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At-Will Employment: A Proposal for its Statutory Regulation

Kurt H. Decker
AT-WILL EMPLOYMENT: A PROPOSAL FOR ITS STATUTORY REGULATION

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INTRODUCTION

In the 1960's, vast strides were instituted at the federal and state levels to eliminate employment discrimination based on race, sex, religion, national origin, age, and handicap. Today there is a corollary interest in broadening protections for employee job interests. This is in part attributable to a slowing economy, high interest rates, and excessive unemployment.

Recently, courts and legislatures have created certain exceptions to the traditional at-will employment relationship. At-will employment allows termination by either an employee or employer for no cause at all. Despite widespread criticism, many jurisdictions still remain faithful to this concept.

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2. See infra note 32.
3. 112 LAB. REL. REP. (BNA) "News and Background Information" 14 (January 3, 1983).
4. 111 LAB. REL. REP. (BNA) "News and Background Information" 127 (October 18, 1982).
5. 111 LAB. REL. REP. (BNA) "News and Background Information" 201 (November 15, 1982).
7. RESTATEMENT (SECOND) OF AGENCY §442 (1958) refers to at-will employment as follows:

   Unless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events.

   Id.

8. It is apparent from recent commentators that at-will employment has become the labor relations topic for the 1980's. For example, see C. Bakaly, Jr. & J. Feerick (Co-ch.), Developing Rights of Employees in the Workplace (1981) [hereinafter cited as Bakaly, Jr. & Feerick]; C. Bakaly, Jr. & J. Grossman, Modern Law of Employment Contracts: For-
Employer-Employee Relationship, 'At Will' Employment Relationship: A Possible Solution to the Economic Imbalance in the
Rev. 267 (1981); Note, Employer's Absolute Right of Discharge: Can Kansas Courts Meet the Challenge?, 57 (1980); Note,
Employee, Comment, Pennsylvania's Response, (1981); Weisburst, Statute, cited as PECK; St.
Employment: A Necessary Change in the Law,
Rule?, MENNEMEIER; Arbitrary or Unfair Discharge, (1981); Isaacson, Jr. Term[ination HANDBOOK (Co-ch.),
Wrongful Discharge, A New Tort to Protect At Will Employees,
Will Doctrine a Bad Omen for the Employment Relationship
Contract Law: An Alternative to Tort Law as a Basis for Wrongful Discharge Actions in Illinois,
Unjust Discharges: An Arbitration Scheme,
Gray, Of a Cause of Action for Abusive Discharge in Maryland,
Wrongful Discharge Tort, 153 (1981); Blades,
Charter, The Employment-at-Will Rule: The Development of Exceptions and Pennsylvania's Response,
The need to protect the at-will employee, who does not possess the bargaining power equal to that of an employer, has arrived. Courts should, at this time, avoid further modification of the at-will employment relationship. This restraint should be observed to minimize the adverse effects that any complete abrogation might have on employment, productive efficiency, and overburdening of the judicial process with additional cases. Time and thought should be given now to whether an abrogation should occur through "judicial erosion" or "legislative mandate."

This article examines the extent to which the legislature rather than the courts should abrogate the at-will employment relationship within an individual state. To accomplish this, the following will be reviewed: (1) historical perspective of at-will employment; (2) erosion of at-will employment within the United States; and (3) abolishing at-will employment through a statutory proposal.

HISTORICAL DEVELOPMENT OF AT-WILL EMPLOYMENT WITHIN THE UNITED STATES

Traditional View of At-Will Employment

Employee and employer rights within the United States trace their beginnings to England's Statute of Labourers. This Statute provided that a general hiring of labor for an unfixed term was presumed to be for a year, and a "master" could not "put away his servant" except for reasonable cause." After its repeal, English courts continued to apply

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9. Approximately 60% to 65% of all American employees are hired on an at-will basis. Another 22% are unionized and about 15% are federal or state employees. See U.S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1979, at 427 (table 704) (union membership); Id. at 392 (table 644) (total labor force); Id. at 313 (table 509) (government employees); see generally Peck, supra note 8, at 8–10; St. Antoine, supra note 8, at 34.

10. 1 W. BLACKSTONE, COMMENTARIES 425 (1969). The Statute of Labourers was enacted in response to the extreme labor shortage that resulted from the Black Death in the mid-fourteenth century.

11. Id. at 425–26.
the Statute's spirit by presuming that a "general hiring" was intended to serve as an employment contract for one year. If the employment continued for longer than one year, it could be terminated only at the end of an additional year.

The American at-will employment approach has been viewed as a departure from, and as a part of, this English heritage. Early American courts adopted the English approach. In the 1880's, however, American law departed from this by developing its own version of at-will employment.

In 1877, H.G. Wood's treatise on master-servant relationships articulated what seemingly became at-will employment in America. Although "Wood's Rule" has been persuasively challenged, it has become the primary basis for at-will employment in this country.

