to *Hiring to Firing*, the podcast. I'm Tracey Diamond, a labor and employment partner at Troutman Pepper Locke. And I'm here with my partner and co-host, Emily Schifter. Together, we tackle all employment issues from hiring to firing.

**Emily Schifter:** Today, we're joined by Chris Andree, an employment partner at Gowling WLG in Canada. Welcome, Chris, and thanks so much for joining us. Can you start by telling us a little bit about your background and the types of employment matters that you handle in your practice?

**Chris Andree:** Thank you for inviting me to participate. Troutman is a valued friend of our firm, and we're happy to help you provide support to your clients that have Canadian operations. I've been with Gowling for the last 18 years. My practice has three main areas. The first is support on mergers and acquisitions. We help with all of the people issues when businesses are buying, selling, receiving investor money, etc.

Second area is litigation. We act for employers in all sorts of claims by employees, former employees, and as well some of their competitors. We also defend clients against claims by regulatory bodies, government agencies, etc. The most important part of my practice is the third part, and that's advisory services. I have more than 30 years of experience that I can bring to assist clients to manage their risks and exploit their opportunities. And that's the part that I enjoy the most, helping businesses manage their people issues.

The great part about my job is my days are never boring. About 30% of my practice involves supporting US-based businesses operating in Canada. I talk to Americans almost every day. Sometimes it's HR or the people function. Sometimes it's senior executives. Sometimes it's US attorneys, both inside, in-house lawyers, as well as outside counsel.

A little bit about us, Gowling, is a national firm. We have over 800 lawyers, which is pretty big in Canada. Have over 40 employment lawyers across all of our jurisdictions in which we have offices, including Quebec. And I'll talk a little bit about Quebec later. So, we can help clients address all of their workplace issues in Canada.

**Tracey Diamond:** So glad to have you here, Chris. And you sit in Toronto. Is that right?

**Chris Andree:** I'm in both Toronto and Waterloo. Waterloo is about an hour and a half west of Toronto. I used to introduce it as the home of Blackberry. That used to be cool. Not as cool anymore.

**Tracey Diamond:** Now it's more retro historical.

**Chris Andree:** That's right.

**Tracey Diamond:** Today's episode is inspired by the TV show *Suits*. It's a hit legal drama that's actually set in a fictional US law firm in New York. Why are we talking about this when we're talking about Canada versus US employment law? Well, while the show is based in the US, most people don't actually realize that it was filmed in Toronto, as many shows are. We thought that would make it a perfect backdrop for today's episode, where we plan to explore the differences between US and Canadian employment law.

Before we jump into our first clip, Chris, can you explain to us how employment law works generally in Canada? For example, in the US, there are federal statutes such as Title VII and the Age Discrimination and Employment Act. And then most of our states have their own employment statutes. Some of which are similar to federal law, and some of which are quite different. Is Canada split up in a similar way between federal law and laws of each of the provinces?

**Chris Andree:** Yeah. For at least a decade, I've done a presentation called *We Are Not the 51st State*. And the point of that title was to sort of make the point that, in many ways, we couldn't be more different from the US in terms of our employment law. The reason it has that title is, in many ways, we're fundamentally different. The first fundamental difference is the relationship between the employer and the employee is a contract. And there's no words in an agreement or in a handbook that can change that. Consequently, contract principles apply. Sort of first-year law school stuff. Offer, acceptance, consideration, those concepts are critical in dealing with the employment relationship in Canada.

Another point of that obviously is that neither party can unilaterally change the terms of the contract. That affects how we hire, how we implement changes during employment, and how we end the relationship. Unlike the US, we don't have a combination of national and provincial legislation that applies to all employees. For us, it's a pretty bright line between federally regulated and provincially regulated employees. So, approximately 90% of all employees in Canada are provincially regulated, and that means that the laws of the province in which they work govern all of their employment relationship. We don't really have national legislation like the FMLA, or the ADA, or the ADEA. Each province has legislation that deals with those issues.

And the fact that it is in each province creates challenges for employers that have operations in multiple provinces.

