

## A Guide to Building Your Retail Business 4<sup>th</sup> Edition

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The dream of running your own retail business can easily become a reality. Whether you are starting from scratch or expanding an existing business, there are many factors that you need to consider. We have prepared this handbook to describe some key elements for launching or growing your retail operation.

### 1. LET'S GET STARTED

Before you start your business, there are several things you should consider. These include:

- Will you operate in a physical, digital or combined retail space?
- Are there any licences you need to operate your business?
- Who will be working for you and what are your obligations to these people?
- How will you manage business information and stay in contact with your customers?

This guide will provide a brief overview of each of these issues and provide you with an understanding of some key legal requirements that impact retail businesses.

This guide is not exhaustive and is not a substitute for legal advice. If you have

questions about your particular situation, please speak with us.

### 2. BRICKS AND MORTAR OR ONLINE RETAILER?

Whether you are starting fresh, or you already have an existing business, one of your critical decisions will be whether you will operate from a physical retail location, have an online presence, or both.

To determine what may be appropriate for your business, you should consider factors such as:

- What product or service are you offering?
- Who is your target market?
- What is your budget?
- Do your customers need to touch, feel or smell your product?

## (a) Bricks and Mortar

If you decide to go with a physical presence, you will need to find a location for your business. Where you choose to locate your retail business will have a major impact on everything your shop does. Your perfect location will depend on your business needs, zoning restrictions and where your customers and competition are located. The difference between selecting the right or wrong location could be the difference between business failure and success.

An ideal location will likely be easy to find and is also readily accessible by your customers. Any one or a combination of the following situations can prevent customers from finding you:

- A hidden stand-alone building that is out of sight;
- Either not enough traffic, or enough traffic but travelling at a speed too fast to see you; or
- A shopping center or strip mall location without a great anchor store.

When you find the right location and space, you also need to consider whether the premises are zoned for your type of business. You may wish to consult with legal counsel to determine what zoning requirements will apply to your location.

Once you have all the information you need about the location and are certain that it is the right space for you, you will have to consider the lease for the premises.

Commercial leases are governed by the *Commercial Tenancies Act (Ontario)*, the common law and the lease agreement. The application of the *Commercial Tenancies Act (Ontario)* is somewhat limited because landlords and tenants in Ontario are treated as sophisticated commercial parties. As sophisticated commercial parties, landlords and tenants are free to negotiate their own terms. This freedom can result in a tenant

being pressured to agree to undesirable terms, as landlords tend to have greater bargaining power in lease negotiations. A written lease agreement signed by the parties may take priority over the *Commercial Tenancies Act*.

You should consult legal counsel to assist in negotiating the terms of the lease and advise you of the risks associated with it.

## (b) Online Presence

If you decide to operate in the online environment, you may or may not require a physical location as well. Of course, in this situation, the location will not have as much importance in terms of attracting customers. Depending on your business and storage needs, you may be able to operate from your home, a small office space or out of a warehouse space.

In addition to your physical location, you will want to consider your online “location.” Consider choosing a domain name that is easy to remember, and identifiable to your business.

Businesses considering doing business online in Canada should be aware of:

- electronic commerce legislation;
- the requirements for online transactions;
- advertising rules, language legislation; and
- privacy laws.

Many online retailers provide a link on each page of their websites to their comprehensive terms and conditions. These terms and conditions usually govern the relationship between the retailer and the customer, explain how personal information may be collected and used, and describe any warranties or similar policies for the customer. By providing these terms, a retailer can avoid some otherwise predictable claims and complaints from customers.

In general, online businesses must comply with the same legislation that applies to traditional “brick and mortar” businesses. But, in some circumstances, this may be more difficult in an online environment where the customers are often (virtually) anonymous. Especially for these impersonal transactions, retailers need properly drafted terms and conditions.

### **3. CONSUMER PROTECTIONS, WARRANTIES AND PRODUCT LIABILITY**

#### **I. Consumer Protection Act**

In Ontario, the *Consumer Protection Act (Ontario)* (the “CPA”) stipulates what information must be provided to customers. There are similar requirements in other Canadian provinces.

