

# Top U.S. Employment Law “Gotchas” for Canadian Companies

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As a U.S. employment lawyer who advises numerous Canadian companies, I’ve seen several traps that Canadian companies frequently fall into. The first step in avoiding these traps is to identify them.

## 1. At-Will Employment is Trap.

One of the biggest differences between Canadian and U.S. Employment law is so called “at-will” employment. Theoretically, employers in the U.S. can fire employees without cause and not have to pay severance. But as I like to tell my clients, this means that you can fire employees in the U.S. for any reason you want ... except for the 1.7 million reasons you can’t. If an employee is in a protected class (e.g. on the basis of age, race, national origin, sex, etc.) or if an employee recently engaged in protected activity (e.g. whistleblowing, protected leave, etc.), then the employer must have a legitimate nondiscriminatory and nonretaliatory reason for the termination. Practically every employee falls into at least one protected class or has engaged in some kind of recent protected activity. With the level of skepticism that U.S. juries now view employers, U.S. employers need strong evidence of a legitimate basis for any termination. This means that employers who terminate employees in the U.S. without a good *and well-documented* reasons are likely to face liability.

## 2. Probationary Employment is a Trap.

While it might make sense for a Canadian employer to include a probationary period in its employment agreement to avoid paying severance after an early termination, this practice can backfire in the U.S. U.S. courts have interpreted such probationary periods as an agreement by the employer to terminate the employee only for cause after the probationary period. In other words, the employer loses whatever protection at-will employment offers in the U.S. And while at-will employment can be a trap, at-will employment does mean that employers don’t have to pay any kind of *statutory* severance for a layoff or reduction in force. Just remember to have a good and well-documented reason for the termination as discussed above.

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### 3. The Cost of Litigation and Settlement is a Trap.

When Canadian employers see the kinds of settlements that plaintiffs in the U.S. are demanding and the kinds of awards that juries in the U.S. are making, it can make their eyes water. Plaintiffs in the U.S. regularly demand six figure settlements for emotional distress in wrongful termination cases that do not allege any outrageous behavior other than the wrongful termination itself. And at mediation, these same plaintiffs are demanding six figure attorney's fees settlements, not because their attorneys have spent that much in fees (they are almost always paid on contingency anyway), but because they can make *you* spend several hundred thousand dollars in legal fees if you don't settle. In February 2023, a Texas jury awarded a single plaintiff in a discrimination suit \$366 million in damages. That number was later reduced on appeal, but if a jury in conservative Texas is willing to award that kind of money to a single plaintiff, the sky is no longer the limit.

Canadian employers have to price this reality into the cost of having less than stellar performance management and documentation practices in the U.S. Canadian employers who think they can just settle with U.S. based employees whom they want to fire without solid documentation justifying the termination are going to have some serious sticker shock.

### 4. The Sheer Number of Rules and Penalties is a Trap.

As an attorney who represents employers, my biggest frustration with U.S. employment law is not that it is pro-employee. I understand the need to balance the scales, especially in regard to lower wage workers. My biggest frustration is that the sheer number, complexity, and opacity of U.S. employment laws and regulations means that good employers who are really trying to comply with the law still being subject to massive liability. Whether it's a multi-million-dollar class action brought under arcane pay transparency laws in Washington, or a \$4,000 per employee pay stub and wage statement violation in California for even tiny errors, U.S. law is an absolute minefield. Canadian companies looking to expand into the U.S. cannot afford to wing it when it comes to employment law compliance. While good U.S. employment law advice can be expensive, it is always many orders of magnitude cheaper than the liability companies will face if they go it alone.