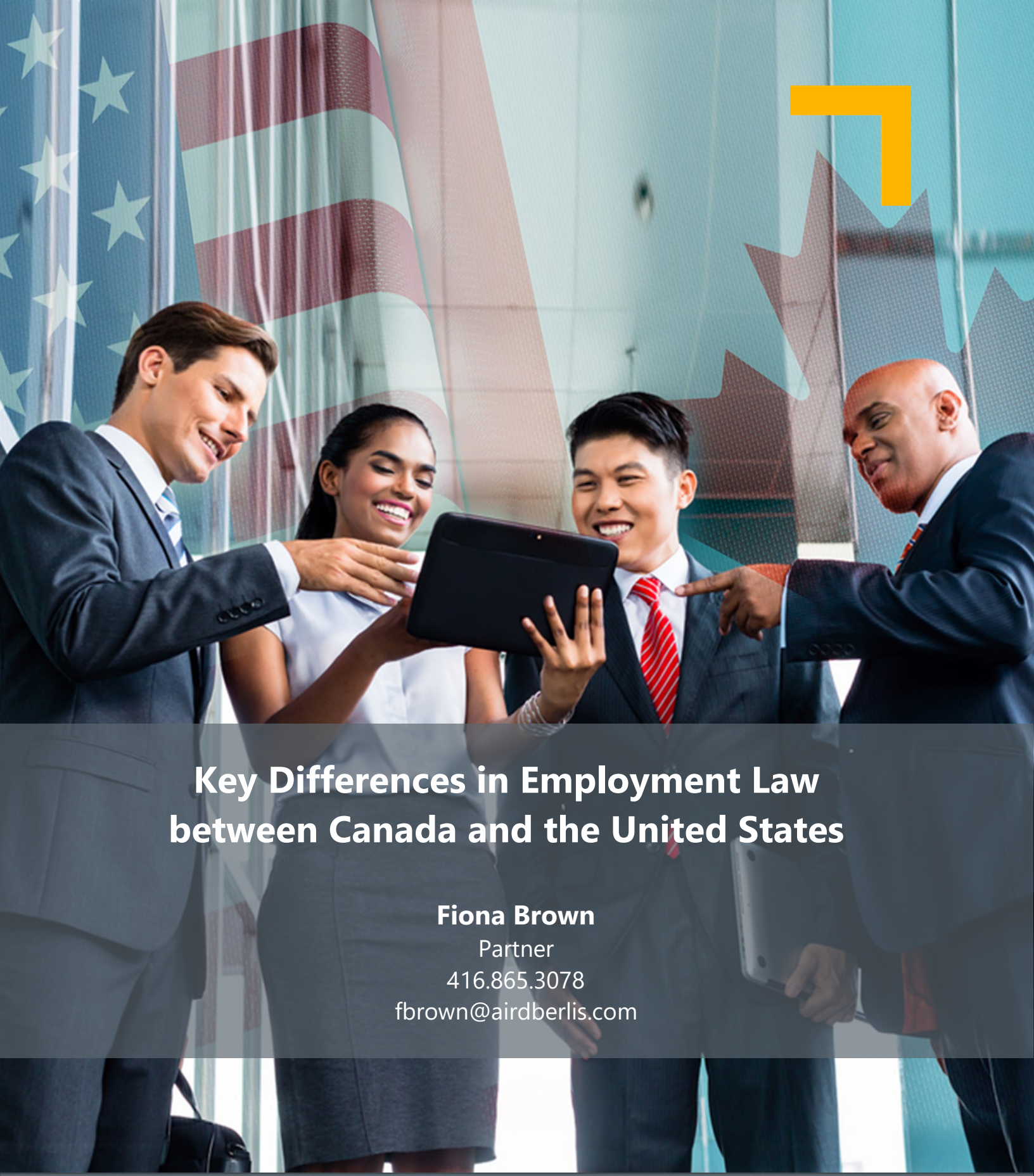

Key Differences in Employment Law between Canada and the United States

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At Will Employment

Many employees in the United States are employed "at will", meaning that they can be terminated at any time without notice or pay in lieu of notice, even if there is no just cause for termination. In Canada, there is no at-will employment. Where there is no cause or resignation, employees are entitled to some type of notice or pay in lieu of notice upon termination. A good employment contract can limit the amount of notice or severance pay to applicable statutory minimums (within each provincial jurisdiction), but Canadian courts have largely interpreted employment agreements strictly against the employer. Employers seeking to limit termination payments in Canada must use very precise language in the employment agreement.