Under the CPA, the information that must be provided to customers at the time of sale or shortly thereafter depends on, among other factors, whether the goods are purchased in-person or online. If the retailer fails to abide by these rules, the customer may have the right to cancel a transaction within a set period of time.

As well, if the customer’s rights under the CPA are not respected, then the customer can bring an action in the courts. This right cannot be limited by the retailer’s terms of sale. Accordingly, a retailer’s terms and conditions or policies that purport to restrict a customer’s methods of settling disputes will not be enforceable.

#### **II. Warranties and Liability**

All persons selling goods in Ontario must comply with the *Sale of Goods Act (Ontario)* (the “SGA”), the CPA

(previously discussed above), the *Competition Act (Canada)* (the “**Competition Act**”, which is federal legislation and discussed below) and Canadian product liability laws.

#### Warranties

The SGA provides that certain warranties (express and implied) apply to all transactions dealing with the sale of goods in Ontario. Most other Canadian provinces and territories have similar legislation.

An example of certain warranties set out in the SGA, are that goods sold are fit for their intended purpose and are of merchantable quality.

In Ontario, these warranties can be disclaimed when goods are not sold to individuals. However, suppliers cannot disclaim warranties in the SGA when selling goods to individual consumers.

Often retailers choose to offer warranties that are more generous than those in the SGA. If you intend to provide customers with additional warranty protections, we recommend that your policy should be set out clearly and that your customers acknowledge either receiving the warranty policy or being clearly directed to it. For online purchases, you should require that customers accept your terms and conditions (including any warranties) before completing their purchase.

For example, it is common for retailers to provide a warranty that the item(s) sold to the individual customer will perform as intended for “X” months after the sale. Such a warranty is optional. Accordingly, it is imperative that your warranty policy be clear and set out precisely (i) the kinds of damages or defects the

warranty covers; (ii) to whom the warranty applies (recommend only the direct purchaser); and (iii) the proposed remedies.

A well drafted warranty policy can save your business significant time and expense in defending claims.

### Return Policies

Retailers are not legally required to have policies for the return of their goods. Accordingly, retailers can customize their return policies to suit their business practices.

### Product Liability

In Canada, the main source of risk for all sellers of consumer products is product liability.

A manufacturer or distributor of a product in Canada has a duty to end users, including second-hand buyers, to design and to manufacture products in a reasonably prudent manner.

Before launching possibly harmful products in Canada, retailers should consider a strategy for how to minimise and to defend potential claims for product liability.

An effective strategy will include at least proper quality checks and controls, clear warnings and instructions to users on how to operate safely the product and often a consumer helpline to resolve quickly simple problems or complaints.

For further information, please read our Product Liability article [here](#).

## **4. BUSINESS PERMITS AND LICENSING**

Whether operating online or through a physical location, it is important to understand what, if any, business licenses and permits you need to obtain. Before you start your own business, you should find out what laws govern your type of retail store.

We have included a brief overview of some common licensing or registration requirements below.

### **(a) Business Number**

Businesses operating in Canada are required to register with the Canada Revenue Agency (CRA) to get a “business number.”

Additional registration is necessary if a company requires a harmonized sales tax (HST), payroll, corporate income tax, or an import/export account.

### **(b) Exporting / Importing Goods**

If you export goods internationally, you should consider whether the goods will be subject to any domestic or foreign regulations.

There are similar considerations for importing goods. For example, if your business imports certain textile products, then it may need to obtain an “import permit” and submit a range of required forms and invoices for each order.

Whether importing or exporting, you should consider these factors:

- General trade sanctions;
- Tariffs;
- Anti-dumping legislation;
- Prohibitions for certain goods; and
- Permit or reporting requirements.

Before certain goods can be sold in Canada, they must meet quality and/or manufacturing specifications. Some of these standards are in the *Consumer Product Safety Act (Canada)*, the International

organization for Standardization (ISO) or other legislation or agreements to which Canada may be a party.