12. The English term "general hiring" is the equivalent of the American term "indefinite hiring"—an employment relationship with no specific duration. Annot., Duration of Contract of Hiring which Specified No Term, but Fixes Compensation at a Certain Amount Per Day, Week, Month, or Year, 11 A.L.R. 469 (1921).


15. Wood wrote that:
With us the rule is inflexible that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. H. WOOD, MASTER AND SERVANT §134 (2d ed. 1886) [hereinafter cited as H. WOOD].

16. The notion that at-will employment arrangements of indefinite duration are terminable by either party, at any time, is not one that has its roots deep in the English common law. See supra notes 10-14 and accompanying text. It apparently sprang from an American treatise writer. See H. WOOD, supra note 15; see also Comment, "The Employment-at-Will Rule" supra note 8 at 480 n. 19; Note, Limiting the Right to Terminate, supra note 8 at 205-206 nn. 22-30 and accompanying text. This treatise cited three cases that supposedly supported this, namely: Wilder v. United States, 5 Ct. Cl. 462 (1869), rev'd on other grounds, 80 U.S. 254 (1871); DeBriar v. Minturn, 1 Cal. 450 (1851); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870). Wilder v. United States concerned a contract between the Army and a private businessman for the transportation of goods. It had nothing to do with general hirings. DeBriar v. Minturn involved a controversy between a discharged bartender and his ex-employer over his right to occupy a room in the tavern. It was essentially a case of unlawful ejection. Tatterson v. Suffolk Mfg. Co. actually contradicts Wood's assertion. The court found no error in allowing a jury to determine the nature of the employment contract from written and oral communications, usages of trade, the situation of the parties, the type of employment, etc. Id. at §136, at 283 n.5. Commentators, however, have severely questioned the soundness of this support. See, e.g., St. ANTOINE, supra note 8, at 33-34; SUMMERS, Individual Protection, supra note 8, at 485; Note, Job Security, supra note 8, at 699-700; Note, Implied Contract, supra note 8, at 341 nn. 53 & 54.

American courts probably adopted "Wood's Rule" to facilitate development during the industrial revolution by promoting the prevalent economic ideology of laissez faire and freedom of contract. Within this framework "Wood's Rule" seemed equitable. It provided the employer the flexibility to control the workplace through the unchallengeable power to terminate at-will. In turn, the employee retained the freedom to resign if more favorable employment presented itself, or if working conditions became intolerable. The at-will employment relationship has even been codified in several jurisdictions and referred to by the United States Supreme Court.

Statutory Restrictions on the Right to Terminate At-Will

Congress and various state legislatures have prohibited, in certain instances, the summary termination of an at-will employee. The primary federal statutory schemes that limit an employer's right to terminate an at-will employee are the Labor Management Relations Act (LMRA) and Title VII of the Civil Rights Act of 1964. The LMRA prohibits termination for exercising the right to organize and select an employee representative. Title VII prohibits any termination based upon discrimination involving race, color, religion, sex, or national origin. In enforcing these statutes, courts have maintained that an employer is free to terminate an employee for any reason except those specifically prohibited by these statutes. Other legislation restricting the right to terminate are: (1) the Age Discrimination in Employment

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18. See, e.g., SUMMERS, Individual Protection, supra, note 8, at 484–86; Comment, Protecting At Will Employees, supra note 8, at 1824–36; Note, Job Security, supra note 8, at 700; Note, Implied Contract, supra note 8, at 342–43, 346–47.
21. Generally speaking, United States government employees, as well as various state and municipal employees, may not be terminated without a hearing and, in some instances, government employees cannot be fired except upon a showing of cause. See, e.g., 5 U.S.C. §7513 (Supp. IV 1980) (Civil Service Reform Act of 1978). For example, the Civil Service Reform Act of 1978 provides that a government agency may remove or otherwise discipline a covered employee only for such cause as will promote the efficiency of the Civil Service. The statute also provides a notice period prior to adverse action and affords the employee the right to be represented by an attorney and the right to a written decision enumerating the reasons for the action taken. Id.
Act of 1967,27 (2) the Occupational Safety and Health Act of 1970,28 (3) the Veterans' Reemployment Rights Act,29 (4) the Fair Labor Standards Act,30 and (5) the Rehabilitation Act of 1973.31 State statutes also contain similar limitations.32

The principal goals of this federal and state legislation have been to: (1) promote unionization as a countervailing force against employer power and control;33 (2) establish a minimum level of economic entitlement for employees;34 (3) combat discrimination against specific groups in hiring and dismissals;35 (4) protect employee health and safety;36 and (5) guarantee a minimum level of security for retirement, and for the survivors of wage earners.37 In addition, the "assumption of

\[\text{Footnotes}\]

