

What “At-Will” Employment Means for Canadian Companies with U.S. Employees

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by Aaron Goldstein

One of the biggest differences between employment in Canada and employment in the United States is the fact that, with the exception of a few jurisdictions, employment in the United States is “at will.” While in Canada employees who are terminated without cause often must be paid severance, in the absence of a contract requiring severance, a U.S. employer is generally not obligated to pay severance when an employee is fired without cause.

This fact has important implications for Canadian companies taking on employees in the United States. 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 with U.S. employees. U.S. courts have interpreted such probationary periods as evidence of an agreement that the employee will only be terminated for cause after the probationary period ends—undermining the presumption of at-will employment under U.S. law.

Canadian companies should be sure to include disclaimers in any employment agreements or employee handbooks used with U.S. employees explaining that their employment is at-will. While the presumption of at-will employment in the United States can be great for employers, there are many ways in which this presumption can be lost. Promises that employment will continue for a particular period of time or that employees will be subject to particular progressive discipline procedure can undermine an employer’s ability to fire an employee at will. Clear at-will disclaimers help prevent the presumption of at-will employment from being undermined.

It is also important to understand the limitations of at-will employment in the United States. While employers do not need cause to terminate employees, employers may not terminate employees for a long list of reasons that are deemed illegal such as the employee’s age, gender, race, religion, national origin, disability, or age (if over 40), or the fact that the employee made a protected work-related complaint, for example, about being discriminated against or a safety issue in the workplace.

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Canadian companies taking on employees in the United States should make sure they have knowledgeable counsel regarding the benefits and limitation of at-will employment—both to enjoy its benefits and to avoid its pitfalls.