FIRING AT WILL IS A STRATEGY FOR FAILURE OUTSIDE THE U.S.

"At-will employment" is a uniquely American concept. If your company employs people internationally, terminating those employment relationships comes with a range of challenges.

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The concept of "at-will" employment, which refers to the idea that an employment relationship can be terminated at any time for any reason (as long as that reason doesn't violate the law) or for no reason at all, is relatively unheard of outside of the United States. Termination laws in many other countries are heavily weighted in favor of the employee.

As a result, when a company that has employees in countries outside of the United States must end the employment relationship—whether due to a layoff, restructuring, performance reasons, or otherwise—that employer must proceed with caution.

If such a termination is handled incorrectly, the employer could find itself on the hook for significant damages, which may include back pay, front pay, emotional distress damages, fines to the employer and more.

Below are some key issues to consider when terminating international employees.

PROCESS REQUIREMENT

Before making any termination decisions, start with a review of the operative employment contract and the statutory requirements. There will be key statutory and contractual elements to consider including seniority, notice period, severance provision, benefits, and/or whether a collective labor agreement applies that will help to determine the timing, process, and related costs involved in terminating a particular employee.

Another critical component to consider is the basis for the termination. Does your company need to undergo a reduction in force? Are the needs of your business changing? Or do you want to terminate because an employee is failing to meet performance standards or perhaps even engaging in misconduct? There are different paths and requirements to follow to properly effectuate a termination depending on the grounds for termination.

One of the most challenging basis for termination is a termination "for cause." Process requirements to establish termination for cause vary by country, and the burden on the employer often comes as a surprise to U.S.-based employers.

For example, in Singapore, an employer must grant the employee an "inquiry" in which the employee should be allowed to present his case on the grounds for termination. Additionally, an employer may suspend the to-be-terminated employee for no longer than one week and must pay the employee at least half of his salary during the suspension period.

In Mexico, the Federal Labor Law specifically lists the types of conduct that may be deemed to constitute cause. However, the burden is on the employer to substantiate the cause of termination and it should be prepared to provide such evidence to the Conciliation and Arbitration Labor Board and labor courts. In order to create the proper documentation to establish termination for cause, the employer must document the wrongdoing and present it to the employee who has to acknowledge her wrongdoing in writing.

To terminate for cause and without notice in Germany, the notice of termination must be served in writing within two weeks of the employer gaining knowledge of the underlying facts leading to the termination. The written notice of termination cannot be in email or fax form and must include an original handwritten signature of the employer. The notice must contain specific information, and if all information is not included in the notice an employee can claim that the notice of termination is invalid. In addition, if there is a works council at the employer there may be additional notice and consultation requirements.

In the Netherlands, in order to terminate after the probationary period an employer must first obtain prior approval from the relevant authority: either the Employee Insurance Agency (UWV) (in the case of economic grounds or long-term incapacity to work) or dissolution of the employment contract by the court (in the case of performance-related reasons or other personal reasons). Once the employer has approval from the relevant authority, only then can it serve notice of termination to the employee.

In each case, it is critical to ensure that you educate yourself or work with trusted local counsel to ensure you understand local employment laws as they pertain to terminations to reduce the likelihood that you will make an expensive mistake .

PROBATIONARY PERIOD

With some exceptions, the probationary period is a period of time during which an employee may effectively be treated as an employee at will. In many countries, probationary periods in employment contracts are permitted, and can serve as a useful tool for employers to mitigate risk, particularly when it comes to terminations.

The rules and standards vary by role and by country, but generally, probationary periods of 3 to 6 months are not uncommon at the beginning of an employee's employment.

A word of warning: it is not unusual for a prospective employee to attempt to negotiate for the removal of the probationary period from their employment agreement. Be cautious about agreeing to such a request. If you agree and the employee turns out to be a poor fit for the role, you will end up paying significantly more money to the employee upon termination during the early days of their employment.

