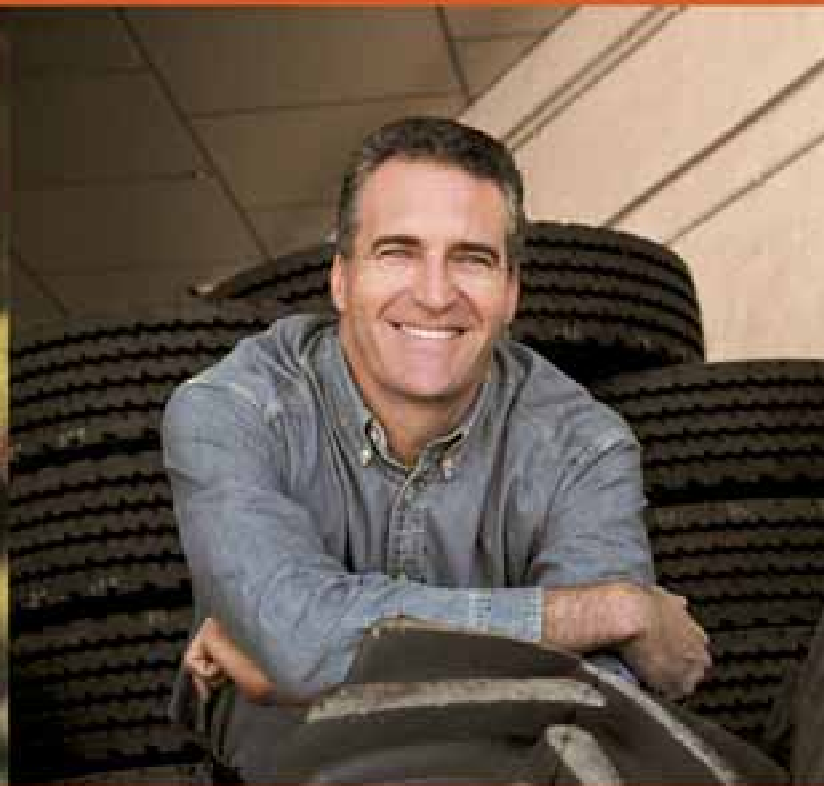
For Inter-Generational Fairness



Labour standards dealing with differences in treatment:
guide and interpretation

Québec

For Inter-Generational Fairness

In 2001, provisions prohibiting the recourse to differences in treatment, also known as "orphan clauses", were incorporated in the Act respecting labour standards. Based on the principle of fairness towards young workers in particular, these provisions aim to prevent an employee from being granted, solely by reason of his hiring date, a condition of employment that is less advantageous than that granted to other employees who perform the same tasks in the same establishment.

Despite the Act's provisions, Québec workers, both unionized and non-unionized, continue to be the victims of unfair difference in treatment clauses in their contracts of employment. On the sole ground that they were hired "too late", employees, often the youngest ones, find themselves confined to a pay scale that condemns them to receive, without the possibility of ever catching up, a wage that is less than that of their colleagues already on the job and who perform the same tasks. For the same reason, other employees will be granted fewer days of vacation than their colleagues already on the job who will continue to enjoy more advantageous benefits.

This guide presents the definition, examples of prohibited and allowed differences, the recourses provided under the Act, as well as the sections of the Act and their interpretation. This guide is intended for employers, employees and unions that want to have a better understanding of how to apply the provisions concerning differences in treatment.

What is a difference in treatment clause?

A difference in treatment clause, also known as an "orphan clause", is a provision, the effect of which is to create, for new employees hired after a given date, conditions of employment that are different from those which employees already on the job enjoy.

Only differences in treatment based **solely** on the hiring date are prohibited. A more advantageous condition granted to an employee by reason of his seniority is allowed. The same is true for other grounds such as professional qualification, experience, performance or job assessment. Distinctions based on such grounds are not considered differences in treatment within the meaning of the Act.

What are the conditions that can give rise to a difference in treatment?