31. 29 U.S.C. §794 (Supp. IV 1980) (requiring affirmative action to advance the employment of handicapped individuals by government contractors or subcontractors).
32. See Note, Limiting the Right to Terminate, supra note 8 at 203 n. 10. For example, state legislatures have also provided some protection for at-will employees. Several states have statutes prohibiting discharges based upon political activity. See, e.g., MASS. GEN. LAWS ANN. ch. 56, §33 (West 1975). For a collection of state laws regarding firing for political activity, see [1982] LAB. L. REP. (CCH) State-Laws P43,045. Some states prohibit discharges because of physical handicaps. See, e.g., CAL. LAB. CODE §1420(a) (West Supp. 1981); MASS. ANN. LAWS ch. 149, §24K (Michie Law. Co-op 1976); MINN STAT. ANN. §363.03, Subd. 1(2) (West Supp. 1981). A few states do not permit employers to take action against employees for serving as jurors or for indicating their availability as jurors; for example, Idaho, Massachusetts, Michigan, North Dakota, and Vermont. For a collection of state laws regarding termination for serving on a jury, see [1982] LAB. L. REP. (CCH) (State Laws) P43,035. Other states prohibit termination for refusing to take a lie detector test; for example, Connecticut, Hawaii, Idaho, Maryland, Michigan, New Jersey, Oregon, Pennsylvania, Rhode Island, and Washington. For a collection of relevant state laws, see [1982] LAB. L. REP. (CCH) (State Laws) P43,055. Another common provision in state laws is a prohibition against retaliatory termination for filing a workers' compensation claim. See, e.g., TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1980). See also M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT ch. 3 (1966); Bonfield, The Substance of American Fair Employment Practices Legislation I: Employers, 61 NW. U. L. REV. 907 (1967).
33. See supra notes 22 and 24.
36. See supra note 28.
risk doctrine” as it applied to employment has been effectively repealed by workers’ compensation laws.38

**Erosion of At-Will Employment**

Perhaps the most significant recent legal development affecting employment relations has been the modification of at-will employment in a number of jurisdictions.39 In the past twelve years critics have increasingly sought to abrogate this relationship. In fact, courts and some state legislatures have responded by developing viable exemptions to at-will employment.

**Court Action**

**Tort or “Abuse” Theories**

The circumstances in which an employer’s right to terminate have been judicially curtailed under a tort or “abuse” theory may be divided


See also Comment, The Employment-at-Will Rule, supra note 8.
into three categories. First, courts have been willing to permit an exception when the termination violates established public policy, especially a "clear," statutorily declared policy. Second, an exception has been applied where employees have been involved in "whistle blowing," i.e., the reporting by an employee of unlawful or improper conduct. Last, courts have found an exception for "abusive" or "retaliatory" terminations; i.e., where an employee refuses to accede to improper requests or demands.

"Public Policy" Exception

One of the most important limitations that some courts have placed upon the termination of at-will employees is the public policy exception. This is usually applied where employees were terminated for: (1) refusing to violate a criminal statute; (2) exercising a statutory right; (3) complying with a statutory duty; or (4) observing the general public policy of the state. Specific examples of employee terminations violating some form of recognized public policy include: (1) declining to commit perjury at the employer's behest;40 (2) refusing to participate in an illegal price-fixing scheme;41 (3) serving on a jury;42 (4) filing workers' compensation claims;43 (5) refusing to take a lie detector test in a state prohibiting its forcible administration;44 (6) performing unauthorized catheterizations;45 (7) mislabeling packaged goods;46 (8) avoiding payment of commissions;47 and (9) avoiding payment of a pension.48

Although the public policy exception has expanded the circumstances where an employee may sue an employer, it is not without limits. Generally, the employee is required to demonstrate initially that

the termination concerns a matter of public policy. When only private interests are involved courts are hesitant to allow recovery. For example, employees have had their claims denied when terminated for: (1) questioning an employer's internal management system;\(^{49}\) (2) questioning an employer's integrity;\(^{50}\) (3) threatening to sue an employer for an injury unrelated to employment;\(^{51}\) (4) taking too much sick leave;\(^{52}\) (5) misusing the employer's Christmas funds;\(^{53}\) (6) seeking to examine an employer's books in the employee's status as a shareholder;\(^{54}\) (7) attending night school;\(^{55}\) and (8) cohabiting with a co-employee.\(^{56}\)

**"Whistleblowing"**

Related to the public policy exception are terminations which involve reporting of the employer's or an employee's allegedly unlawful or improper conduct to the employer or to governmental authorities. These are essentially instances of either: (1) protective whistleblowing; or (2) active whistleblowing. "Protective whistleblowing" occurs when the employee is asked to commit a crime.\(^{57}\) "Active whistleblowing" involves the employee seizing the initiative and disclosing his/her suspicions, that may or may not be well founded. Cases have recognized this for reporting to either government or employer authorities conduct that may violate the law, but where no statute requires an employee to report.\(^{58}\)

**"Abusive" or "Retaliatory" Termination**

Here the employer tries to exploit a position of power in the employment relationship. The employer then retaliates against the employee for refusing to accede to its demands.\(^{59}\)

**Contract Theories**

**Express or Implied Guarantees**

This exception concerns situations where employees have been told upon hiring that they would be employed so long as they “did the

\(^{49}\) Keneally v. Orgain, 606 P.2d 127 (Mont. 1980).

