Watch Your (Employment Contract) Language—Employment "At Will"

The dangers of using U.S. boilerplate in a Canadian employment contract.

The U.S. may be our biggest trade partner, but there's one American import that Canadian employers should strictly avoid: a boilerplate employment contract. While relying on a standard form agreement from *any source* is ill-advised, boilerplates from the U.S. are especially dangerous to the extent they're designed for employment "at will." The problem is that in Canada, employment is very much not "at will." Consequently, if your boilerplate was drafted south of the border, using it with your own employees can get you into a heap of trouble. Consider the following scenario.

SITUATION

A U.S.-based IT services consulting company hires an experienced Canadian financial professional as director of special projects to work out of its Newfoundland office. The employment contract states that the director's relationship with the company is "terminable at will." **Translation:** Either side can terminate the contract at any time and for any reason or for no reason at all. The clause also says that any dispute arising over this clause will be governed by and construed in accordance with "substantive Canadian employment laws."

The company is disappointed with the director's performance and fires him after just 3 months on the job, effective immediately. The company pays him the 2 weeks' termination notice to which he's entitled under the Newfoundland *Labour Standards Act* (LSA). But the arbitrator says that's not enough and awards the director 5 1/2 months' notice. The company appeals but to no avail.

THE PROBLEM

In Canada, employees terminated without cause are entitled to both:

- Employment standards termination notice (2 weeks in the director's case); and
- What's called "reasonable notice" of termination under common law, a set of employment rules created by judges in court cases that exist side by side with employment standards statutes.

Because it's more generous, employers often try to get employees to give up their common law notice rights and settle for the minimum termination notice required by

the province's employment standards act. But courts won't enforce these waivers of common law notice if they violate the employment standards rules. And that's what happened in this case. Specifically, the phrase "terminable at will" gave the employer the right to fire the director at any time without providing the required LSA notice.

Nor was the language saying that the contract was governed by "substantive Canadian laws" enough to keep termination notice to the LSA 2-week minimum. The rule is that to effectively waive common law notice, the language must be not only compliant with employment standards laws but also completely clear and unambiguous. The phrase "substantive Canadian laws" didn't come close to meeting this standard of clarity to the extent that it could be interpreted as including either the LSA minimum or "reasonable notice" under common law [*Charles River Consultants Corp. v. Coombs*, [2007] NLTD 174].

THE LESSON

DON'T use "at will," or any other language you may see in U.S. contracts that purport to allow an employer to terminate an employee without notice, to try to limit an employee's right to notice of termination. This language may work in the U.S., but in Canada employees have a right to some notice—or damages in lieu of notice—no matter what the contract says. Phrases to avoid:

- "Terminable at will;"
- "Employment at will;" and
- "Employee at will."

DO keep in mind that if you don't say otherwise, the notice to which the employee will be entitled will be "reasonable notice" under common law. You can agree to a shorter notice period in the contract. But to do so you must state as specifically as possible the notice to which you're agreeing. For example, if you want to limit notice to the minimum under your province's employment standards act, make sure you spell this out and specifically cite the provision by section number.