In addition to wage differences, the Act prohibits differences related to other aspects covered by a standard within the meaning of the Act respecting labour standards, namely:

- hours of work;
- paid statutory holidays;
- paid annual leave (vacation);
- rest periods;
- absences by reason of illness or accident;
- absences and leaves for family or parental reasons;
- notice of termination of employment or lay-off, and certificate of employment;
- uniform, material and tools provided, training and travel expenses.

It should be noted that the stipulated protection deals **only** with the aforementioned aspects. Different conditions of employment concerning aspects not referred to in the Act cannot be considered differences in treatment.

Moreover, the condition of employment about which an employee is complaining must be compared with the most advantageous condition of employment enjoyed by another employee performing the same tasks in the same establishment and not only the minimum provided for under the Act.

Prohibited differences

On September 1, 2004, Louise was hired as a supermarket cashier. As stipulated in her collective agreement, her wage is set at $7.50 an hour. Her colleagues who perform the same tasks were hired a few weeks prior to the signing of the collective agreement at the rate of $7.75 an hour. The agreement provides for no catching up between Louise's pay scale and that of her colleagues.

If no reason other than the hiring date, for example experience and training, justifies the lower wage paid, Louise is the victim of a difference in treatment, prohibited under the Act.

In the undertaking where Angelo works, the employees hired prior to January 1, 2003 and who perform the same tasks as him are entitled to a vacation indemnity of 8%, whereas for the employees hired after that date, the indemnity is 6%. Angelo was hired after January 1, 2003. Although the indemnity stipulated in the Act respecting labour standards is 4%, Angelo could file a complaint to obtain the 2% difference, because he is granted a condition of employment that is less advantageous than that of other employees solely on the basis of his hiring date.

Some premiums, allowances and indemnities may be in addition to the basic wage. If for example, a night or evening premium was lower for employees hired after a given date, this would constitute a wage difference prohibited under the Act.

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Allowed differences

John, a mechanic, was hired on April 1, 2004. The undertaking that employs him has no unionized employees.

After being with the undertaking for a few days, John learns from a colleague that for several years now, the employer has traditionally given one day of paid leave to his employees on their birthday. However, the employer, having modified his policy effective January 1, 2004, refuses to offer this benefit to all new employees hired after that date.

Although John may find the situation unfair, it does not qualify as a difference in treatment, given the fact that a paid leave at the time of an employee's birthday is not a condition of employment stipulated in the Act respecting labour standards.

Mary was just hired as a window dresser in a department store. Under the collective agreement in effect in her undertaking, she receives a wage of $8 an hour. On her first day of work, Mary talks with her colleague Ann who performs the same tasks as Mary does. Ann tells Mary that she has been working for the store for four years and that she now earns $11 an hour in accordance with the wage progression scale established by the collective agreement.

In this situation, Mary cannot conclude that she is the victim of an illegal difference in treatment, since her colleague's higher wage is based on her seniority in the undertaking and not on her hiring date.

Special conditions

Under some circumstances, employees may benefit from special conditions of employment under the Act respecting labour standards. However, these special conditions cannot serve as points of comparison to conclude that there are differences in treatment. Differences are authorized in the following cases:

1. For **handicapped persons**. These persons may benefit from a special arrangement concerning their conditions of employment on a permanent basis.
2. In the case of a **reclassification** or **demotion** of an employee, an **amalgamation** of undertakings or an internal **reorganization** in an undertaking. In these cases, temporary differences are permitted for the time required to take corrective action. As a general rule, the differences are eliminated progressively **within a reasonable period of time**.
3. In undertakings where there are **several pay scales** for employees who perform identical tasks within the same establishment. To allow these undertakings to comply with the Act, an employee may receive a remuneration outside the pay scale until such time as the pay scale catches up to the employee's wage and this wage difference is eliminated. This must occur **within a reasonable period of time**. Indeed, the employer must establish within a reasonable period of time a single pay scale for the employees who perform the same tasks in his establishment.

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A benefit maintained following a reclassification

Up until just recently, Peter held the position of shift leader in a workshop and his wage was set at $20 an hour under the terms of his collective agreement. Following several changes made to the administrative structure of the undertaking, Peter's position was done away with and he was reassigned to an operator's position remunerated at $17 an hour.