\(^{50}\) Abriz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978).


job.” Statements of this nature may create indefinite term contracts. This may occur through express agreement, oral or written, especially where an employer personnel manual provides a policy for release of employees “for just cause only.” Personnel manuals potentially may have a much broader application. Employer liability, however, probably can be minimized if it refrains from giving assurances or promises, oral or written, at any time.

**Good Faith and Fair Dealing**

Some courts have indicated that there is an implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts. This may exist where the totality of the relationship firmly establishes the indicia of an implied agreement that gives rise to the requirement of good faith and fair dealing. Among the factors supporting this are: (1) extraordinary length of service; (2) good employee performance verified by routinely receiving raises, bonuses, and promotions; (3) employer assurances that employment would continue; (4) employer practice of not terminating except for cause whether based on an oral or written policy; and (5) no prior warning that the employee’s position was in jeopardy.

**Legislative Action**

Despite the seemingly abundant legislation on the federal and state levels limiting the right to terminate at-will employees, an outright alteration or abolition of at-will employment is yet to be achieved. Regretfully, these piecemeal restrictions may be the result of a continued legislative acknowledgment that some vitality remains in the at-will employment relationship.

This is not to say that legislatures have not considered statutory regulation of at-will employment. Legislatures in Connecticut, Michi-

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61. Id.


65. See supra notes 21–37.
gan, New Jersey, New York, Pennsylvania, Puerto Rico, South Dakota, and Wisconsin have reviewed this. Since 1980, limited statutory protection has been enacted in Michigan, Puerto Rico, and South Dakota. This indicates a beginning of serious legislative action to follow firmly the path of many state judiciaries in modifying or abolishing at-will employment. As more courts make inroads into this, increased pressure will be placed upon legislatures to create statutory solutions that specifically define employee and employer rights instead of relying on fluctuating case law interpretations. The next ten years will witness continued debate on this issue as inflation, unemployment, and employee desires for increased job security remain of widespread concern.

ABOLISHING AT-WILL EMPLOYMENT THROUGH LEGISLATION

The power that an employer has over its employees is formidable. When that employer is a large corporation it has virtually no limit.

66. See Barbash, Feerick & Kauff, supra note 8, at 23, 65-79; Bakaly, Jr. & Feerick, supra note 8, at 42.
67. Barbash, Feerick & Kauff, supra note 8, at 23, 65-79; M.C.L.A. §15.362 (1982); Laws of Puerto Rico tit. 29, §§185a, 185b (1982); South Dakota passed a just cause standard specifically limited to contracts for employment at a stated annual salary, which under the statute are deemed to be a hiring for one year and terminable only for just cause during the initial year. S.D. Codified Laws Ann. §60-1 to 60-4 (1982). In addition, in 1980, United States Congressman Benjamin S. Rosenthal introduced to the United States Congress "The Corporate Democracy Act". It was an attempt at federal legislative relief for employees-at-will, which, if passed, was to be incorporated into the National Labor Relations Act. H.R. Rep. 7010, 96th Cong., 2d Sess., 126 Cong. Rec. 2490 (1980). Title IV of the bill provided in pertinent part:

It is further declared to be the policy of the United States to protect employees in the security of their employment by ensuring that they are not deprived of such employment on the basis of their having exercised their constitutional, civil, or other legal rights, or because of their refusal to engage in unlawful conduct as a condition of employment.

Id. §401(a)

The bill also provided that "[e]mployees shall have the further right to be secure in their employment from discharge or adverse action with respect to the terms or conditions of their employment except for just cause." Id. §401(c). The bill defined just cause as follows:

The term "just cause" shall be defined in accordance with the common law of labor contracts established pursuant to section 301 of the National Labor Relations Act, except that such term shall not include (A) the exercise of constitutional, civil, or legal rights; (B) the refusal to engage in unlawful conduct as a condition of employment; (C) the refusal to submit to polygraph or other similar tests; or (D) the refusal to submit to a search of someone's person or property, other than routine inspections, conducted by an employer without legal process.

Id. at §401(b)(15).

