

# TrueNorth

## Cross-Border Views on North American Workplace Laws

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Business Reorganization at "Can-Am Widgets": A Case Study of Layoffs in the United States and Canada

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One of the challenges facing employers with employees located in multiple countries is how to implement necessary business reorganizations while complying with each country's employment laws. In this issue of *True North*, we consider a situation where a company needs to lay off employees in both the United States and Canada, highlighting the key differences in termination procedures, as well as tips for drafting a Canadian employment agreement that minimizes liabilities in the event of termination.

The following is a hypothetical situation designed to illustrate cross-border issues in labor and employment law. Ensuring legal compliance in this area is very fact dependent and employers should contact experienced counsel before undertaking any of the actions discussed below.

### Business Reorganization at "Can-Am Widgets": A Case Study of Layoffs in the United States and Canada

Can-Am Widgets has two manufacturing facilities, one in Ontario and the other in Wisconsin. While the corporate office is in Wisconsin, each facility has its own operations staff, including a general manager, sales staff, human resources, accounting, etc. Each facility employs about 300 people, including the front office operations staff. Can-Am makes specialized widgets for the telecommunications and automotive industries.

Because of the downturn in the economy, Can-Am has decided to reorganize its operations and lay off some staff. As part of the reorganization, the company has decided to terminate the Ontario HR staff (three people) and centralize its HR functions in Wisconsin. The Ontario plant's HR staff includes:

- The Director, who has worked at Can-Am for 18 years, is 55 years old and earns \$100,000 base salary;
- A Benefits Analyst, who is 35 years old, earns \$75,000, has only been with Can-Am for 9 months and was recruited away from another employer, where he had worked for 10 years, before the economy turned sour; and
- An HR Generalist who is also 35, has worked for Can-Am for 7 years, and earns \$50,000.

All employees are covered by the company's health, dental and life insurance plan. None have an express employment contract.

Can-Am is also terminating three front office accounting staff from its US facility, who, coincidentally, are the same ages and have essentially the same lengths of experience as the Canadian HR staff. They also do not have employment contracts, and Can-Am's employee handbook contains a provision indicating that each employee is employed "at will." Each of these employees is a Caucasian female; the remaining accounting employees are overwhelmingly female and of various races and ethnicities, but are mostly Caucasian.

The VP of HR contacts his US-based outside counsel, seeking advice on terminating these employees.

**Vice President of Human Resources:** *Let me know if you see any issues here.*

**US Counsel:** For the three US employees, your handbook has an at-will provision, which means you can terminate employees at any time for any reason without prior notice. Unless Can-Am has a severance plan, there's no requirement to pay the employees any severance. From your description, it doesn't appear that the terminations have a discriminatory impact — you're not disproportionately affecting one group at the expense of another since the employees you are terminating appear to be representative of the accounting employees. But the Director is over 40, and age discrimination laws apply to individuals over 40. Otherwise, it appears there are no issues with the terminations under either state or federal law — remember that in the United States, all employers are regulated by the federal government, the states, and sometimes local government too.

Because of the economy, it is taking terminated employees longer to find new comparable work. Accordingly, it may be more likely that they would sue the company. Because of this, you may want to think about offering each employee severance pay in exchange for a release of all potential claims against Can-Am.

**Vice President of Human Resources:** *That's a good idea — how much severance should we offer?*

**US Counsel:** There's no accepted guideline or formula — it's really a question of what the employee will accept. If Can-Am has offered severance pay in the past in exchange for a release, the amounts offered to those employees is a good guideline. As mentioned, one of the employees is over 40 and any release for that employee needs to comply with the Older Workers Benefit Protection Act ("OWBPA") in order to obtain a valid release of age discrimination claims. The OWBPA requires you to provide the employee with a period of time in which to consider the release before signing and a period of time to revoke the release after signing. If the

employee is being laid off as part of a reduction in force, you will have to provide information about the specific employees being laid off, including these employees' ages.

**Vice President of Human Resources:** *Great. But what about the Canadian employees? Usually, terminations there have been handled by the HR Director who we're terminating. I believe she may have a law firm she works with, but it would be awkward to use them given her relationship with them."*

**US Counsel:** I think Canada's in a different country; I don't know anyone there. But US laws offer a lot of protection to employees, so it's probably the same. Have you Googled it?

**Vice President of Human Resources:** *Yes — I found a newsletter on cross-border employment issues called True North — I'll contact those guys.*

The Vice-President reaches out to "those guys."

