

# Global HR Hot Topic

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## Dismissing Staff Outside the United States



Each monthly issue of *Global HR Hot Topic* focuses on a specific challenge to globalizing HR and offers state-of-the-art ideas for ensuring best practices in international HR management and compliance. White & Case's International Labor and Employment Law practice helps multinationals globalize business operations, monitor employment law compliance across borders and resolve international labor and employment issues.

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**Challenge:**

Because the US employment-at-will system differs so greatly from the “indefinite” employment regimes in the rest of the world, US multinationals that need to dismiss staff abroad often run into hurdles.

Firing an employee in the United States can be a challenge. Group firings—reductions-in-force—can be a big challenge. And from the point of view of a multinational headquartered in the United States, *overseas* individual dismissals and “collective redundancies” can be an intractable challenge.

As is often noted, “[u]nlike many other...countries, the default presumption in the United States is that employment is ‘at will,’ meaning an employer or employee can terminate the employment relationship for any reason or no reason at all.” (Jason Schwartz & Andrea Lucas, “The Mobile Executive: US Employment Law,” 12 *IBA Bus L. Int’l* 263, 263 (2012).) The other side of that coin is that when an American employer emerges from its at-will cocoon and ventures out abroad, staff dismissals become more rigid and less hospitable. Yes, the United States itself imposes plenty of federal and state laws that regulate certain aspects of a domestic US dismissal—anti-discrimination and anti-retaliation laws, whistleblower protections, the WARN Act (29 USC § 2101 *et seq.*), unemployment compensation mandates. But other countries regulate firings much more intrusively, either by prohibiting no-cause dismissals entirely or by imposing expensive notice and severance pay obligations. And these restrictions apply more or less worldwide, not only in rich civil law jurisdictions like Continental Europe and Japan but also in common law jurisdictions like Australia, Canada and England as well as in developing countries like Chad, Indonesia and Paraguay.

To draw a loose analogy, we might think of a US at-will employee dismissal as analogous to the end of a business relationship, when a customer or client stops using a preferred provider. By contrast, a firing overseas looks more like a *divorce*. Even amicable divorces can be slow, complex and drawn out. Contested divorces get interminable, expensive and ugly.

**Pointer:**

Factor into any overseas dismissal decision the very different view that other legal systems have of the employment relationship.

## Dismissing Staff Outside the Employment-at-Will US

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The United States, including some of its territories and excluding only Montana (*Montana Wrongful Discharge Act of 1987*, Mont. Code Ann. § 39-2-903(2)), is the world's only notable "employment-at-will" jurisdiction. Employment-at-will means the right to end employment—for an employee to quit and for an employer to fire—for any reason or no reason except of course that neither an employer nor an employee is free to breach an express or implied employment contract when terminating employment, and no employer is free to dismiss anyone for an illegal discriminatory, retaliatory or statutorily prohibited reason.

"American exceptionalism" in the particular regard of employment termination law means that, from the US headquarters point of view, the rules overseas that dictate how to fire employees look stricter, more complex and more expensive. But American employment law mavens (experts in domestic US workplace laws) argue that the US employment-at-will doctrine has eroded over the years to the point that by now, a smorgasbord of federal, state and local employment laws regulates a stateside firing. Speaking historically, this is a fair point; a dismissal today is indeed more regulated in the United States than back in 1860 or 1960. But speaking *geographically*, this view is tough to support. To a law-abiding employer in say, France or Malaysia or Venezuela or Zimbabwe, American employment-at-will looks alive, well and robust. Even our fellow jurisdictions with legal systems descended from England's like Australia, Canada, Hong Kong, Ireland, Jamaica, Malawi, New Zealand, South Africa and the UK itself all impose significant restrictions on unilateral firings in the absence of any alleged discrimination. It has been said that "[d]espite dire predictions of the demise of [US] at-will employment in the early years of the 21st century, it appears that 'funeral arrangements' may still be a bit premature." (P.J. Strelitz *et al.*, "Employment-at-Will," *International HR Journal* Thomson West, Summer 2008, at 16.) Indeed, looking in from abroad, the American employment-at-will law doctrine looks like the Wild West, where a hapless innocent is at risk of getting shot (fired) without any meaningful protection from the local lawman.