At the end of the 96th Congress, with no formal action having been taken, the Corporate Democracy Act died. See also Comment, The Employment-at-Will Rule, supra note 8 at 483-84, n.54.
"Take-it-or-leave-it" is the name of the game. It is not uncommon for a recruiter in attracting the most qualified employees to say "if you perform well, you will have a job for life." Similarly, a conscientious employer attempting to further positive employee relations may include in an employee handbook a grievance procedure and/or a statement that termination will be for "just cause" only. Likewise, a personnel manager, in making an employment offer, may quote a salary on a per annum basis. These typical employer acts have been the norm for years. It rarely was considered that these commonplace statements, representations, and policy enunciations might form the basis for employer liability.

Today, there is a growing recognition that the at-will employee should be similarly protected as most public employees and union-organized employees are in the private and public sectors. It can no longer be denied that this right goes back to the medieval Statute of Labourers that imparted a "just cause" requirement in employee terminations.

Job terminations are treated quite differently in other areas of the industrial world. The International Labor Organization (ILO) recommended in 1963 that there should be a "valid reason for such termination connected with the capacity or conduct of the worker based on the operational requirements [of the employer]." This was again considered at the ILO International Labor Conference in Summer, 1982. The convention called for better protection for at-will employees. Regrettably, the American government and its business delegates adhered to their traditional "tunnel vision" approach on this question and voted "No." Protection against wrongful terminations is afforded by statute in all the Common Market countries, Sweden, Norway, Japan, and Canada.

The practice in Western Europe is to hear wrongful termination claims before specialized labor courts or industrial tribunals. Typically,
these are tripartite. They are normally composed of a professional judge or legally trained individual serving as chairman, along with laypersons.74

It should be taken as a given that all employees are entitled to protection against wrongful terminations.75 However, should the courts or the legislatures be the primary movers in abrogating at-will employment? Through the courts, a body of common law would result. Statutory solutions would involve selection of tribunals and procedures. Overriding both would be the type of remedies to be granted. On one hand, courts may be unwilling "to break through their self-created crust of legal doctrine,"76 while legislation is often the product of organized interest groups.77

With the benefit of recent judicial decisions that limit at-will employment, it is no longer impossible to foresee what will be imposed by the judiciary.78 Courts are likely to be long on generalization and short on detail when it necessitates outlining procedures, remedies, etc.79 Even though legislatures may not wish to take the initiative for understandable political reasons, they may be compelled to take action by the boldness of some courts.80 At some point, employers may support legislation on the belief that the compromises and greater exactness of a statutory solution are preferable to the broad strokes and blurred outlines often produced by an uninnovative judiciary.81 Even more important, nonunionized employers may perceive legislation as the most important deterrent to unionization of their plants; i.e., the union's argument of increased job protection from wrongful termination is minimized.82

74. ST. ANTOINE, supra, note 8, at 35.
75. This view most recently has been prominently advanced by the distinguished professor from the University of Michigan, Theodore J. St. Antoine. See ST. ANTOINE, supra, note 8, at 35; 107 LAB. REL. REP. (BNA) "News and Background Information" 911 (June 1, 1981).
76. SUMMERS, Individual Protection, supra, note 8, at 521.
77. PECK, supra note 8.
78. See supra notes 39–64.
79. ST. ANTOINE, supra, note 8 at 35.
80. Id.
81. This promise of a union bargaining greater job security cannot be underestimated. It is one of the most important reasons why employees seek to organize. On the other hand, organized labor may be a critical factor in securing legislative relief. It is the only interest group that might be willing to take the lead in promoting such a cause. A common assumption, however, is that unions will not favor legislation protecting employees against arbitrary treatment by employers because it will undercut one of unions' prime selling points. This possibility cannot be denied. Organized labor, however, could profit considerably from refurbishing its image as the champion of the disadvantaged. More practically, a universal rule against termination without cause actually could prove beneficial to unions in their organizing drives by protecting union sympathizers. Id.
82. Id.
The result may be that in a number of states the process of abrogating at-will employment will go through two stages. The first step that may be considered as tentative will be taken by the courts. After this, the legislatures will be compelled to provide a more definitive, logical, and orderly framework for resolution of these disputes.\(^3\) This is the course that every state should follow. Courts are neither equipped to handle the additional caseload nor sufficiently experienced in the area of employee terminations. The judicial process is too long and procedurally cumbersome to provide adequate or swift remedies to the parties involved.\(^4\) If the interests of employees and employers are to be adequately considered in abrogating at-will employment, new specialized legislation will be necessary. The judiciary may be able to respond to the extreme case and to the atypical situations of an employment termination. However, they have no capacity to construct an administrative mechanism for daily enforcement and their more formalized processes are not readily accessible to the average person.

Any statute should take the initial handling of these matters out of the court's jurisdiction. Instead, all employee termination disputes should be handled by arbitrators. The same court deference should be given to their decisions as is done in other labor matters.\(^5\) Arbitration would provide a proven, quick, inexpensive, and final resolution without overburdening the courts.\(^6\) The statute should articulate a standard for lawful termination or discipline in terms similar to "just cause."\(^7\)

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83. Id.
84. Id.

at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement . . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process.


