

“At-Will” Employment Can Be a Trap for Canadian Companies with U.S. Employees

September 21, 2026 – Cross-Border Counselor

by Aaron Goldstein

One of the biggest differences between employment in Canada and employment in the U.S. is the fact that, with the exception of a few jurisdictions, employment in the U.S. 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.

Canadian companies sometimes understand this to mean that they have more flexibility to terminate employees in the U.S. This is often a mistake. While employers do not need “cause” to terminate employees, employers may not terminate employees for a discriminatory reason, such as the employee’s gender, race, religion, national origin, disability, or age (if over 40). These categories are referred to under U.S. law as “protected classes.”

Employers also may not terminate an employee for engaging in certain “protected activity”, such as taking legally protected leave or engaging in various kinds of whistleblowing activity. What is more, U.S. law presumes that an employee who is terminated shortly after engaging in such protected activity was retaliated against, absent sufficient evidence from the employer that the employer had a legitimate, non-retaliatory reason for the termination.

Between the long list of protected classes and protected activity the vast majority of employees can raise a claim for wrongful termination, absent well-documented evidence from the employer justifying the termination. In other words, at-will employment, as most people think of it, rarely applies. And even where employers have some evidence supporting a termination, that employer may still have to go to trial to prove that the termination was proper. To avoid trial through a motion for summary judgment, the employer’s documentation must be extensive and clear. Otherwise, that employer may spend over half a million dollars on trial defending the termination of an employee who was paid a tenth that amount in annual salary.

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The presumption of at-will employment in the U.S. does have its benefits for employers and employers should take steps, such as including at-will disclaimers in employment agreements, to preserve the at-will presumption. However, Canadian companies taking on employees in the U.S. should make sure they have knowledgeable counsel regarding the benefits and limitation of at-will employment—both to enjoy its benefits and to avoid liability where at-will employment does not apply.