Despite this reclassification, the employer could agree to temporarily maintain Peter's wage at $20 an hour. In such a situation, the other operators in the establishment could not use the wage that is temporarily being paid to Peter as a basis for comparison to claim a difference in treatment.

A difference in wage temporarily maintained following an amalgamation of enterprises

The maintenance employees of the ABC company earn $15 an hour at the top of the scale stipulated in their collective agreement. With a view to increasing its market share, the ABC company amalgamates with the XYZ company whose unionized maintenance employees are remunerated at a maximum rate of $12 an hour.

In order to not penalize the employees of the ABC company, the employer could allow these employees to temporarily retain this wage difference, without contravening the provisions of the Act respecting labour standards. The undertaking will however have to establish a single pay scale for all its maintenance employees within a reasonable time period.

A difference in wage to be eliminated within a reasonable time period

The collective agreement of the SuperPro company provides for two pay scales. For employees on the job since January 1, 1997, the wages are between $20,000 and $50,000. For employees on the job since January 1, 1998 the wages vary between $15,000 and $40,000. To comply with the Act, the employer establishes a single pay scale for all of his employees who perform the same tasks in his establishment. He determines that the wages of employees will be from $15,000 to $45,000.

To prevent those employees who receive wages in excess of $45,000 from being disadvantaged owing to their integration in the new pay scale, the employer could decide to grant them special wage conditions temporarily, until such time as the new scale catches up to the wage conditions of these employees.

However, to eliminate the wage differences within a reasonable time period, the pay increases offered to these employees outside the scale should not be as great as those granted to other employees. Otherwise, the differences would never be eliminated.

Labour standards dealing with differences in treatment

The reasonable nature of the period of time may vary from case to case based on all of the elements likely to affect the elimination of the difference and the means employed to achieve this objective, such as:

- the number of employees;
- the scope of the difference to be eliminated;
- the period of time during which the conditions of employment are in effect;
- the employer's economic capacity.

The elimination of differences is an obligation of results found in the Act. While the employer may justify and maintain differences that ensue from an administrative reorganization for example, a temporary situation cannot last indefinitely, and the parties must work to establish a deadline for eliminating such differences.

The Commission will engage in monitoring activities in undertakings where contracts of employment providing for differences in treatment have been identified. If the Commission considers that corrective action should be taken, it can ask the undertakings to prepare a precise plan to remedy the situation obliging them to eliminate the wage differences within the time period agreed upon. When this period expires, the Commission will make an inspection in some undertakings to ensure that the commitments have been respected and that the differences in wages have been eliminated.

The provisions of the Act respecting labour standards are public in nature and the parties to a collective agreement must abide by them. The Commission des normes du travail invites undertakings and unions to make sure that their collective agreements respect the provisions of the Act. Any agreement that violates these standards is automatically null and void.

What are the recourses?

A non-unionized employee should contact the Commission des normes du travail. A unionized employee who has a recourse under his collective agreement, such as a grievance right, may use the procedure stipulated in the agreement. He may also choose to lodge a complaint with the Commission des normes du travail.

If an employee is unionized or subject to a decree, or if he wants to lodge a complaint with the Commission des normes du travail, he must show, when he lodges his complaint, that he has not used the recourses provided in this collective agreement or the decree that governs him. If he has used these recourses, he must have discontinued the proceedings before a final decision was rendered.

After having validated the admissibility of the complaint, the Commission will make inquiry. If there are differences prohibited under the Act, the Commission will ask the employer to rectify the situation. If the violations in question are not corrected, the Commission can institute the appropriate legal proceedings.

Sections of the Act and their interpretation

87.1. No agreement or decree[1] may, with respect to a matter covered by a labour standard that is prescribed by Divisions I to V.1, VI and VII of this chapter and is applicable to an employee, operate to apply to the employee, solely on the basis of the employee's hiring date, a condition of employment less advantageous than that which is applicable to other employees performing the same tasks in the same establishment.

The same applies in respect of a matter corresponding to any of the matters referred to in the first paragraph where a labour standard pertaining to that matter has been fixed by regulation.

