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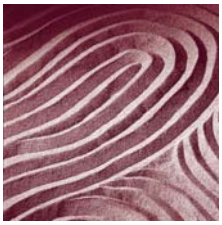

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Patricia Forte
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Employers find a different world up (or down) there

Walter Stella and Patricia Forte / Special to The National Law Journal

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U.S. and Canadian companies wishing to conduct cross-border business, and those that already have established cross-border operations, need to be mindful of fundamental legal differences in their legal obligations to employees.

As a general rule in the United States, an employment relationship for no specific duration may be terminated at any time, for any reason or for no reason at all. The mere existence of an employment relationship in the United States affords no expectation that employment will continue, or that it will end on certain conditions. This concept is generally referred to as the at-will employment doctrine.

While at-will is often the starting point in the United States, the parties are free to alter the at-will relationship. The employment relationship is fundamentally contractual. Therefore, the parties are free to define their relationship as they wish, including the terms on which it can be ended.

One example of a contractual departure from at-will status is an agreement that the employee will be terminated only for good cause, as that term is defined under the agreement. The employer and employee also may enter into an agreement that the employment relationship will continue for a specified term, or upon the occurrence of a specific event.

The contractual understanding need not be express, but may be implied in fact, arising from the parties' conduct evidencing their actual mutual intent. U.S. courts typically examine the totality of the circumstances to determine whether the parties' conduct gave rise to an implied-in-fact contract. In reviewing the totality of the circumstances, courts seek to enforce the actual understanding of the parties to an employment agreement as evidenced by their conduct.

Several factors may bear upon the existence and content of an implied-in-fact agreement. These factors include the personnel policies or practices of the employer; the employee's longevity of service; actions or communications by the employer reflecting assurances of continued employment; and the practices of the industry in which the employee is engaged.

The law in this area is unsettled. Courts in many instances have determined that employers in the United States had altered the at-will relationship through their written and unwritten policies and practices, or informal assurances to employees during the course of the employment relationship. However, some U.S. courts have held that long duration of service, regular promotions, favorable performance reviews, praise from supervisors and salary increases are a natural consequence of the employment relationship and do not alone imply an employer's contractual intent to relinquish its at-will rights. See, e.g., *Horn v. Cushman & Wakefield Western Inc.*, 72 Cal. App. 4th 798, 817-819 (1999). The issue is whether the employer's words or conduct, on which an employee reasonably relied, gave rise to that specific understanding.

There are many legal exceptions to the at-will doctrine in the United States. For example, various federal and state discrimination statutes limit an employer's ability to discharge an employee on the basis of a statutorily protected classification regardless of at-will status. Other laws prohibit an employer from retaliating against an employee for exercising legally protected rights.

Courts also have created various public policy exceptions to the at-will doctrine. Thus, although employers in the United States may not face the same limitations on their contractual rights to terminate an employee at will as do employers in other countries, they must not violate the myriad state and federal employment laws that govern the employment relationship in the United States.

Notice demanded in Canada

In Canada, the concept of "at will" employment does not exist. As in the United States, employment relationships in Canada are fundamentally contractual. However, all written and verbal employment contracts of no specific duration contain an implied term that if an employer ends the employment relationship for any reason (other than for "just cause"), the employer is legally obligated to provide the employee with advance reasonable notice of termination of employment, or alternatively, payment in lieu of such reasonable notice.

Generally speaking, a termination without cause in Canada requires giving an employee advance notice that his or her employment will end. The concept of "reasonable notice" is meant to afford an employee sufficient opportunity to look for and secure alternate employment so that there is no gap in employment.

Instead of notice of termination, an employer can end employment immediately and pay an employee the wages or salary equivalent of the working notice that would have otherwise been

given to the employee. Compensation is based on the salary, benefits and certain other perquisites that the employee would have received had he or she been permitted to work over the notice period.

An employee who is not given "reasonable notice" of termination may bring a lawsuit for wrongful dismissal, claiming damages equivalent to the amount of wages or salary, benefits and perquisites to which he or she would have been entitled if proper and reasonable notice of termination had been given. In addition, an employee may sue an employer for punitive damages when employees are not provided with sufficient reasonable notice and are, for example, subjected to discriminatory and harassment behavior. See *Keays v. Honda Canada Inc.* [2006] O.J. No. 3891 (Ont. Ct. App.).

