

“At-Will” Employment in the U.S. – It’s a Trap!

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by Aaron Goldstein

Many Canadian employers expanding into the U.S. believe the U.S. legal presumption of at-will employment will provide them with additional protection against wrongful termination claims. Unfortunately for those employers, this belief is a trap.

In Canada, employees who are terminated without cause often must be paid severance. In the U.S. however, an employer is generally not obligated to pay severance when an employee is fired without cause unless there is a contract requiring severance.

The reality in the U.S. is that essentially every employee falls into an exception to the at-will employment doctrine. Wrongful termination claims in the U.S. are almost always discrimination or retaliation claims. In the former claim, the employee alleges that they were terminated due to some protected characteristic such as age, gender, or race. In the later claim, the employee alleges that they were terminated because they engaged in some protected activity, such as taking protected leave or complaining about workplace harassment. Once an employee alleges discrimination or retaliation, the presumption of at-will employment falls away and the employer must demonstrate a legitimate non-discriminatory and non-retaliatory reason for the termination, which the employee cannot show was a mere pretext.

Because just about every employee is in some protected class or has recently engaged in some protected activity, U.S. employers must have a legitimate reason for the termination supported by strong documentary evidence. Otherwise, the employee gets to tell their story to a jury predisposed to rule against any employer who cannot provide a satisfying reason why they terminated that employee.

And U.S. juries over the last several years have rendered several devastating verdicts, including a \$366 million verdict handed down by a Texas jury in a case alleging race discrimination. As this case demonstrated, these verdicts are not limited to states with a reputation for being employee friendly such as California.

Employers’ best defense against such verdicts is a strong performance management

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system that documents the legitimate non-discriminatory and non-retaliatory reasons for a termination. This requires documenting performance issues over time, not coming up with and documenting reasons after the fact. Even better, if an employer can show, with documentation, that they tried to help the employee be successful, but the employee lacked either the ability or the inclination to do so, it can help stop an employment claim before it can move much past the demand letter stage.

Canadian companies taking on employees in the U.S. should make sure they have a firm grasp of the kinds of performance management practices that will keep them out of trouble. Relying on at-will employment alone is a recipe for disaster.