

Publication

Ten Key Differences Between Canadian and U.S. Employment Laws

Christina Medland and Joseph Vicinanza

Employers with operations in several jurisdictions are required to meet the standards imposed by local employment laws. There are a number of significant differences with respect to the treatment of employees in Canada and the United States. This bulletin summarizes the key differences between these two jurisdictions.

1. Termination of Employment

Canadian employers are required to give employees at least statutory notice of termination or pay in lieu, and may be required to give lengthier notice or pay in lieu as provided under common law or contract. In the United States employment is generally “at will” and notice of termination by an employer is required only by contract or company policy.

2. Severance Policies

Severance plans or policies are uncommon in Canada because they set a floor, not a ceiling, on severance since they do not override rights to statutory or reasonable notice. Further, in the absence of a collective agreement, notice and severance entitlements are generally determined on an individual basis and are not affected by severance payments made to other former employees of a company. Hence, there is little reason for a standardizing document such as a severance plan. Severance policies or plans are more common in the United States, where companies generally adopt written severance plans. Most severance plans require that the severed employee execute a release of claims as a prerequisite to receiving severance payments. The employer may amend the plans from time to time.

3. Employment Litigation

Employment litigation in Canada tends to result in predictable damage awards and, as a consequence, is generally settled quickly and easily. In the United States, employment litigation against employers tends to be asserted as a claim of human rights discrimination, which employers feel compelled to defend against. This may generate large and unpredictable damage awards, which makes this litigation costly and more difficult to settle.

4. Consideration

Continued employment does not generally constitute valid consideration in Canada. Accordingly, if restrictive terms are added to a Canadian employee’s contract of employment (such as a post-employment non-competition covenant), fresh consideration, such as a raise or an option grant, should be provided. In the United States, state law governs whether continued employment is sufficient consideration for post-employment non-competition agreements. Further, material adverse changes to the terms and conditions of a Canadian employee’s employment can only be made on reasonable notice. In the United States, absent a written agreement or statutory rights (e.g., minimum wages, overtime pay) employment terms are generally subject to modification at will and without prior notice.

5. Restrictive Covenants

Publication

Canadian courts generally enforce non-competition and non-solicitation covenants that are reasonable (given the business interest to be protected) in time, geographic scope and nature of the protected business if they do not unduly limit an employee's ability to secure employment. U.S. courts will enforce non-competition agreements that are reasonable in time and scope, but the restriction must generally be based on protecting the trade secrets or other proprietary rights of the company. Canadian courts do not "blue pencil" or modify restrictive covenants, so a covenant that is too broad will be struck out completely. In the United States, some states will modify the terms of a restrictive covenant, particularly if the covenant contains a blue pencil clause.

6. Compensation Disclosure

The new compensation disclosure rules in the United States are now in effect. Similar disclosure rules were proposed in Canada and were due to be in effect from December 31, 2007, but the Canadian regulators recently announced that the proposed rules may be changed significantly and will not take effect until December 31, 2008.

7. Options

In Canada, the usual tax treatment of a stock option is that the difference between exercise price and fair market value is taxed to the employee at effective capital gains rates at the time the underlying share is disposed of. The company is not entitled to a deduction. This is similar to the tax treatment of an incentive stock option for U.S. purposes. Canada has no equivalent of a non-qualified option.

8. Restricted Stock

Grants of restricted stock are taxed to Canadian employees at the time of grant. Grants of restricted stock are taxed to U.S. employees at the time the restrictions end. For a Canadian employee to obtain tax treatment comparable to U.S. tax treatment of restricted stock grants, Canadian companies instead grant restricted share units, which are notional units with value equivalent to the company's shares. However, there are deferral or deductibility limitations on these types of vehicles, depending on the structure chosen.

9. Changes to Post-Retirement Benefits

In Canada, it is difficult to reduce post-retirement benefits without notice and almost impossible to reduce these benefits for existing retirees. In the United States, there is more flexibility in making changes to these benefits.

10. Human Rights

In both Canada and the United States, discrimination in employment is prohibited on specified grounds such as colour, gender, ethnic origin, religion/creed, age and in some states, sexual orientation. The most significant differences between the two regimes relate to discrimination based on disability. In both jurisdictions, disability-based discrimination is prohibited by legislation (in the United States under the Americans with Disabilities Act and in Canada under human rights codes and the Canadian Charter of Rights and Freedoms), and employers have a duty to accommodate the disability. In Canada, however, the duty to accommodate disability obligates an employer to accommodate an employee's disability to the point of undue hardship to the employer as a whole, and alcoholism and drug addiction

Publication

are recognized as disabilities at law that require accommodation. Workplace drug and alcohol testing in Canada are correspondingly restricted. In the United States, alcoholism and drug addiction (in recovery) are recognized as disabilities. Pre-employment drug and alcohol testing is more common in the United States in certain industries.

Originally published by Torys LLP December, 2007

[Type Name Here]

[TYPE DATE HERE] ■ PAGE 4