Canadian consumers should be informed of any extra costs they have to pay, such as taxes, shipping and/or tariffs.

Before importing or exporting goods across the Canadian border, we recommend consulting with an experienced customs broker and with legal counsel to ensure that you are meeting all of the legal requirements.

### **(c) Product Labelling**

The label that appears on your product communicates to your potential customers the value of that product. While your labels can be used to sell the benefits of your product, they must also comply with certain rules and standards.

The rules are more restrictive for some types of products than for others. Here are some examples of labelling requirements for specific product categories.

#### **I. Textile Labelling**

If your business sells textile goods such as coats, hats, gloves or stuffed goods, then you may be required to attach certain labels to your goods prior to their sale or use. This requirement can become more complex if the textile goods are being imported from another country.

Some of the labelling requirements include information regarding the fibre content of the product, and information identifying the manufacturer, processor or finisher by their CA Number (for Canadian dealers only) or by listing their complete business name and postal address.

#### **II. Upholstered and Stuffed Articles Labelling**

Upholstered or stuffed products sold in Ontario must list the material used for filling and meet specific labelling requirements. Product labels must be securely attached and made of a white durable fabric or synthetic material.

#### **III. Food Safety and Labelling**

Local health authorities are responsible for carrying out food service inspections and are the main source for information on food safety.

If your business will be providing or selling food, then you should contact your local health authority and arrange an inspection of your premises, equipment and processes to make sure your business is complying with the applicable legislation.

If you are involved in the production, service or processing of food products, you are also required to comply with safety standards and labelling regulations from the Canadian Food Inspection Agency and the Ontario Ministry of Agriculture and Food.

#### **(d) Music Licences**

If your store plays background music for your customers, you may need to obtain a license to use music.

No license is required if you only play regular commercial radio, a free and public music source. However, you will need to obtain a license any time you play music that was intended for private rather than public use. This includes music recorded in the form of CDs or MP3 files, or music

provided through a subscription-based service such as satellite radio.

You, as the business owner, bear the responsibility of determining which types of music licenses you require. You may need licenses from one or both of SOCAN and Re:Sound, the two dominant music licensing bodies in Canada. Both organizations propose fees to the Copyright Board of Canada, an independent body appointed by the government, which ultimately determines the licenses and fees, if any, required for using music in a store.

Without a licence, you could be liable for copyright infringement and may become the target of legal action by SOCAN and/or Re:Sound. If you are uncertain about whether you require a license, or about the process for acquiring the right licenses for your business, speak to your legal advisors.

#### **(e) Contests**

If you are considering operating contests for your customers, you must comply with the *Criminal Code* and the *Competition Act*. Under the *Criminal Code*, it is an offence to operate illegal lotteries, which have three components: (i) a prize; (ii) chance; and (iii) consideration (value provided by contestants as a condition of participation). A legitimate contest cannot have all three components. Most contests in Canada tend to remove consideration and chance. The simplest way to remove the consideration component is to include in the contest the words “no purchase necessary.” To remove the chance element, it is common to include a skill testing question.

It is mandatory to prominently display contest rules in places where people may enter the contest. There is specific information that must be included in a contest’s rules, including, but not limited to, the number and approximate value of the prizes, the area or areas in which the contest takes place, and any fact within the

knowledge of the person that affects materially their chances of winning.

This is only a brief summary of issues to consider when running a contest. To ensure any contest you run complies with Ontario law, we recommend you obtain our legal advice.

## **5. EMPLOYEES AND HUMAN RESOURCES ISSUES**

You will want to carefully consider the people you hire to work in your new business. You will also need to consider various issues related to employees, including making hiring decisions, paying your employees, providing sufficient time off, and how you will end employment relationships.

### **(a) Background Checks**

Employers in Ontario are generally permitted to conduct background checks on prospective or current employees. Common checks may include:

- Criminal history; and
- Credit history.

Medical background checks and drug and alcohol testing may be permitted only in very specific and restricted circumstances.