Now you have the same challenges across 50 states. We only have 10 provinces and three territories, so I guess we have it easy. But, again, it does create challenges. One of our provinces is Quebec, and its legal system is based upon the Napoleonic civil code, which is similar to Louisiana. And that is quite unique in Canada. And, consequently, it has many laws that are different from the other nine provinces and territories in Canada. We joke that Quebec is our California, but it doesn't have any palm trees.

Another fundamental difference about Quebec is the official language of Quebec is French. And under their language laws, all communications with employees must be in the French language. That includes handbooks, employment agreements, memoranda, emails. And, of course, that creates a real challenge for businesses that don't have a French language capacity. Of course, Gowling can assist with that as necessary.

There are two other I would say key differentiators. We don't generally have jury trials for employment matters. It would be exceptionally rare to have a jury trial. And the second key difference is it's highly unusual to get an award of punitive damages in an employment claim in Canada. It's fair to say that the risk to employers of a catastrophically large award is markedly lower in Canada.

Before I sort of give you the impression that nothing is the same, there are many similarities between Canada and the US, such as human rights protections, health and safety rules, workers' compensation scheme, labor relations, union issues. It's not entirely different, but there are many, many differences.

**Tracey Diamond:** It's interesting when you talked about your practice and how it's separated into deal work, and litigation, and advisory work. That is very similar to the way our practices are run here in the US. I find it really fascinating to see how so much is the same and yet so much is so fundamentally different. I would never profess to be an expert and advise at all on Canadian law. That's why we called you, Chris.

**Chris Andree:** That's the way we like it.

**Tracey Diamond:** In the US, there's a requirement in federal law and the law of some, but not all states, that the employee who wants to bring a discrimination claim must first file with the EEOC or a state human rights agency. That's called the administrative prerequisite to suit. Is there a process like that in Canada?

**Chris Andree:** Generally, no. As I mentioned, those issues are dealt with at a provincial level for most employees. And in each province and at the federal level for federally regulated employees, there is a regulatory body that is responsible to enforce human rights. That body will receive the claims and adjudicate them under its own process. It's not a sort of gatekeeper for allowing claims. It is actually the adjudicative body. Those adjudicators are typically lawyers or former lawyers who hear the evidence and they issue decisions.

Some provinces have a direct access model where the complainant files the application with the tribunal, and the matter proceeds to a hearing. There are other provinces that have a human rights commission, and that commission is responsible to investigate the complaints and try to resolve them. And if they can't be resolved and they have some merit, then they are referred on to the tribunal for a hearing. There is a bit of a gatekeeper role there.

But I think the key difference for most human rights complaints in Canada is they're not brought by way of lawsuit in a civil court. In most cases, they are adjudicated through that regulatory process that I described. There are opportunities to bring human rights claims in a court. But, typically, that is part of a broader claim, such as a wrongful dismissal claim. So, if someone says, "I've been wrongfully terminated," and part of the motivation was human rights, they could bring the claim that way. But we generally do not have standalone human rights lawsuits, discrimination lawsuits, the way that I understand you do.

**Emily Schifter:** That's so interesting. I have to imagine, given the way that the administrative process differs, given the differences in the types of damages you can get, that settlement-type negotiations work maybe a little bit differently. When I think about, especially an employer in

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California and the threat of the types of damages you're talking, as compared to maybe a little bit more of a – it's a little more hemmed in, it sounds like, in Canada.

**Chris Andree:** Yeah.

**Emily Schifter:** How do leave laws work in Canada? Is there government-mandated leave? And is it paid? Obviously, it sounds like it's not quite like the US with both the federal and the state overlay.

**Chris Andree:** Yeah, we have many of the similar leaves of absence rights that you have or that I believe you have. Almost none of them are paid by the employer. We have some very generous leave entitlements. For example, pregnancy and parental leaves, up to 18 months for the birth mother, up to 15 months for the father or adoptive parents.

We have personal sick leaves, bereavement leaves, family illness leaves, and others that you would be familiar with. Those exist in each one of the provincial legislation. And then we have some in certain provinces that are not universal across all of our provinces. For example, we have domestic and sexual violence leave in Ontario. That is up to 15 weeks and 5 days of that are paid. That is a bit unusual in terms of having a paid leave.