**Vice President of Human Resources:** *They have all been good employees, but we simply have to cut back. We can handle their functions from the US and I know what we do in the States; is there any difference here?*

**Canadian Counsel:** The first difference is that in Canada, unlike the United States, employers are regulated by the federal government or the provinces, but not both. A small number of employers in certain industries — banks, airlines and telecommunications — are federally regulated. Most employers, like Can-Am, are provincially regulated. Another surprising difference is that the concept of employment "at-will" does not exist. All employment relationships in Canada are contractual. The contract may be in writing or it will be implied with the hiring of the employee. An employer considering termination of an employee in Canada is really terminating a contract with the employee. A process must be followed and generally severance liabilities must be paid in Canada.

**Vice President of Human Resources:** *I didn't know we had a contract with these people. I am sure, however, that we did not have a written contract with any of them. What do we have to do now?*

**Canadian Counsel:** An employer can terminate an employee relationship for cause or by giving the employee reasonable notice of termination. Serious misconduct, neglect of duty, and gross incompetence that persists despite warning may all amount to cause. An employee terminated for cause is not entitled to notice or payment in lieu of notice. Cause does not appear to be a factor in these terminations.

As mentioned, employment may also be terminated by giving an employee reasonable working notice of termination or by paying the employee compensation instead. "Reasonable notice" is an estimate of the time it will take the employee to find comparable employment. Courts consider key employment factors such as age, length of service, position and income in setting the reasonable notice period. An employee who is terminated has a duty to look for work, and the employee's claim will be capped at the point at which comparable employment is found.

Employment standards legislation in Canada — here, the relevant legislation is Ontario's *Employment Standards Act* — establishes minimum notice of termination and severance pay requirements. But those standards are merely minimums and in most cases, an employee's dismissal claim will be greater than the statutory minimums.

**Vice President of Human Resources:** *What exactly are we talking about? How much is this going to cost?*

**Canadian Counsel:** None of these employees have written employment agreements that define payments on termination, so we need to look at each of the employees individually to estimate Can-Am's liability.

- **Director of Human Resources:** 55 years old, with Can-Am for 18 years, earning \$100,000.

Under the *Employment Standards Act* this individual is entitled to 8 weeks notice of termination or 8 weeks termination pay. The employee is also entitled to 18 weeks severance pay for a total of 26 weeks under the statute. Under the common law of dismissal, the employee's position, age and long service would contribute to a

longer notice period in the range of 17 to 20 months. The Company should consider an initial offer to this employee between 12 and 14 months, which encompasses the statutory minimums for notice and severance pay.

- **Benefits Analyst:** 35 years old, 9 months with the Company and recruited away from another employer where he had worked for 10 years, earning \$75,000.

In ordinary circumstances this employee's claim would be a limited one. The employee is at an early stage of his career and has less than a year of service. Under the statute, he would be entitled to one week's notice or pay in lieu of notice. In Ontario, severance pay is not payable to an employee with less than 5 years of service. The common law analysis is more generous, however. An employee at his level with less than one year of service could reasonably expect 1 to 3 months' notice or compensation in lieu of notice. Can-Am's recruitment of this individual adds additional liability. It is likely that a court would give the employee credit for his 10 years of past employment which was interrupted as a result of Can-Am's solicitation. The notice period would likely jump to 9 to 12 months. An opening offer of 6 to 8 months would be reasonable.

- **The HR Generalist:** 35 years old, 7 years of service, earning \$50,000.

Under statute this individual would be entitled to 7 weeks' notice and 7 weeks' severance pay for a total of 14 weeks of minimum payments. In a dismissal claim, the employee would likely be awarded 7 to 10 months inclusive of the 14 weeks of statutory payments. An initial offer of 5 to 7 months would be reasonable.

**Vice President of Human Resources:** *So when you say we owe the employee several months of "reasonable notice," what does that mean in dollars?*

**Canadian Counsel:** In Canada, dismissal awards are aimed at making the employee whole for the period the court determines to be reasonable notice. This means the employee would be compensated for base salary, insured benefits, any bonus, stock option, car allowance, and

other perquisites that the employee would have enjoyed if the employee been given working notice. There are exceptions. For example, a bonus or stock option may specifically state that benefits no longer accrue after the last day of work. To be enforceable, an exclusion of this kind must be clearly stated and brought to the employee's attention at the time the benefit was extended to the employee.

**Vice President of Human Resources:** *What if we just offer to pay these employees their base salary for the notice period?*

**Canadian Counsel:** At this stage, the Company is making an offer and it is possible that the employee may accept the termination package focused on base salary only. However, if the remaining features of the compensation package are significant, Can-Am can expect a demand letter from the employee's lawyer seeking a more comprehensive offer.