Although background checks may be permitted, employers should exercise caution when using their results. Sometimes background checks may reveal information on a prospective employee’s protected traits such as their race or religion, even if this is not the intended purpose. In Ontario, making employment decisions based on a protected trait can be a human rights violation. Therefore, discovering any information about an employee’s protected traits may complicate the decision to hire or fire an employee.

For more information, please see our expanded publication on background checks [here](#).

### **(b) Employment Applications**

Depending on your hiring practices, your business may use standardized application forms to screen job applicants. Although application forms can help distill and extract important information about applicants, such as their employment history and whether they are permitted to work in Canada, there are limits on the information that can be requested

To ensure that your business is not requesting prohibited information, you should have an application form drafted or reviewed by Ontario legal counsel.

### **(c) Employment Standards Act (Ontario)**

The *Employment Standards Act (Ontario)* (ESA) and its regulations provide minimum standards for employee wages, hours of work, vacation and leave entitlement, and notice on termination, among other things. Some employees may, however, be exempt from these standards. Often the distinction is made based on whether the employment is managerial in nature, or not. The ESA provides various exemptions for professionals and employees in managerial positions. Employers should discuss this issue with Ontario legal counsel.

### **(d) Employee Wages**

Employees have a right to be paid on or before their scheduled pay date via either cash or cheque. Employers may alternatively pay their employees by direct deposit if:

- The employee consents;
- The employee is the only person authorized to access the target bank account; and

- Unless the employee agrees otherwise, the financial institution is located within a reasonable distance from the location where the employee usually works.

### **(e) Working Hours**

There are restrictions on the number of hours an employer can require employees to work in a workday or work week. Generally, an employee cannot be required to work over eight hours per workday, or 48 hours per work week without prior agreement, or in some cases, without prior approval from the Ministry of Labour.

Employers must also permit employees to take eating breaks at least every five hours and allow their employees a minimum number of hours free from work each day, week, and two-week period.

### **(f) Public Holidays and Vacations**

There are nine statutory holidays in Ontario. Generally, employees are entitled to take these days off with holiday pay. Alternatively, employees may agree to work on a statutory holiday and receive a premium wage or, take a substitute day off with holiday pay.

In addition to the statutory holidays, employees are permitted at least two weeks of vacation time for each 12-month period they work. Employees are also entitled to vacation pay. This pay may either be added to the employee's paycheque generally or paid when vacation time is taken.

### **(g) Leave**

Employees are permitted to take unpaid leave from work when certain situations occur. These include:

- Personal or family injury, illness or emergency;
- The employee becomes pregnant; or

- The employee or their spouse gives birth or adopts a child. See our publication on Pregnancy and Parental Leave [here](#).

Employers are required to allow the leave for prescribed periods of time and must allow the employee to return to his or her job when the permitted leave period ends.

### **(h) The End of the Employment Relationship**

Generally, for indefinite employment agreements, employees must be given notice (or pay in lieu of notice) if their employment is terminated without cause. Whether or not an employee is entitled to receive notice of termination and/or other compensation depends on how and why their employment ended.

Employers should consult with Ontario legal counsel to ascertain what reasonable notice would be required, and if any other payments must be made when an employment relationship is terminated. For more information, please see our FAQ on Employee Terminations [here](#).

## **6. ESTABLISHING STORE POLICIES**

The best time to establish policies and procedures for your retail business is during the planning stages. By anticipating problems before you open your doors, you can choose how you will handle special situations, as well as the normal day-to-day operations. This helps avoid making mistakes while you are serving customers.

A company's workplace policies and expectations for employees should be communicated in an employee handbook. Regardless of the size of your business, a handbook may be useful for the following reasons:

- Legal Requirement: there is a requirement that businesses have a

- written record of certain workplace policies;
- Historical Record: it provides a useful tool to prove what business policies were in place at a given point in time in the event of any legal challenge;
- Clear Expectations: An employee handbook removes any ambiguity with regards to what is expected of employees;
- Uniform Business Standards: it helps standardize the corporate culture and rules across multiple offices; and
- Access to Information: an employee handbook allows employees to easily determine what is expected of them in a particular situation.