In terms of the compensation that people can receive while they're on these leaves, similar to your unemployment insurance scheme, we have employment insurance. I don't know whether we're just trying to put a positive spin on it. But it provides benefits to employees in circumstances such as unemployment and layoff, but it also provides benefits during many of the leaves that are permitted under the provincial legislation.

For example, birth mothers can get up to 18 months of EI benefits during their pregnancy and parental leave. It doesn't obviously – well, maybe not obviously. It doesn't equal their wages, but it does provide a measure of support to all employees who take these statutory leaves, and that is, in part, a way to encourage people to take their leaves.

All of the leave entitlements include a right to reinstatement to the position once the leave is

ended. As it does for you, that can create significant challenges for employers where the employee has been gone for an extended period of time. And in some cases, that's up to 18 months. So, you can imagine the changes that have occurred in a workplace, the sort of reintegration that would be required for someone who's been gone on a leave of that length. So, it does create some challenges, but those protections are there.

**Tracey Diamond:** I think we're seeing that happening more and more in our states with the advent and the rise of paid family leave laws in a structure similar to what you're suggesting or what you have in Canada where there's sort of partial reimbursement and it's being paid through the unemployment insurance fund or something similar to the unemployment insurance fund, which ultimately, here anyway, gets paid through payroll deductions from wage earners. I think that we're going to see those kinds of statutes in more and more states as time goes on.

**Chris Andree:** Yeah, ours is not a direct pay. Each employee and each employer, as part of their payroll taxes, pay into the employment insurance scheme.

**Tracey Diamond:** Right.

**Chris Andree:** And so no individual employer is punished in circumstances where they have to lay off employees, or an employee takes a leave, or anything like that. It's sort of a pool. And so employees are encouraged to take those rights.

**Tracey Diamond:** Exactly. Yeah.

**Emily Schifter:** We promised that we were going to talk about suits. We've pulled a few clips from the show that talk about different workplace issues like harassment, drug testing, internal investigations, discrimination. And we're going to use those moments to highlight some of these differences, how these scenarios would be addressed under Canadian law versus how they might play out here in the US.

Let's jump into the first one for the topic of employee terminations. In this clip, Mike, an associate of the law firm, and Louis, a partner, discuss the paralegal, Rachel's, played by

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Meghan Markle, abrupt termination after she was accused of leaking a confidential witness list to a rival law firm.

[BEGIN CLIP]

**Louis:** You rooted out the person responsible for leaking the witness list to Wakefield-Cady.

**Mike:** Louis, I have no idea what you're talking about.

**Louis:** It was almost cute how you hid the evidence in the Galusska briefs. Like, you didn't want to take the credit.

**Mike:** What? Louis, I didn't hide anything.

**Louis:** Don't worry, no one's going to label you a snitch.

**Mike:** Snitch.

**Louis:** We didn't even think to check the fax machines. That was brilliant. The lists were sent from right here in this firm.

**Mike:** This is a copy of a fax submission form sent from 3 days ago. This doesn't implicate anybody.

**Louis:** That's the confidential employee code. She must not have known that the machine recorded it.

**Mike:** She?

**Rachel:** Wait, why am I being suspended? I didn't leak any documents. Who told Louis I did this?



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**Security Guard:** Let's go, please. This way, miss.

**Mike:** No, no, no, no. Louis, you have to stop this. I didn't turn Rachel in.

**Louis:** That's sweet how you didn't really mean to hand someone in. Wait, Mike, stop. You did a great thing. And because of that great thing, \$10,000. And don't spend it in one place.

[END CLIP]

**Emily Schifter:** It's rather shocking that Louis paid Mike \$10,000 for allegedly turning Rachel in. But leaving that aside, the clip does bring up the topic of employment terminations generally. As you already mentioned, Chris, in the US, in the absence of a written contract stating otherwise, employees are at will, which means the company can end the employment relationship at any time for any reason. And that's not the case in Canada. What are the steps or the due process that might be required before suspending or terminating an employee in Canada?