Interpretation

The employee in question is one who is contemplated by one of the following labour standards:

- wages;
- hours of work;
- paid statutory holidays;
- paid annual leave;
- rest period;
- absences by reason of illness or accident;
- absences and leaves for family or parental reasons;
- notice of termination of employment or lay-off and certificate of employment;
- various other standards (such as special clothing).

An employee who is not contemplated by one of these standards or who is not subject to the Act is excluded from the application of section 87.1.

The condition of employment stipulated in this section is that dealing exclusively with a matter contemplated by the aforementioned types of standards and that which is set by a regulation arising from the Act respecting labour standards. For example, the standards pertaining to retirement (section VI.1) are excluded from the application of section 87.1.

The stipulated protection deals with the matters contemplated by the Act respecting labour standards. As a result, different conditions of employment concerning, for example, paid sick leaves would not be considered prohibited differences in treatment, as this matter is not contemplated by the Act.

In the case of a matter contemplated by a standard, the condition of employment about which the employee is complaining should not be compared to the standard stipulated in the Act, but rather to the more advantageous condition of employment from which another employee performing the same tasks in the same establishment allegedly benefits.

For example, the standards pertaining to the annual leave provide for indemnities of 4% or 6% depending on the length of the employee's uninterrupted service. In an establishment, the conditions of employment of employees performing the same tasks stipulate that the annual leave indemnity is 8% for employees hired before a given date; whereas it is 6% for those hired after that date.

1 Collective agreements and decrees are defined in section 1, subsections 4 and 5 of the Act:
"(4) "**agreement**" means an individual contract of employment, a collective agreement within the meaning of paragraph *e* of section 1 of the Labour Code (chapter C-27) or any other agreement relating to conditions of employment, including a Government regulation giving effect thereto;
(5) "**decree**" means a decree adopted under the Act respecting collective agreement decrees (chapter D-2);"

An employee who belongs to the second group could claim the 2% difference by invoking a prohibited difference in treatment. It would then be necessary to make a comparison between the condition of employment that applies to this employee and that of the same nature applicable to the other employees performing the same tasks in the same establishment, and determine if the difference applies to him solely on the basis of his hiring date.

This principle, which arises from section 87.1, applies only in the case of prohibited differences in treatment. The resulting claim is not based on the provisions of section 99 of the Act, but rather on those of sections 87.1 and following of Division VII.1.

It is with the "other employees performing the same tasks in the same establishment" that the comparison of a condition of employment must be made. The establishment is the physical place where the work is performed.

The differences in treatment to which this provision refers are prohibited when they are based solely on the hiring date.

87.2. A condition of employment based on seniority or years of service does not contravene section 87.1.

Interpretation

This section is interpretive in nature as section 87.1 prohibits a difference solely on the basis of the hiring date. The use of the term "solely" necessarily presupposes that reasons may be invoked by the employer including those of seniority and years of service, as stipulated in section 87.2. The same is true for reasons such as competence, experience, performance, evaluation on a merit basis, or the quantity of production.

While seniority or years of service generally accumulate from the hiring date, they can progress differently between employees hired on the same date when they are based on the total hours worked, the period during which a position is occupied, the period of employment in a given sector of the undertaking or in the same establishment of the employer. That is why a difference based on seniority or years of service is not prohibited.

However, it would be a different matter if the employer wanted, in relation to the same seniority and the same years of service, to provide for conditions of employment that are less advantageous for employees hired after a certain date.

87.3. The conditions of employment applied to an employee pursuant to a special arrangement for the handicapped and the conditions of employment applied temporarily to an employee following a reclassification or demotion, an amalgamation of enterprises or an internal reorganization in an enterprise shall be disregarded for the purposes of section 87.1.

The wages and wage rules temporarily applied to an employee to prevent the employee from being disadvantaged owing to the employee's integration into a new wage rate, a wage scale whose range has been modified or a new wage scale shall also be disregarded, provided that

(1) the wage rate or wage scale is established to be applicable, subject to the situations referred to in the first paragraph, to all employees performing the same tasks in the same establishment; and

(2) the difference between the wage applied to the employee and the rate or scale established to be applicable to all such employees is progressively eliminated within a reasonable period of time.

