

Damages: The Dark Side of Having Employees in the United States

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by Aaron Goldstein

Canadian employment law is, in many ways, far more employee favorable than U.S. employment law. With the exception of a few states, employment in the United States is “at-will.” This generally means that either the employer or the employee may terminate the employment relationship without cause and without notice, so long as the reason for the termination is not discriminatory (e.g., based on age, race or gender) or retaliatory (e.g., in retaliation for the employee engaging in whistleblowing activity). U.S. employees also have far fewer privacy rights in the workplace. Employees generally have no expectation of privacy in any computers or other electronic devices provided by the employer.

However, there is one aspect of employment law that is far more treacherous and unpredictable in the United States—that is, the monetary damages available to employees who successfully sue their employers.

Under U.S. law, an employee alleging that he or she was terminated for a discriminatory reason may seek lost wages including both “back pay” and “front pay.” Back pay consists of all of the wages the employee would have earned, from the date of termination through the date when the court issues an award, had the employee not been terminated. If the employee has not found a new job by that time, this amount can be well over a year’s pay and includes not just base salary, but any bonus, overtime, and fringe benefits the employee would have earned. Front pay consists of all the wages the employee would have earned *going forward* from the award. Juries can award lost wages all the way through the employee’s expected date of retirement. A 40-year-old employee could be awarded 25 years of lost wages (through the typical retirement age of 65) where the jury believes that the employee is unlikely to find another job.

Even where the employee finds a new job, the former employer can be on the hook for the difference between what the employee is making at the new job and what the employee expected to make at the old job. For example, a 35-year-old employee who is making \$20,000 a year less could seek an award of \$600,000 in lost wages (through age

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65).

In addition to lost wages, employees may seek emotional distress and punitive damages. Juries have broad discretion to award employees emotional distress damages resulting from an improper termination. These emotional distress awards can rise well into the six-figures. In 2009, a federal appellate court upheld a \$1 million emotional distress award. Employees may be entitled to punitive damages where a jury finds that the employer discriminated against the employee “with malice or reckless indifference.” While punitive damages are limited by statute in certain cases, they are not capped in others. Where punitive damages are uncapped, they can easily reach six figures and can sometimes exceed \$1 million where the employer’s conduct is found to be particularly heinous.

Finally, employees are usually entitled to recover their attorney fees, even if they recover only a fraction of the damages they are seeking at trial. What is more, employees are rarely required to pay their former employer’s attorney fees if they lose.

While employees may appear to have fewer rights under U.S. employment law, the consequences for the employer if those rights are violated can be extreme. Canadian companies who are taking on employees in the United States should take care to consult with experienced employment counsel to assess their employment practices and avoid the substantial liability that can result under U.S. law.