**Chris Andree:** Well, first, let me tell you how excited I was that we're using Suits clips. I was a huge fan. I bumped into filming a few times in Toronto, but I never saw my favorite character in real life. I was a big Louis Litt fan. But when I was speaking earlier, I sort of skipped over one of the big differences between Canadian and US employment law. There is no at-will employment, as you mentioned, in Canada.

Employees that are terminated without just cause or the phrase is good and sufficient cause in Quebec are entitled to notice of termination or pay in lieu of notice. And that period of notice is governed by both statute in each province as well as common law or judge-made law in each province.

The statutory entitlement is quite low, certainly by our standard. It's sort of up to eight weeks. It's usually a week per year or thereabouts per year of service. But the common law entitlement is extraordinary, even by international standards. A long-service, older worker who holds a senior position in an organization may be awarded as much as 24 months' notice. That comes as quite a surprise to many of our US clients, as you might imagine.

What constitutes just cause is the subject of much debate in the case law and amongst my colleagues, and obviously with council for terminated employees. What is clear, though, is that the standard is very high. Cause is determined in the context of the employee's total employment history. The misconduct or the poor performance will be weighed against the employee's prior work history, including things like commendations, prior disciplinary record, and the ability of the employer to impose a lesser consequence.

The result of that is, in some cases, the same misconduct by two different employees can lead to two different legal outcomes. If you've got a long-service employee with a good work record, the misconduct may only warrant a suspension or written warning. Whereas, if you've got a short-service employee with a poor disciplinary record, that same misconduct may justify termination for cause. And so, that creates a challenge for employers to figure out sort of where they land on that spectrum.

The good news is that absent any statutory protections, such as a prohibition against reprisal for taking one of the leaves of absence that we talked about earlier, or complaining about an unsafe work environment, absent those kinds of protections, employers have the absolute right to terminate without cause, provided they provide notice or pay in lieu of notice.

As I describe to some clients, I can terminate their employment, or you can terminate their employment if they wear a blue shirt and you don't like blue. But if their eyes are blue or their skin is blue, then we've got a statutory protection, and now we're into a different issue. Sort of in summary, employers can fire as they can in the US. It's just a lot more expensive.

Turning to workplace investigations, they can be done internally or they can be done by an external expert. The legal duty is to conduct an investigation reasonable in the circumstances. For example, it's not reasonable for an HR professional to investigate the CEO that they report to. On the other hand, you don't have to hire an outside investigator every time one employee complains about another employee. Whatever is reasonable in those circumstances.

In terms of the due process or the credibility of the investigation, that usually arises where the

employer is trying to show that there was no violation of the statutory right that the employee may be alleging or that they are trying to demonstrate just cause to terminate and avoid that obligation to provide notice or pay in lieu. The failure to follow due process undermines the credibility of the investigation and, therefore, the facts that the employer is relying upon to impose the discipline. It's more than a sanction, per se, for not doing a great investigation.

The failure to investigate or to do a shoddy investigation can lead to additional damages. For example, if an employer alleges cause based on employee theft and then cannot prove it, not only would the employee be entitled to pay in lieu of notice, as they would in any termination, but the court can award additional damages for the failure to prove an allegation of dishonesty, which has a negative effect on the employee's reputation.

I earlier mentioned punitive damages are not really a thing in Canada. Generally, that's true, but they can be awarded in these kinds of circumstances. But the good news, as I also mentioned, is the good news for employers is that the award is probably going to be somewhere in the range of \$25,000, which is substantially less than the kind of punitive damages awards that I think are made in the US.

**Emily Schifter:** I think it's so interesting the point about anyone can be terminated without cause. It might just be more expensive. I find that sometimes when I'm advising Canadian employers who are starting to do business in the US, that is always a bit of a happy surprise that it's not the case. Here, it's only if you've got an executive with an employment agreement that outlines cause or if you've got a severance plan. But other than that, they're kind of like, "Wow, I can just fire them." Pros and cons.

**Chris Andree:** That is a different environment for sure.

**Tracey Diamond:** And also with the investigation, I also think it's really interesting this concept of if you can't prove the dishonesty, if that was the basis for the termination, then you may be subject to punitive damages. Where here, all the employer has to have is a reasonable belief. That's not a pretext for an underlying discrimination claim in order for the employee to have the right to any kind of damages. That's a really big difference.