NOTICE PERIOD

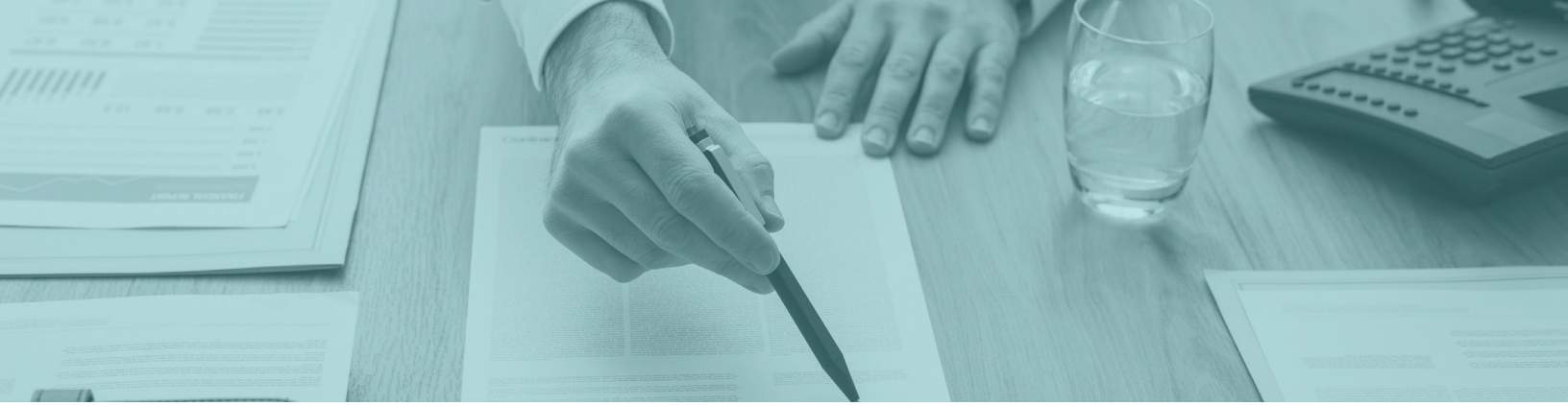
Statutorily, an employer must provide the required notice to an employee prior to termination. Notice periods are often set by law and related to seniority. However, it is not uncommon for employees to negotiate for longer notice periods than what the law requires.

If you are considering terminating an employee, you must determine how much notice is required and whether you want to have the employee work through her notice period or provide her with paty in lieu of notice (if permitted under local law).

It is not uncommon for notice periods to be equivalent—meaning the employee must provide the employer with the same notice as required by the employer prior to ending the employment relationship. Generally, during the notice period, the employee is entitled to all the benefits she would receive during employment, regardless of whether she is working or receiving payment in lieu of notice.

You may be wondering whether there is a way out of the notice provision. Unless you have legally established cause, you must honor the notice period or provide payment in lieu of notice (if permitted under local law). In some circumstances, you may wish to treat the notice period as "garden leave," which requires the employee to sit out of her employment duties and receive full pay and benefits as though she were still employed. If you don't want the employee to immediately be able move to a competitor, this may be a good option to pursue. In some countries, the ability to pay an employee in lieu of notice or place her on garden leave requires such rights to be detailed in the employment contract.

(A word on independent contractors: If your now employee served as an independent contractor with your company before transitioning to a full-time employee, it is possible (or even likely) that, upon termination, local law may recognize the employee's start date to be the start of the independent contract period, not the start of the full-time employment period entitling that employee to notice, severance, and other employment-related benefits backdated to the original start of the relationship.)



NON-COMPETE

When considering termination of an employment relationship, you may be prompted to wonder whether you have a valid and binding non-compete agreement with that employee and whether that non-compete is enforceable. Well, maybe, but it depends on where the employee is employed, how the relationship ended, and whether the non-compete obligation is properly documented and complies with legal requirements.

If your employee is in Canada, you may well have a non-compete in the employment agreement, but that agreement is not enforceable. In many other countries, you may have a valid non-compete, but it is required to pay some portion of salary to the employee during the non-compete period to be able to enforce it. And if the employer initiated the termination, the non-compete may not be enforceable at all.

As with employment in the United States, the enforcement of a non-compete agreement may need to be litigated and will be fact specific to the case at hand. If your company lays off an employee, you could be hard pressed to find a court willing to enforce your non-compete.

SEVERANCE AND OTHER AMOUNTS DUE ON TERMINATION

It is important to remember that severance and payment in lieu of notice are not the same. In many cases, if an employer initiates termination, that terminated employee will be entitled to both.

Given the expense involved, it is important to consider all amounts that may be owed prior to terminating or negotiating an exit with an employee. In many countries, there will be a statutory minimum set for severance based on factors such as length of service/seniority, title, and even age. The severance may also take into account the total cost of employment inclusive of benefits and allowances thereby increasing the total severance cost.

In addition, other payments an employee may be entitled to upon termination include payments for unused vacation time, annual bonuses, 13th or 14th month payments, commissions, or other contractual bonuses. In some countries,final pay and some of these other payouts are due upon the date of termination.

Terminating an employee is always complex, no matter the country. But terminating an employee outside the United States adds an additional layer of complexity. The stakes are high and the cost of doing it wrong can be significant.

There is one overarching rule of thumb to keep in mind where an international termination is involved:

Do not fire at will.

Before terminating an employee outside of the United States, ensure that you have retained knowledgeable local counsel who can walk you through the consequence of the terms of the employment contract, and who can guide you through the legal requirements of conducting a proper termination that mitigates your cost and your risk. Alternatively, consider working with a Global PEO such as Globalization Partners to manage your global workforce and will help to manage any international terminations.