86. See MENNEMEIER, supra note 8.
87. Most collective bargaining agreements in the private and public sectors do, in fact, require "cause" or "just cause" for termination or other discipline. Where this is not contained in a collective bargaining agreement many arbitrators imply a "just cause" limitation. For instance Arbitrator Walter E. Boles held that "a just cause" basis for consideration of disciplinary action is, absent a clear proviso to the contrary, implied in a modern collective bargaining agreement.


If the Company can discharge without cause, it can lay off without cause. It can recall, transfer, or promote in violation of the seniority provisions simply by invoking its
Certain employees should be excluded from the statute. Among these are probationary employees and employees covered by a contract or collective bargaining agreement providing for binding arbitration in the event of a termination.

claimed right to discharge. Thus, to interpret the Agreement in accord with the claim of the Company would reduce to a nullity the fundamental provision of a labor-management agreement — the security of a worker in his job.


The general significance of the terms "cause" or "just cause" were discussed by Arbitrator Joseph D. McGoldrick as follows:

... [I]t is common to include the right to suspend and discharge for "just cause," "justifiable cause," "proper cause," "obvious cause," or quite commonly simply for "cause." There is no significant difference between these various phrases. These exclude discharge for mere whim or caprice. They are, obviously, intended to include those things for which employees have traditionally been fired. They include the traditional causes of discharge in the particular trade or industry, the practices which develop in the day-to-day relations of management and labor and most recently they include the decisions of courts and arbitrators. They represent a growing body of "common law" that may be regarded either as the latest development of the law of "master and servant" or, perhaps, more properly as part of a new body of common law of "Management and labor under collective bargaining agreements." They constitute the duties owed by employees to management and, in their correlative aspect, are part of the rights of management. They include such duties as honesty, punctuality, sobriety, or, conversely, the right to discharge for theft, repeated absence or lateness, destruction of company property, brawling and the like. Where they are not expressed in posted rules, they may very well be implied, provided they are applied in a uniform, non-discriminatory manner.


Absent precise definitions, "cause" or "just cause" may be considered any combination of the following factors:

(a) The "law of the shop" as to the particular offense; i.e., the response to that offense developed over a period of years. Showing a consistent pattern of viewing that offense in a certain manner, as requiring severe or less than severe discipline;

(b) A consistent pattern of enforcement of rules and regulations and of making known the rules to all employees;

(c) Case histories of other incidents of enforcement;

(d) Known practices of severe discipline for certain offenses because of the product manufactured or safety consideration;

(e) Offenses calling for immediate suspension and those not requiring removal;

(f) On-premises and off-premises offenses, and the differences in their treatment;

(g) General "arbitral authority," derived from publication of awards, articles, etc.;

(h) The arbitrator's own sense of equity and his/her subjective judgment as to the significance, seriousness and weight to be given the incident involved, the record of the employee, or the circumstances causing the termination;

(i) The severity of the case's facts;

(j) Attempts made to rehabilitate the employee by the employer;

(k) Progressive discipline steps that may or may not have been taken;

(l) The discipline penalty imposed as it relates to the case's facts;

(m) Whether a "second chance" is warranted from the employee's prior record or

(n) Whether the employee is unreclaimable as indicated by his/her prior record, facts of the case; etc.

For a general discussion of "cause" and "just cause" see F. ELKOURI & E. A. ELKOURI, HOW ARBITRATION WORKS 611-613 (3d ed. 1976).
Instead of opposing legislation, the prudent employer should welcome a statutory scheme as providing an orderly legal remedy outside of the courtroom. Unless this is done, the prospect of increased and costly litigation is almost a certainty. Terminated employees can be expected to litigate new fact situations concerning an employer's obligation to deal with employees fairly and in good faith.

Preventive employer planning can be important. More responsible employee hiring, training, and termination procedures should be developed. In essence, abrogation of at-will employment may cause employers to make better employment decisions that may eventually effect improved personnel policies. These policies should result in more efficient use of personnel if the employer conscientiously develops these areas. At the same time, any legislation should create responsibilities for both employees and employers in terminations. Employers should be afforded protection for improper employee resignations that include usurping corporate opportunities to work for a competitor or to compete against the employer. These general guidelines provide the framework for legislation that will not undermine the employment relationship. It sets forth a speedy, just, inexpensive, and conclusive means for resolving one of the most important disputes between employee and employer.

**Statutory Proposal for Regulating At-Will Employment.**

*Statutory Proposal*

Outlined below is a statutory proposal for regulating at-will employment terminations within a state:

**EMPLOYEE/EMPLOYER PROCEDURES FOR TERMINATING THE EMPLOYMENT RELATIONSHIP**

*Section 1. Short Title.*

This act shall be known and may be cited as the “Act Regulating Employment Terminations.”