**Emily Schifter:** Let's turn to the topic of harassment. In our next clip, Mike meets with a pro bono client who worked as a secretary and is seeking help after facing sex harassment after work.

[BEGIN CLIP]

**Nancy:** I got myself a job as a secretary at Devlin McGregor, and I even got promoted to secretary of the president, Charles Hunt. And that's when it all changed.

**Mike:** It's okay. You tell me what happened.

**Nancy:** He started asking me to stay late, ordering dinners together, stuff like that. One night he says that if I sleep with him, he's going to take care of me in the firm. And if I don't, he's going to fire me.

**Mike:** So, what did you do?

**Nancy:** I went to human resources. They said they investigated, couldn't find anything to support my claim. 2 months later, I was fired for poor job performance. They wouldn't let me say goodbye to anybody. They wouldn't write me a letter of recommendation. I wasn't looking for a payoff. All I wanted was for it to stop. Can you help me?

[END CLIP]

**Tracey Diamond:** In the US, workplace sexual harassment is prohibited under federal law as well as the law of most states. And this clip illustrates what we call quid pro quo harassment, which is when a manager threatens to fire an employee unless the employee sleeps with him or her, or the manager promises something to the employee for sleeping with them. The other form of harassment that is actionable under federal law in the US is a hostile work environment claim of sex harassment. And the standard there is whether the conduct is severe, meaning one really egregious conduct, such as assault, or pervasive, which could be less egregious incidents that,

taken together as a whole, makes someone uncomfortable going to work. Some state laws, such as New York, have a lower standard. Chris, let's turn it back to you. What about in Canada? Are there specific statutes governing workplace harassment? And what are the obligations of employers to prevent and respond to harassment?

**Chris Andree:** The high-level answer is yes. Each province has a human rights code or a human rights act, which specifically addresses harassment based upon prohibited grounds of discrimination, which include sex. Sexual harassment is defined in most of the statutes, and it generally speaking is defined as including sexual solicitation or an advance made by a person in a position to grant or deny a benefit, or a reprisal, or threat of reprisal for the rejection of a solicitation or advance.

Almost all provinces also have health and safety legislation which requires employers to have harassment policies in place and to investigate complaints of harassment that they receive, both sexual harassment and other kinds of harassment. In terms of an employer's duty and the potential liability, the individual would generally bring a human rights application before the human rights tribunal and seek remedies before that tribunal, as I described earlier. Those remedies can include reinstatement.

So, think of it like a unionized environment where they can be reinstated to their role. That would often come with back pay, damages for lost wages, if they're not reinstated, and protection from future reprisal. I mentioned that the awards for a violation can be low, but the process is slow. And with the threat of reinstatement with back pay, employees can typically receive a meaningful settlement through negotiations because the risk of a reinstatement many months, sometimes years after the incident, creates a motivation for the employer to reach a resolution.

An employee can also sue for constructive dismissal under a concept similar to what you described as the hostile work environment concept. And that is based on a breach of the implied term of the employment contract to provide a safe workplace that is free from harassment. If the employee can show that it was not reasonable for them to remain in the workplace and that they had no real choice but to quit, then they can claim what they would have claimed had they been

fired outright. They take the position they have been constructively dismissed and their employment is over. They had the right to resign, and then they get whatever damages they would be entitled to under a wrongful dismissal claim.

**Tracey Diamond:** And that's similar here in the US, this concept of constructive discharge. That's a good illustration of a similarity between our two countries.

**Chris Andree:** Yeah. What's a little different is the awards for wrongful dismissal can be up to 24 months' pay.

**Tracey Diamond:** Yeah, that's for sure. All right, let's turn to our next clip. In this clip, Louis confronts Mike in the middle of the workday and demands that he take a drug test on the spot. The test is performed on site with Louis waiting just outside the bathroom.

[BEGIN CLIP]

**Louis:** Mike. Where you going?

**Mike:** To my cubicle.

**Louis:** No, you're not. It's pee-in-a-cup time.

**Mike:** I'm sorry. What?

**Louis:** Drug test. Follow me.

**Mike:** I'm just going to put my stuff back –

**Louis:** Now. Time to face the music.

**Man:** Leave the cup on the counter. Oh, you'll have to leave that out here.

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**Mike:** Why?