Canadian federal, provincial and territorial employment standards legislation prescribes minimum reasonable notice periods regarding the termination of employment. These minimum notice periods may vary slightly among jurisdictions, but the general formula is linked to an employee's years of service and is usually equal to one week of notice, or pay in lieu of notice, per year of service up to a certain maximum.

In some jurisdictions, severance pay requirements are mandated in addition to "termination notice" or "termination pay." In Ontario, for example, the Employment Standards Act of 2000 requires an employer to pay severance pay when an employee has been employed by the employer for five years or more and, the employer has a payroll (in Ontario) of at least $2.5 million, or the severance occurred because of a permanent discontinuance of all or part of the employer's business and the employee is one of 50 or more employees who have their employment relationship severed within a six- month period. Severance pay is based on one week of wages or salary for each year of service, to a maximum of 26 weeks.

The art of common law notice

Common law is often invoked in Canada to increase the minimum notice period prescribed by legislation. The assessment of common law notice is an art rather than a science.

There is no formula to calculate a "reasonable notice" period in common law. Common law notice is determined on a case-by-case basis by assessing various factors about the employee, the nature of the employment and the manner in which the termination was effected.

Factors that are taken into account include the age of the employee; the employee's position, expertise, educational background and training; the prospects for re-employment in the same geographical area; and whether the employee was induced to leave secure employment in order to join the current employer.

Common law notice can greatly exceed the minimum notice period prescribed by legislation. Older and long-tenured executives and managers are typically entitled to a lengthier notice period than younger and short-tenured junior administrative or clerical employees. For example, some judges and lawyers apply an unofficial guideline to assess the notice period for executives, managers and other senior employees who have a lengthy tenure of employment in the range of about one month per year of service. That same guideline would probably not be used to assess the notice period for a young, junior employee with a short tenure of employment.

The cap on common law reasonable notice periods is 24 months. It is rare, but possible, for the court to exceed this cap in special circumstances. See *Lowndes v. Summit Ford Sales Ltd.* [2006] O.J. No. 1438 (Ont. Ct. App.); *Kilpatrick v. Peterborough Civic Hospital* (1998), 38 O.R. (3d) 298 (Ont. Gen. Div.).

Good faith and fair dealing

One term that is implied in every employment relationship in both the United States and Canada is an implied covenant of good faith and fair dealing. However, its effect on termination decisions is very different in each country.

The implied covenant in the United States precludes a party from acting in bad faith to frustrate the contract's actual benefits. For example, an employer in the United States breaches the implied covenant of good faith and fair dealing by terminating an at-will employee merely to cheat the worker out of another contract benefit. The covenant does not impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement, however.

This is true even when an employee argues that the termination of employment denied him or her contractual benefits and thus violated the implied covenant of good faith and fair dealing. Because employment at-will allows the employer freedom to terminate the relationship as it chooses, the employer does not frustrate the employee's contractual rights merely by exercising its right to do so. See *Hejmadi v. AMFAC Inc.*, 202 Cal. App. 3d 525, 547 (Calif. Ct. App. 1988).

On the contrary, in Canada the implied covenant of good faith and fair dealing imposes substantive limitations on an employer's right to terminate an employee. If a Canadian employer acts in bad faith in the manner in which it terminates an employee, the employee can be compensated by an increase in the reasonable notice or pay in lieu of notice awarded. These damages are called "*Wallace* damages", named after a 1997 Supreme Court of Canada decision called *Wallace v. United Grain Growers Ltd.* [1997] 3 S.C.R. 701 (Can.).

'Sensitivity, dignity, honesty'

The effect of the *Wallace* decision is that employers are obligated to treat their employees with sensitivity, dignity, honesty and respect, particularly at the time of dismissal. Employers who breach that obligation may be liable for paying a lengthened notice period.

Companies that employ individuals in both the United States and Canada should be aware of the significantly different restrictions and obligations that apply to termination decisions in each country. These differences affect all aspects of the employment relationship. Attention to the terms of hire, the supervision of employment and the manner in which a termination is handled require careful consideration to avoid the potential pitfalls associated with the significant liabilities at stake.

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