*Section 2. Definitions.*

The following words and phrases, when used in this act, shall have, unless clearly indicated otherwise, the meanings given to them in this section:

“Appointing Authority.” Either the State Bureau of Mediation or the County Court, whichever is designated the responsibility

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through the filing of a complaint for appointing an arbitrator to hear an employment termination.


“County Court.” The County Court in the county where the termination of employment occurred.

“Employee.” Any person who performs a service for wages or other remuneration under a contract of hire that is written, oral, express, or implied. Employee includes any person employed by an individual, person, partnership, association, corporation, and the State of ____________, including any of its political subdivisions or any agency, authority, board, or commission created by them. Employee does not include those: (a) covered by a collective bargaining agreement that contains a final and binding grievance arbitration procedure for the review of employment terminations; (b) protected by a statutory civil service or tenure procedure; (c) who have a written employment agreement that contains a final and binding grievance arbitration procedure for the review of employment terminations; or (d) that are in a probationary status.

“Employer.” Any individual, person, partnership, association, corporation, and the State of ____________, including any of its political subdivisions or any agency, authority, board, or commission created by them.

“Persons.” Any individual, sole proprietorship, partnership, association, corporation, and the State of ____________, including any of its political subdivisions or any agency, authority, board, or commission created by them.

“Probationary Status.” A six month period of time that occurs immediately after an employee is hired by an employer. It shall not include, when an already employed employee is given a new employment position, advancement, or promotion by his/her employer.

“Termination of Employment.” Any involuntary or voluntary discontinuation of the employment relationship by an employee or employer including but not limited to: terminations, discharges, resignations, firings, layoffs that result from an improper action or inaction of an employee or employer, etc.

Section 3. Termination of Employment.

Termination of the employment relationship by an employee or employer shall not occur unless there is a valid reason for the termination that is not arbitrary, capricious, or discriminatory and
relates to: (a) the ability or conduct of the employee; (b) the operational requirements of the employer; or (c) an employee's desire to seek other employment or discontinue current employment.

**Section 4. Termination of Employment — Notice.**

(a) *Employee Initiated Terminations.* An employee who terminates the employment relationship on his/her own initiative shall notify the employer orally of the intended termination at least fifteen (15) calendar days prior to the effective date of termination and shall before the date of termination provide the employer in writing with the reasons for the termination either through delivery in person or by certified mail return receipt requested.

(b) *Employer Initiated Terminations.* An employer who terminates the employment relationship shall notify the employee orally at the time of the employment termination of the reasons therefor and, thereafter, in writing by delivery in person or by certified mail, return receipt requested, within ten (10) calendar days after the employment termination, of all the reasons therefor.

**Section 5. Termination of Employment — Complaints.**

An employee or employer who believes that a termination of employment has occurred in violation of section 3 may file, by certified mail, return receipt requested, a written request for arbitration of the dispute with either, but not both, the: (a) Bureau of Mediation; or (b) the County Court in the county where the termination of employment occurred at the county's Prothonotary's Office. This written request must be mailed by certified mail, return receipt requested, not later than thirty (30) days after receipt of the employee's or the employer's written notification as is provided for in Section 4. Where no written notification or an untimely written notification is provided in accordance with Section 4, the employee or employer must file this written request by certified mail, return receipt requested, not later than ninety (90) days after the employee's last date of employment.

**Section 6. Arbitration.**

(a) *Appointment.* Where a written request for arbitration has been filed with the Bureau of Mediation, the Bureau shall appoint an arbitrator within forty-five (45) days after the request is received from the panel of arbitrators maintained by the Bureau and shall within this time period notify the employee and employer of the appointment. In the event a written request for arbitration is filed with the County Court in the county where the termination of employment occurred, the Court on its own motion shall appoint an arbitrator within forty-five (45) days after the request is received by
the county's Prothonotary's Office from a list of attorneys it shall maintain who it deems by experience, knowledge, and familiarity of employment relations are qualified to hear these disputes on an alternating basis.

(b) Hearing. Within thirty (30) calendar days after his/her appointment, or within further additional periods of time as the employee and employer may in writing agree, the arbitrator shall schedule a hearing.

(c) Conduct of Hearing. The hearing shall be conducted in the following manner:

1. Fixing of Locale — The parties may mutually agree upon the locale where the arbitration is to be held. If there is a dispute as to the appropriate locale, the arbitrator shall have the power to determine the locale and his/her decision shall be binding. At least ten (10) days prior to the hearing, the arbitrator shall mail notice of the time and place of the hearing, unless the parties otherwise agree.

2. Vacancies — If any arbitrator should resign, die, withdraw, refuse, or be unable or disqualified to perform the duties of his/her office, the Bureau or the County Court, whichever was the original appointing authority, shall, on proof satisfactory to it, declare a vacancy. Vacancies shall be filled in the same manner as the making of the original appointment, and the matter shall be reheard by the new arbitrator.