**Man:** If you take it in there with you, I have to check to make sure you don't have another urine sample.

[END CLIP]

**Tracey Diamond:** This, of course, raises some major privacy concerns. In fact, in a later episode, Louis falsifies Mike's drug testing results, got to love Suits, to bribe Mike into smoking pot with a potential client.

**Emily Schifter:** In the US, the Drug-Free Workplace Act of 1988 requires federal contractors and grant holders to have a drug-free workplace policy, but it doesn't specifically mandate drug testing. And in fact, there really is no US federal law either mandating or prohibiting drug testing of private employees outside of certain safety-sensitive positions like truck drivers and pilots.

States, of course, in the US vary a lot in terms of their drug testing laws. Some require a written policy or certain confidentiality requirements giving employees the opportunity to explain the results. Others don't have much restriction at all. But as a general rule, pre-employment testing is allowed after a conditional offer of employment has been made. And drug testing after an accident or in the case of reasonable suspicion of impairment is permitted, but random drug testing gets a little trickier.

**Tracey Diamond:** A lot of focus these days is around marijuana testing, which varies by state. In New York, for example, pre-employment testing for marijuana is banned altogether. And in New Jersey, employers may test for marijuana pre-employment, but they may not base an employment decision on the results of the test. The concept here being that marijuana stays in your system for up to 30 days. And in states in particular where not only medical but recreational marijuana is legal, it would be unfair to reject an applicant because they have marijuana in their system, because it's not evidence of present impairment necessarily. Chris, what are the rules around employee drug testing in Canada?

**Chris Andree:** Well, I think we're pretty close to the New Jersey approach that you just described. Generally speaking, I've always thought that our drug testing is another area where we differ significantly from the US. Generally speaking, drug testing is prohibited in Canada. And the reasoning is that, unlike alcohol testing, a positive test for drugs does not indicate impairment at work.

And so, for example, as you mentioned, you can test positive for cannabis days or even weeks after use and long after the effects of the THC have worn off. And so, the view of – and this is the Supreme Court of Canada, the view of the utility of testing is highly questionable.

**Tracey Diamond:** Is that just for marijuana testing? Or is that true for drug testing generally?

**Chris Andree:** Drug testing generally.

**Tracey Diamond:** Really?

**Chris Andree:** And so the way that the courts have come down is the violation of the employee's right to privacy regarding their personal health information is not outweighed by the safety concerns. Because, generally speaking, you can't point to safety concerns if you can't point to impairment at work. Past use doesn't mean impairment at work. On that basis, pre-employment testing fails because a positive test cannot indicate impairment at work. They haven't started working yet. You can question whether that person was wise to have used substances before they took a test for a job they wanted. But that's a different podcast.

There are certain safety-sensitive positions where random testing may be permitted. However, as I think you described for New Jersey, the positive test does not lead to automatic dismissal or automatic termination. It's an indication that impairment may have occurred. And so further investigation is required.

The other thing that may differ is an employee who tests positive will likely have human rights protections. Because, generally speaking, drug addiction is considered a disability in Canada, and it triggers the duty to accommodate, which is similar to the duty to accommodate that you



would have in the US related to disability issues. A positive test has to be carefully managed by the employer.

Now there are industries where random testing is accepted by employees, even though technically it's a violation of their privacy rights. You mentioned truck drivers. There are many truck drivers in Canada that drive into and out of the US. And so they submit to random testing because they need to satisfy the DOT regulations, not because it's not a violation of their rights.

There are industries, particularly in the oil sands industry in northern Ontario or in northern Alberta, in some construction industries, where testing has been negotiated between the workplace parties, the unions, and the employers because it's in everybody's interest. And so they've modified the rules, but those are negotiated outcomes, not imposed.

Specific to cannabis or marijuana, the answer to cannabis testing is relatively easy in Canada because cannabis is legal in Canada. Testing for it wouldn't demonstrate a lot of useful information about an employee. Again, impairment is the issue that we focus on, not past use.