In addition, Can-Am is required by the *Employment Standards Act* to continue benefits for the period of statutory notice. That would be 8 weeks in the case of Director of Human Resources, one week in the case of the Benefits Analyst, and 7 weeks in the case of the HR Generalist. If Can-Am terminates benefits after the minimum statutory period but before obtaining a release, the Company could be directly liable for any insured claim that may arise during the period of reasonable notice (e.g., reimbursement for health and dental claims, life insurance proceeds etc.).

**Vice President of Human Resources:** *Is there anything we can do to reduce these costs?*

**Canadian Counsel:** Can-Am has the option of giving the employees working notice for all or part of the anticipated period of liability. Working notice allows the employer to derive the benefit of the employee's productivity while fulfilling its notice obligations. This would only be practical if Can-Am is prepared to implement its transition plan over an extended period of time, and if it is confident that the employees will continue to be constructive members of the workforce knowing that their employment is coming to an end.

Can-Am should also consider its options in paying out the severance packages. Employees who are terminated have an obligation to mitigate their

losses. If the employee finds a comparable job, the employee's claim is contained. Severance offers are often in the form of a lump sum. However, Can-Am could consider structuring its offer in continuing payments which come to an end or are reduced at the point at which the employee is reemployed. If the employee's prospects are good, mitigation will reduce Can-Am's liability. The Company may also want to consider providing relocation counseling to facilitate the employee's job search.

**Vice President of Human Resources:** *How should we go about informing the employees of their termination?*

**Canadian Counsel:** Each employee should meet individually with her manager and an HR representative of the Company. The reason for termination should be briefly reviewed, together with the Company's severance offer. The employee will be provided with the written offer and be afforded a reasonable period of time to confer with a lawyer before deciding whether or not to accept the offer. If the offer is accepted, a final release will be obtained and payments made. If the employee rejects the offer, the Company still must pay minimum statutory payments and benefit continuation.

**Vice President of Human Resources:** *My US counsel suggested we obtain releases from the employees we're terminating in the United States. Can we get an enforceable release in Canada?*

**Canadian Counsel:** Absolutely, so long as the amount paid is more than the amount of the employee's minimum statutory compensation.

**Vice President of Human Resources:** *What happens if we don't reach a settlement with the employees?*

**Canadian Counsel:** One advantage of Canadian dismissal law as compared to that of the United States is predictability. The principles courts follow in determining reasonable notice periods are well known to counsel acting for employees and employers. For this reason, most claims are resolved within a matter of weeks after termination occurs. These three employees are HR specialists and will likely have their own sense of a reasonable outcome.

If the employee is not satisfied with the employer's offer, the employee's option is to bring an action for wrongful dismissal. This is a civil action, which would involve an exchange of pleadings, depositions, court-supervised mediation and, ultimately, a trial. It is extremely rare to proceed to trial in a dispute that is limited to the length of notice period, however.

An age discrimination complaint from the Director of Human Resources is possible, but unlikely. It appears that the Director is affected by a general downsizing in her department, which will also affect two employees at an early stage in their careers. Moreover, the Director's claim at common law is significant and relatively certain. She is more likely to look to the law of dismissal for a remedy than pursue a lengthy and less certain discrimination complaint.

**Vice President of Human Resources:** *Is there anything we can do to avoid liabilities like this in the future?*

**Canadian Counsel:** Yes. Unlike the United States, in Canada, an employment agreement comes into existence with the hiring of every employee. It cannot be avoided. But employers in Canada can take advantage of the contract-based employment relationship to define and limit their obligations.

In Canada, written employment contracts may take the form of a letter or a more elaborate executive contract. Employment contracts generally specify what the employee will receive if the employment relationship is terminated without cause. It is possible to limit liability to the statutory minimums provided that the

agreement is clear and the employee understands its significance. It is often necessary to exceed a minimum termination payment to attract the best candidate, particularly for senior positions. A termination payment above the statutory minimum also allows the employer to obtain a binding release from the employee.

A contract can also ensure that the employer has the flexibility to extend additional duties to the employee and to modify benefits, bonus plans, and other terms as may be necessary. The employer may also wish to include confidentiality, nonsolicitation and noncompetition restrictions in the contract. In other words, the employment contract can be used to the employer's advantage to minimize liability, to ensure that the employer's objectives are achieved and its interests protected during the employment relationship.