Interpretation

Conditions of employment, both temporary and permanent, applied to an employee because he is handicapped are permitted. Conditions of employment that are temporarily applied to an employee by reason of a reclassification, a demotion, an amalgamation of enterprises or an internal reorganization are also permitted for the time required to eliminate the difference.

In this case, the employee in question is one who retains his wage and his conditions of employment despite a reclassification or a demotion to a position for which the established conditions of employment are less advantageous than those which he benefits from. However, this employee's conditions of employment must be temporary in nature. As a result, these conditions of employment must be standardized within a reasonable time period.

Moreover, the differences in treatment with respect to wages and wage rules are allowed if they are applied temporarily to an employee to avoid his being disadvantaged by reason of his integration into a new wage rate, a new pay scale or a pay scale the range of which has been modified, provided that:

1. this new wage rate or this new pay scale is established in order to be applicable to all employees who perform the same tasks in the same establishment, subject to the aforementioned situations (reclassification, demotion, amalgamation of enterprises or internal reorganization);
2. the difference between the wage applied to the employee who is temporarily outside the scale and the rate or the pay scale established to be applicable to all these employees is eliminated progressively within a reasonable time period.

The time period to gradually eliminate the wage difference may vary according to the undertaking. For example, depending on the number of employees in the undertaking who are victims of differences in treatment, the scope of the difference to be eliminated, the length of time during which the conditions of employment are in effect, the employer's economic capacity.

An illustration of the foregoing would be the case where there are two pay scales in an undertaking. The first would be between $20,000 and $50,000 for employees on the job since January 1, 2000 and the second between $15,000 and $40,000 for employees on the job since January 1, 2001. To comply with the Act, the employer establishes a single pay scale that is between $15,000 and $45,000. This pay scale applies to the undertaking's employees who perform the same tasks in the same establishment. To avoid disadvantaging employees having a wage in excess of $45,000 by reason of their integration into the new scale, the employer could, on a temporary basis, decide to grant them special wage conditions, until the new scale reaches the wage conditions of these employees.

The employer must proceed in such a way that the wage difference is eliminated progressively. The wage increases that the employee outside the scale could receive should not be the same as those received by the other employees included in the scale who perform the same tasks in the same establishment, as the difference would never be eliminated within such a context.

This elimination must also be achieved within a reasonable time period that may vary from case to case. The reasonable nature of the time period is determined on the basis of all of the elements likely to affect the elimination and the means implemented to arrive at this goal. The number of employees, the scope of the difference to be eliminated, the time period during which the conditions of employment have been in effect, and the employer's economic capacity are all factors that should be analyzed when determining if the time period is reasonable.

102. Subject to sections 123 and 123.1, an employee who believes that one of his rights under this Act or a regulation has been violated may file a complaint in writing with the Commission. Such a complaint may also be filed on behalf of an employee who consents thereto in writing by a non-profit organization dedicated to the defence of employees' rights.

If an employee is subject to a collective agreement or a decree, the complainant must then prove to the Commission that he has exhausted his recourses arising out of that agreement or that decree, unless the complaint concerns a condition of employment prohibited by section 87.1; in the latter case, the complainant must prove to the Commission that he has not exercised such recourses or that, having exercised them, he discontinued proceedings before a final decision was rendered.

Interpretation

An employee may address a complaint in writing to the Commission des normes du travail. A non-profit organization dedicated to the defence of employees' rights (such as a union) may also address a complaint in writing to the Commission on behalf of an employee who consents thereto in writing.

However, if the employee is subject to a collective agreement or a decree, he must prove that he has exhausted the recourses arising out of that agreement or that decree, namely a final decision concerning this recourse has been rendered. This final decision or decision without appeal is the one described as such in an act.

When section 87.1 dealing with differences in treatment is invoked in support of a complaint, the employee does not have to exhaust the recourses arising out of his collective agreement or his decree. Instead, he must prove to the Commission that he has not exercised such recourses or that, having exercised them, he discontinued proceedings before a final decision was rendered.