**Emily Schifter:** Definitely interesting. Another similarity, as you kind of mentioned, is the duty to accommodate. Because there is some protection under the ADA for alcoholics, for past drug users, not active drug users. It can get hairy for US employers trying to balance those questions as well.

Moving to our last clip. This is about gender discrimination claims. Here, Daniel Hardman represents a client alleging she was fired for discriminatory reasons. He accuses Jessica Pearson of letting women go once they no longer serve her purpose.

[BEGIN CLIP]

**Daniel:** You said my client's dismissal was due to a variety of factors. And then you said it wasn't the affair, and it wasn't job performance. So I ask you, what was it? Is it a personal dislike? Are you jealous of her? Or do you just hate other women?

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**Harvey:** Tread lightly, Daniel.

**Daniel:** Let's try some questions your client can answer. Were you in a relationship at the time of my client's dismissal?

**Jessica:** Excuse me?

**Harvey:** Jessica Pearson's personal life is not an issue here.

**Daniel:** I beg to differ. And since your client can't seem to find her words today, I, for one, can testify that she was not in a relationship at the time. She's always been married to her job. And she wants her female associates to be equally committed, so that as soon as they have anything else in their lives, in other words, sex, she cuts them loose.

[END CLIP]

**Emily Schifter:** In the US, this could lead to gender discrimination claims under Title VII, a federal statute, and maybe also applicable state law depending on where it happened. How are gender discrimination claims handled in Canada?

**Chris Andree:** Well, first, I'll say Daniel Hardman is a great villain character. You can hate him after a 30-second clip. That is amazing. Generally speaking, the prohibited grounds of discrimination under our provincial human rights legislation include sex, sexual orientation, gender identity, gender expression, marital status, family status. And several of those are relevant in the clip that you showed.

And as I discussed regarding sexual harassment, an employee could address these claims through an application to the provincial human rights commission or tribunal, or by alleging constructive dismissal in a civil action.

The burden of proof in a discrimination claim is a bit complicated and can be quite challenging for employers. There's an obligation on the employee to show a prima facie case of

discrimination. We can debate how high that standard is or should be. But assuming that it is satisfied, the burden then shifts to the employer to demonstrate that the prohibited ground of discrimination played no role in the action taken. So, you're effectively trying to prove a negative. And under our case law, even if 1% of the motivation was based on the prohibited ground of discrimination, the actions by the employer are considered discriminatory and the employee is entitled to a remedy.

Another key difference between Canada and the US is the awards for violations of human rights. In Canada, in my own opinion, is the awards are embarrassingly low. They range from anywhere between \$5,000 and \$50,000 Canadian. Given our terrible exchange rate, that's about \$3,500 US to \$35,000 US.

Now the value of damage awards is increasing, but I think it's going to take a long time before the level of those damages actually acts as a deterrent to employers that are motivated to discriminate. In that respect, we have some work to do, I would say, in trying to remedy those kinds of circumstances.

**Tracey Diamond:** Canadian law seems so employee-friendly in some aspects and yet very not employee-friendly when it comes to damages amounts.

**Chris Andree:** That is an excellent way to analyze it. Lots of protections, but when it comes to actually compensating employees for the wrongs, there isn't a lot there for them. And that actually, I think, has a big impact on how litigious we are. Because there's not a big pot of gold at the end, most plaintiffs and plaintiff counsel are not as motivated to pursue those claims to the end because there isn't that big reward.

**Tracey Diamond:** Makes sense. Well, listen, Chris, we really want to thank you for your time today and for giving us a really great primer on Canadian employment law. I think that there's a lot of fodder here with regard to US employers that do business in Canada, and making sure they understand these very important differences, as well as the many similarities between our two countries.

A special thank you to our amazing summer associate, Mika Vapor, who assisted with hunting through the many seasons of Suits to find great clips for us and also to put together a structure for our discussion today. And thank you to our listeners for listening in and being so loyal to our podcast. We love having you listen in to these podcasts. Please send us an email. Tell us what you think. Give us some ideas for future episodes and your favorite TV shows and movies. And don't forget to check out our blog, [hiringtofiring.law](http://hiringtofiring.law). Thanks so much.

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