## **7. OCCUPATIONAL HEALTH AND SAFETY AND WORKERS COMPENSATION**

Employers must also comply with *Ontario's Occupational Health and Safety Act* (OHS). The OHS seeks to keep workplaces safe for workers. Ontario's Ministry of Labour will investigate when there is an accident involving workers, or if a complaint is made. Employers who violate the OHS can face severe penalties.

In addition, most Ontario employers are required to obtain Ontario Workplace Safety and Insurance Board (WSIB) coverage for their employees. The WSIB provides insurance for injuries and illness experienced in workplaces and supports early and safe return to work for injured workers. WSIB coverage also protects employers from lawsuits related to work injuries and from the direct costs of these injuries. If a business is required to register with the WSIB and fails to do so, it could face penalties, including fines up to \$100,000 and/ or imprisonment.



## 8. **PRIVACY CONCERNS: PROTECTION OF PERSONAL INFORMATION**

Depending on the type of business you operate, or how you communicate with customers, suppliers, and other business contacts, your business may be subject to rules regarding protecting private information and digital communication. This section will provide a brief overview of these rules.

### **(a) Personal Information**

What Information is Protected?

Under privacy legislation, organizations must protect all personal information they collect. Personal information is any information that can be used to identify an individual. This may include such data as customer names, addresses and telephone numbers.

Organizations must be very careful as personal information can be collected in a myriad of ways, such as customer mailing lists and in-store surveillance cameras.

*Is Your Business Affected?*

All organizations that collect, use or disclose personal information through commercial activities are required to comply with federal and provincial laws designed to alleviate consumer concerns about information privacy. If your organization conducts business in Canada and collects personal information, then it is likely affected.

*Obligations*

To comply with the law, your business will have to be careful how it collects and stores information. In general, when collecting information, organizations must ensure that the person who provides the information is fully aware of how and why the information is being collected and provides his or her consent to the collection.

Regarding storage, regardless of the format by which your organization stores information, you need to have safeguards to ensure the information is protected. The types of safeguards required will depend on the sensitivity of the information your organization collects and may include both physical and digital protections. There is also a limit on how long your organization may store information.

It is important to discuss compliance with legal counsel to ensure you are not violating your customers' rights. For example, something as simple as failing to alert customers that you use security cameras prior to them entering your store would result in a violation of the law.

For more information on the law regarding the collection and protection of personal information, please speak with us by emailing [lhegedus@houserhenry.com](mailto:lhegedus@houserhenry.com).

### **(b) Closed Circuit Television (CCTV)**

If your business has a physical space, you will likely want to secure your premises. Closed circuit television, or video surveillance, is a common form of security in most retail stores. If you choose to adopt this measure, your video surveillance practices must comply with the *Personal Information Protection and Electronic Documents Act*. If the recordings capture sound, then you must also consider the *Criminal Code* provisions dealing with the collection of private communications.

The Privacy Commissioner of Canada has a list of the 10 key things you should do when considering, planning and using video surveillance:

- 1) Consider a less privacy-invasive alternative.
- 2) Establish the business reason for conducting video surveillance and use video surveillance only for that reason.

- 3) Develop a policy on the use of video surveillance.
- 4) Limit the use and viewing range of cameras as much as possible.
- 5) Inform the public that video surveillance is taking place.
- 6) Store any recorded images in a secure location, with limited access, and destroy them when they are no longer required for business purposes.
- 7) Individuals have the right to know when they are being recorded so be ready to answer questions from the public.
- 8) Give individuals access to information about themselves.
- 9) Educate camera operators on the obligation to protect the privacy of individuals.
- 10) Periodically evaluate the need for video surveillance.