Employees in Canada can be terminated without notice if there is just cause. However, just cause can be difficult to establish. Usually, there will have to be ongoing problems and written warnings to the employee before termination without notice is allowed, or the employee will have to have committed an egregious act. In some cases, employers will offer a termination or severance package to reduce the risk of litigation.

Provincial Regulation

In Canada, labour and employment regulation is primarily handled by the provincial governments. Each province has its own set of regulations relating to employment law, labour relations, occupational health and safety, and human rights. Each province has expert regulatory boards and tribunals which hear disputes related to labour and employment. The federal government only has jurisdiction over certain industries, such as banking and shipping, and has its own boards and tribunals to deal with disputes within its jurisdiction.

Most of the regulations are fairly similar and consistent across the country, but there are some important differences that employers should be aware of. Overtime, for example, is calculated differently in each province. Because of these differences, it is important for employers to make sure that they get human resources advice specific to each province where they have operations. If a business has employees in multiple provinces, those employees will be subject to their home province's regulations, even if the business is not based there.

Overtime Eligibility

In Canada, whether an employee is eligible for overtime is determined by the relevant employment standards legislation. Most employees are eligible, with exceptions for management and certain high-skill employees such as engineers and lawyers. There is some variation between the provinces on what types of employees are exempt from overtime.

Unlike in many states, employment agreements in Canada cannot restrict who is eligible for overtime, and there is usually no distinction afforded based upon whether the employee is compensated by a salary or through an hourly wage.

How overtime is calculated varies from province to province, but generally, employees are entitled to 1.5 times their normal pay for all hours worked beyond the regular work week. The regular work week is usually 40-44 hours. In some provinces, such as British Columbia, employees are entitled to overtime after 8 hours worked in a day. Many provinces allow for averaging agreements, and there are exemptions for certain industries such as agriculture. Employees paid by salary and hourly wages are entitled to overtime pay.

Restrictive Covenants

Restrictive covenants in employment agreements are governed by the common law in all of Canada, except for Québec which uses a civil code. Canadian courts have traditionally been very hesitant to enforce non-competition clauses in employment contracts. Normally, only executive-level employees will be bound by a non-compete and, even then, only if the temporal and geographical limitations of the clause are reasonable. Unlike in the United States, broad non-competition clauses in employment contracts are almost always unenforceable.

Canadian courts are more likely to enforce non-solicitation clauses for employees, especially for sales employees and others with significant access to clients. These provisions should still be relatively narrow both in terms of time and geography. If a restrictive covenant such as a non-compete or non-solicit clause is too broad, a court will declare it unenforceable in its entirety. Canadian courts will not alter restrictive covenants to make them enforceable.

Changing Terms and Constructive Dismissal

As a result of at-will employment in the United States, many employees are subject to unilateral changes in their employment agreements. The same is not true in Canada. The terms of an employment agreement can only be changed if consideration is provided for the change. Usually this means that if employers want to add terms for their employees, they have to provide appropriate notice or compensation for the change.

If an employer fundamentally changes the terms of employment, an employee in Canada is entitled to claim constructive dismissal. Employees are entitled to the same compensation for constructive dismissal as they would be for a standard without cause termination. Changes such as demotion, material salary decreases and fundamental shifts in working conditions will normally constitute constructive dismissal. Employees can also claim constructive dismissal as a result of a toxic work environment or a situation that would make it unfair for them to continue to work.

Conclusion

Navigating the Canadian marketplace can pose unique challenges for American businesses. Adjusting to Canadian law, work culture and expectations can slow down the expansion process. Aird & Berlis has significant experience in making it easier for American and international businesses to expand into Canada. We are always ready to advise on incorporating Canadian subsidiaries, developing employment contracts and any other issues that may arise.

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Fiona has extensive experience advising international businesses entering the Canadian market. To date, she has advised more than 100 companies expanding into Canada. Fiona advises clients in this space all day, every day. She has been practising for more than a decade and is a regular speaker and writer on market expansion matters. Fiona is proud to have been recognized by *The Best Lawyers in Canada, The Canadian Legal Lexpert Directory* and *Benchmark Canada*.

A proactive and comprehensive approach is required to succeed in a new market. Fiona manages teams of other lawyers and patent agents to provide her clients with a full range of legal services to help their businesses grow. She acts as project manager to ensure her clients receive seamless legal services in all relevant areas.

Fiona takes great care to understand her clients' businesses and deliver advice that is tailored to meeting their specific needs. Her responsiveness, dedication to clear communication and hands-on approach show that she is personally invested in the success of her clients.

Summer student **Matthew Patterson** contributed to this article.