

The Employment Laws of Canada and the U.S. Vary Dramatically

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We frequently work with Canadian companies that are embarking upon or expanding their U.S. activities. At some point during our initial meeting with the principals of such a company, we turn to the topic of employment law. I like to preface the discussion of that topic by saying "Now I'm going to make you smile."

The principals generally then give us quizzical looks with hints of smiles. We proceed to explain that employment in the U.S. is "at will," meaning that, in the absence of an employment agreement, a union contract or an established employment policy, the employment relationship is severable by either party at any time and for any reason or no reason at all without:

- there needing to be "cause" for the termination;
- needing to give advance notice; or
- the employer's needing to pay severance.

"At will" employment is completely antithetical to Canadian employment law principles. Under those, in order to terminate an employee's employment, there typically must be "cause," the employer must give the employee notice of termination for a period of the time before the termination is effective and the employer must pay the employee severance.

Given this dramatic variance between Canadian and U.S. employment laws, Canadian employers are well-advised not to, in "knee jerk" fashion, treat U.S. employment situations and issues as they would handle those in Canada.

For example, given that employment is "at will" in the U.S., employers there frequently do not need to enter into employment agreements with employees.

In our experience, we have observed that Canadian employers more frequently enter into employment agreements with their employees than do U.S. employers, and that may be to button down most favorably as contractually possible these elements:

- the employer wants an expansive list of events that are "cause" for termination to provide the employer broad flexibility to sever the relationship;
- the employer wants to provide the minimum amount of notice of termination possible; and
- the employer wants to pay the minimum amount of severance pay required.

These desires are tempered by the fact that employers compete for good employees, and an employer may not be able to hire the best or even good employees if the employer "races to the bottom" and offers the least favorable terms to employees.

Under employment "at will," U.S. employers often do not need employment agreements to button down those elements in their favor.

Further, by offering and entering into employment agreements with U.S. employees that provide the terms and provisions of Canadian employment agreements, an employer may unnecessarily tie its hands and reduce its flexibility in its ability to deal with U.S. employees.

Many U.S. employees, including senior level employees, have never had employment agreements and do not expect a new employer to offer one.

In order to entice a desired employee to leave his or her existing employment, a new employer may need to offer an employment agreement providing a commitment to employment for a specified term (rather than having it simply "at will") and additional benefits, and U.S. employers offer employment agreements in those situations.

In addition to providing a commitment to employment for a "term," employment agreements often include other provisions in the employer's favor, such as

- "Confidentiality" -- the employee's agreement not to disclose the employer's confidential information;
- "Non-competition" -- the employee's agreement not to compete with the employer for a period of time following the termination of employment in a specific territory; and
- "Non-solicitation" -- the employee's agreement not to solicit the employer's customers, suppliers or other employees following termination of the employee's employment.

If a U.S. employee is not given an employment agreement with a commitment to employment for a term, the above protections are often provided in a separate "confidentiality, non-competition and non-solicitation agreement."

In summary, Canadian employers should pause before treating U.S. employees as their Canadian employees and offer employment agreements only when necessary, not routinely or as a matter of general practice.

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