## 9. ANTI-SPAM LEGISLATION

Under Canada's Anti-Spam Legislation (CASL), there are limits on when electronic messages, including emails, can be sent for a commercial purpose. A commercial electronic message (CEM) is any electronic message sent to an electronic address for the purpose of conducting a commercial activity. This includes an offer to buy or sell products or services, an advertisement or a promotional message for a business or individual.

This means that routine activities, such as sending email messages to customers and operating your company's website, may be affected.

Under CASL, your organization is required to obtain consent before sending any business emails, except in certain permitted exceptions. All business emails are required to include information about your organization and a simple and effective unsubscribe feature.

It is crucial to ensure your organization is not sending emails that violate CASL, as your organization could face a penalty of \$10 million, in addition to being liable to any individual that received an infringing message.

Effective July 1, 2017 a private right of action comes into force under CASL. Under the private right of action individuals can sue for damages of \$200 per violation to a maximum of \$1 million/day.

For more information on anti-spam legislation, please see our publication providing an overview of anti-spam legislation [here](#), and our publication on complying with anti-spam law [here](#).

## 10. COMPETITION ACT (CANADA) (the "Act")

The Act is intended to protect consumers from anti-competitive practices.

### (a) Price Maintenance

One such anti-competitive practice under the Act is price maintenance.

Price maintenance may occur where a person (i) by means of agreement, threat or promise, influences upward or discourages the reduction of, another person's selling or advertised prices; or (ii) refuses to sell a product to or otherwise discriminates against any person or class of persons because of the low pricing policy of that other person or persons.

For example, price maintenance may occur where a supplier controls the price at which the downstream firm is selling their product.

To be found guilty of price maintenance under the Act, the misconduct must have had, is having or is likely to have an *adverse effect on competition in a market*.

Therefore, the investigative authority must determine what constitutes an 'adverse

effect on competition' and define the relevant 'market'; neither of which is a simple task.

### **(b) Ordinary Price / Sales**

Most retailers will at some point hold a 'sale' for certain items or have outlet stores that sell items at a 'discount'.

This raises the question of what constitutes a sale?

Under the Act, to make a valid claim that an item is for 'sale' or is priced at a 'discount', the company or other suppliers in the *relevant geographic market* must have either:

- (i) sold a substantial volume of these products within a reasonable period of time before or after making the representation (Volume Test); or
- (ii) offered the product for sale in good faith for a substantial period of time recently before or immediately after making the representation (Time Test).

### **Additional Resources**

We invite you to access related articles on the topics we have covered in this guide, available on our website at [www.houserhenry.com](http://www.houserhenry.com).

We also encourage you to contact us with any further questions or thoughts at 416-860-8032 or email us at [lhegedus@houserhenry.com](mailto:lhegedus@houserhenry.com).

[Product Liability](#)

[FAQ - Employee Background Checks](#)

[Pregnancy Leave and Parental Leave in Ontario](#)

[FAQ - Employee Terminations](#)

[Two-Step Process for Complying with Canada's New Anti-Spam Legislation](#)

[Before Your Business Hits "Send"; Preparing for Canada's Anti-Spam Legislation](#)

As noted above, it is important to determine the relevant geographic market. That market may be determined by several factors such as the market reach of the representation, the number and location of competitors, the likelihood of travel to purchase the product in question and the location of consumers reached by the representation.

Even if someone fails the Volume Test or Time Test, it may not be a violation under the Act if the person can establish that his or her actions were not materially false or misleading.

### **11. CONCLUSION**

If you have made the decision to establish or expand a retail business in Ontario, we congratulate you on embarking on this exciting journey. We hope the topics discussed in this guide on leasing, licenses, employees and human resources, and privacy and anti-spam legislation, have provided you with a basic outline of some of the key legal issues to be considered when operating a retail business in Ontario.

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## About HHS

Since 1934, Houser Henry & Syron LLP has provided legal services to Canadian and foreign private businesses, helping them deal with complex legal challenges to grow and to manage risk successfully. We help our clients with mergers and acquisitions, commercial real estate, reorganizations, shareholders disputes and agreements, commercial agreements, employment issues and financing. We also pride ourselves in practising in *Plain English*.