We speak of American employment-at-will as a "doctrine" or "rule" but actually it is the opposite—a mere label for the *absence* of any affirmative mandate. (Cf. Barry D. Roseman, "Just Cause in Montana: Did the Big Sky Fall?," *American Constitution Soc'y for Law & Policy* paper, Sept. 2008, at 2-6.) Actual legal doctrines and rules grant enforceable legal rights. For example, the US Fair Labor Standards Act grants employees a right to overtime pay and US Title VII grants employees a right to a nondiscriminatory workplace. "Employment-at-will," though, is merely a phrase we use to describe a legal vacuum, the *absence* of affirmative rights, the negative concept that our law, absent any express individual employment agreement

or collective bargaining agreement that requires otherwise, grants no right for either party in an employment relationship to perpetuate the relationship, to get pre-termination notice, to access an in-house claims procedure or to receive severance pay.

In sharp contrast, "indefinite employment" regimes abroad grant affirmative legal rights. Local foreign employment laws tend to regulate how, when and why an employer can end an indefinite-term employment relationship. Many employment termination laws overseas impose unwieldy pre-termination notice requirements, steep severance pay obligations, cumbersome pre-firing procedural steps and oppressive reduction-in-force ratification regimes.

Under this view the world's employment law regimes break down into two categories, employment-at-will and indefinite employment, two inherently different ways of understanding what an employment relationship fundamentally is. The employment-at-will worldview looks through the lens of what we might call the *contract metaphor* of employment while the indefinite employment/security-of-tenure worldview looks through the lens of what we might call the *paternal metaphor*.

Under the employment-at-will/contract metaphor, employer and employee are two theoretical equals who freely enter a reciprocal business agreement for services. The law presumes their relationship is terminable at the will of either party unless evidence demonstrates that the parties intended something more permanent. If an employment contract includes some special termination provision, then that provision controls; otherwise, the presumed default arrangement is that one party, the employee, can end the relationship at any time without penalty by quitting and so the other party, the employer, can also end the relationship at any time without penalty, by firing. Employment is a two-way street, so its rules run in both directions.

By contrast, under the indefinite employment/security-of-tenure paternal metaphor, a boss wields most of the power in an inherently unequal relationship and so owes his staff special considerations. The paternal view sees employees as functional dependents who rely on a boss for a living. As a *quid pro quo* to a boss's right to assign work and set the pay rate, law in indefinite employment jurisdictions attaches burdens. Just as laws require that parents and even pet owners not commit abuse or neglect, and just as laws can require one spouse to support the other, the indefinite employment paternal metaphor sees a boss as a guardian who owes duties to dependent employees. In these jurisdictions, hiring a worker can mean embarking on a long-term (sometimes called "permanent") employment relationship that

endures until the employee quits or dies—or at least until the boss complies with legally mandated termination procedures which may require proving good cause for dismissal. In essence, a boss who wants to end an employment relationship needs to arrange a legal separation analogous to divorce or emancipation proceedings, and will likely have to pay notice and severance pay just as a spouse pays alimony or child support. Indeed, these “paternal” protections extend well beyond dismissals: Indefinite employment jurisdictions require employers to offer lots of “goodies” such as mandatory paid vacation and holidays, mandatory profit sharing, mandatory “thirteenth-month pay,” plus vested rights rules that restrict lowering pay and benefits and flat caps on hours worked.

Of course, both of these metaphors are legal fictions—getting a job is not really the same as entering into a commercial contract, and employees are not really helpless dependents. Rather, these metaphors merely explain why indefinite employment/security-of-tenure jurisdictions impose strict employee protections while US employment-at-will does not. A multinational that buys into the contract metaphor needs to change its expectations when venturing out and hiring staff abroad.

At that point, we need to drill down and stop talking in generalities. To take four random examples, Canada, Japan, Iraq and Singapore,

all regulate no-cause firings and so we label them all “indefinite employment” or “security-of-tenure” jurisdictions. But looking closer, these “indefinite employment” systems regulate employment dismissals in radically different ways. Japan and Iraq impose all but “lifetime employment” models while Canada and Singapore require little more than funding pre-termination notice. And then we must distinguish yet more granularly: Japan’s lifetime employment termination laws are very different from Iraq’s; Canada’s looser notice-based regime differs significantly from Singapore’s.

These extreme differences among national employment law regimes should come as no surprise. After all, employment laws evolved in isolation inside each legal system over many centuries. England’s Parliament, for example, was legislating employment topics as rarified as employee poaching a full 143 years before Columbus discovered America. (*Ordinance of Labourers*, 23 Edw. III (1349).) Employment law today is therefore much less internationally aligned than are younger branches of law like antitrust, environmental and securities.

This extreme variation among the world’s employment laws compels a US-based multinational that must fire overseas staff to learn precisely how local foreign laws regulate the dismissal.