

Employment Terms and Terminations: It's Different in the States

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by Aaron Goldstein

Employers sometimes include fixed terms of employment in their employment agreement. Sometimes a fixed term is meant to prompt the parties to renegotiate at the end of the term. Sometimes a fixed term is meant to document the point in time where the parties have, in fact, agreed that the employment will end. Sometimes a fixed term is designed to create a point in time where the employer can end the employment without having to pay severance. But sometimes employers include a fixed term in an employment agreement without carefully considering the legal consequences. Under U.S. law, those consequences can be significant.

One fundamental difference between employment law in Canada and employment law in the United States is the concept of “at-will” employment. Unlike Canada, where an employer must generally have cause to terminate an employee without having to pay damages, in the United States, an employer may generally terminate an employee for any non-discriminatory and non-retaliatory reason, so long as the employer and the employee have not entered into an employment agreement that says otherwise (with the exception of Montana, where employment is not “at-will”). Put another way, as long as the employer is not terminating the employee’s employment for a reason related to the employee’s age, race, gender, sexual orientation, etc., and so long as the employer is not terminating the employee’s employment because the employee engaged in protected activity (such as taking pregnancy leave, whistleblowing, reporting harassment, etc.), the employer can terminate the employee’s employment without paying damages. In the absence of an agreement to the contrary, U.S. law presumes that employees are employed “at will.”

Employers and high-level employees in the United States frequently enter into employment agreements that they intend to supersede the presumed at-will relationship. They do so by including provisions in the employment agreement that provide for severance to the employee if the employer terminates the employee’s employment without “Cause” (as defined in the employment agreement), or if the employee quits for “Good Reason” (also as defined in the employment agreement).

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Employers, however, can sometimes *unintentionally* destroy the at-will employment relationship by including provisions that U.S. law interprets as incompatible with at-will employment. One way this can happen is if the parties include a provision stating the duration or “term” of the employment agreement. Where an employment agreement states that the employment shall continue for a certain period of time, U.S. courts may interpret that provision as giving the employee the *right* to employment for the term of the contract. This means that if the employer terminates the agreement before the end of the term and the employee has not breached the agreement, the employer will be liable for the pay and benefits the employer would have paid the employee had the agreement continued through the end of the term. What is worse, the employee’s mere poor performance may not constitute a sufficient breach of the employment agreement to excuse the employer from paying what the employee would have earned through the end of the term.

Even where the employment agreement gives the employee a right to severance if the employer terminates the employee without cause, including a fixed term of employment in the employment agreement can potentially entitle the employee to pay through the end of the term *in addition* to the severance upon which the parties agreed if the employee is terminated without cause. Again, this is because a fixed term can create a right to employment for the duration of that fixed term.

If an employer subject to U.S. law intends to employ someone at-will, the employer should simply not include a fixed term of employment, but instead include an “at-will” disclaimer. If an employer subject to U.S. law intends to offer an employee severance if the employee is terminated without cause and has no plans to otherwise limit the duration of employment, that employer should also not include a fixed term of employment.

Where an employer does intend to hire an employee for a fixed duration but wants to retain the ability to terminate the employee without paying the employee through the end of the fixed term, the employer must include terms in the employment agreement that make that intent clear. For example, the agreement could specifically state that the parties anticipate the agreement ending on a certain date, but that the employee’s sole entitlement should employment end sooner is the severance package described elsewhere in the agreement.

Employers must take care when including fixed terms of employment in their employment agreements. Otherwise, they might be on the hook for a lot more than they bargained for.