5. In the case of a collective agreement within the meaning of the Labour Code (R.S.Q., chapter C-27) or an arbitration award in lieu thereof, Division VII.1 of Chapter IV of the Act respecting labour standards enacted by section 2 of this Act and the amendment made to section 102 of the Act respecting labour standards by section 3 of this Act have effect from the date of coming into force, after 29 February 2000, of a first collective agreement for a certified group of employees, of a new collective agreement or of an arbitration award in lieu thereof.

Interpretation

Sections 87.1 and following, as well as the amendment made to section 102 of the Act respecting labour standards are applicable effective from the date of coming into force

- of a first collective agreement for an employee concerned by certification,
- of a new collective agreement (renewal),
- of an arbitration award in lieu of a collective agreement,

provided that this date of coming into force is after February 29, 2000.

If the collective agreement comes into force on January 1, 2000, hence before February 29, 2000, the provisions of the Act dealing with differences in treatment can only apply at the next date of renewal of said collective agreement.

If the collective agreement comes into force after February 29, 2000, the provisions dealing with differences in treatment have effect beginning from the date of the coming into force of that collective agreement (a first collective agreement or a renewal) or at the date of the coming into force of the arbitration award in lieu of a collective agreement.

6. In the case of an agreement within the meaning of the Act respecting labour standards, other than agreements referred to in section 5 of this Act, Division VII.1 of Chapter IV of the Act respecting labour standards enacted by section 2 of this Act has effect from 1 July 2000, unless the agreement is binding on an employee in a group of employees certified under the Labour Code and for which a first collective agreement within the meaning of that Code has not been made and is therefore not in force; in the latter case, Division VII.1 of Chapter IV of the Act respecting labour standards enacted by section 2 of this Act and the amendment made to section 102 of the Act respecting labour standards by section 3 of this Act have effect from the date of coming into force of the first collective agreement or of an arbitration award in lieu thereof.

Interpretation

Sections 87.1 and following as well as the amendment made to section 102 of the Act respecting labour standards apply to every individual contract of employment or every agreement relating to conditions of employment (except for a collective agreement within the meaning of the Labour Code) effective July 1, 2000. Non-unionized employees are referred to here.

However, if the case involves a group of certified employees for whom no collective agreement has been made, sections 87.1 and following as well as section 102 will only apply at the time of the coming into force of said agreement, even if it occurs after July 1, 2000.

7. In the case of a decree within the meaning of the Act respecting collective agreement decrees (R.S.Q., chapter D-2), Division VII.1 of Chapter IV of the Act respecting labour standards enacted by section 2 of this Act and the amendment made to section 102 of the Act respecting labour standards by section 3 of this Act have effect from 1 January 2001.

Interpretation

Sections 87.1 and following as well as the amendment made to section 102 are applicable effective January 1, 2001 to a collective agreement decree.

VARIOUS COMING INTO FORCE SITUATIONS	
Collective agreement or arbitration award	At the date of coming into force • of a first collective agreement • of a new collective agreement • of an arbitration award in lieu of agreement if this date is after February 29, 2000. If this date is before February 29, 2000, this provision applies at the renewal of the agreement.
Agreement (individual contract, agreement pertaining to conditions of employment)	Effective July 1, 2000 EXCEPT if certification is granted under the Labour Code, but a first agreement is not yet in effect. In this case, the effective date is the date of the coming into force of the first agreement or the arbitration award.
Collective agreement decree	Effective January 1, 2001.

8. For the purposes of sections 5 and 6 of this Act, the date of coming into force of a collective agreement is the date determined pursuant to section 72 of the Labour Code.

Interpretation

To determine the date of coming into force of a collective agreement, reference must be made to section 72 of the Labour Code which stipulates that while a collective agreement only takes effect at the time it is filed at one of the offices of the Commission des relations du travail, it comes into force on the date stipulated therein by the parties or failing that, on the date that said agreement is signed.

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The Commission des normes du travail is also present in 14 administrative regions.

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This information is provided for information purposes only. For more details, please refer to the Act respecting labour standards and its regulation or contact customer services at the Commission des normes du travail.

In this document, the masculine form designates both women and men.

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