3. Representation of a Party — Any party may be represented at the hearing by an attorney or by another representative of their choosing.

4. Stenographic Record — Any party may request a stenographic record by making their own arrangements. If the parties agree that a transcript is to be the official record of the proceeding, it must be made available to the arbitrator. The cost of a record shall be paid for by those parties requesting one, in such proportion as they may agree.

5. Attendance at Hearing — Persons having a direct interest in the arbitration are entitled to attend hearings. The arbitrator shall have the power to require the retirement of any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other persons.

6. Adjournments — The arbitrator, for good cause shown, may adjourn the hearing upon the request of a party or upon
his/her own initiative, and shall adjourn when all the parties agree thereto.

(7) Oaths — Before proceeding with the testimony, the arbitrator may, in his/her discretion, or if requested by either party, require witnesses to testify under oath administered by him/her.

(8) Arbitration in the Absence of a Party — The arbitration may proceed in the absence of any party, who after due notice, acceptable to the arbitrator, fails to be present or fails to obtain an adjournment.

(9) Evidence — The parties may offer evidence as they desire and shall produce additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. The arbitrator may subpoena witnesses and documents upon his/her own initiative or upon the request of any party. The arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of the arbitrator and all of the parties, except where any of the parties is absent, in default, or has waived his/her right to be present.

(10) Evidence by Affidavit and Filing of Documents — The arbitrator may receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as he/she deems proper after consideration of any objections made to its admission.

(11) Inspection — Whenever the arbitrator deems it necessary, he/she may make an inspection in connection with the subject matter of the dispute.

(12) Closing of Hearings — The arbitrator shall inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the arbitrator shall declare the hearings closed. If briefs or other documents are to be filed, the hearings shall be declared closed as of the final date set by the arbitrator for filing of these briefs. The time limit within which the arbitrator is required to make his/her decision shall commence to run, in the absence of other agreement by the parties, upon the closing of hearings.

(13) Reopening of Hearings — The hearings may be reopened by the arbitrator on his/her own motion, or on the motion of either party, for good cause shown, at any time before the decision is made.

(14) Time of Decision — The decision shall be rendered promptly by the arbitrator and, unless otherwise agreed by the
parties, not later than thirty (30) days from the date of closing the hearings.

(15) Release of Documents for Judicial Proceedings — The arbitrator shall, upon the written request of a party, furnish to the party at its expense certified facsimiles of any exhibits in the arbitrator’s possession that may be required in judicial proceedings relating to the arbitration. Personal notes and working papers of the arbitrator are exempt from disclosure.

(16) Judicial Proceedings — The arbitrator is not a necessary party in any subsequent judicial proceedings relating to the arbitration unless a court so requires.

(d) Decision. After the close of the hearing, the arbitrator, based upon the issues presented, shall render a written opinion outlining the reasons for the decision. The arbitrator shall sign and date the decision. A copy of the decision shall be mailed to the employee, employer, and the appointing authority by certified mail, return receipt requested. Parties shall accept as legal delivery the date the decision is received in the mail via certified mail, return receipt requested, from the arbitrator, addressed to such party at its last known address or to its attorney, or other representative appearing at the hearing.

(e) Remedies. The remedies from which the arbitrator may select include, but are not limited to, the following:

(1) Sustaining the termination of employment against the employee or employer with or without a monetary award.

(2) Reinstating the employee with no, partial, or full back pay.

(3) A severance payment.

(4) Adding a reasonable rate of interest to any monetary award.

(5) Requiring restitution for any employee or employer property.

(6) Attorney’s fees or other fees for a party’s representative.

(7) Any other remedy permitted under the law.

(f) Settlement. At any time after the appointment of the arbitrator, the employee and employer may settle their dispute and the terms of the settlement shall be set forth in an arbitrator’s decision.
(g) Costs of Arbitration. The employee and employer shall share equally the costs of the arbitration, but shall bear their own costs for witnesses and the presenting of their respective position unless otherwise decided by the arbitrator. The arbitrator shall set his/her own fee for the hearing of the dispute.

Section 7. Effect of the Arbitrator's Decision.

An arbitrator's decision shall be final and binding upon the employee and employer and may be enforced in the County Court of the county in which the dispute arose.

Section 8. Judicial Review.

The County Court of the county in which the dispute arose shall review the arbitrator's decision, upon petition by either an employee or employer filed within thirty (30) days after receipt of the arbitrator's decision. This review shall be only for the reasons that:

(a) there was evident partiality by an arbitrator appointed as a neutral, or corruption or misconduct of the arbitrator prejudicing the rights of any party;
(b) the arbitrator exceeded his/her powers; or
(c) the arbitrator refused to postpone the hearing upon good cause being shown therefor, or refused to hear evidence material to the controversy, or otherwise so conducted the hearing as to prejudice substantially the rights of a party.

The pendency of a proceeding for review by the County Court, or any further appeal to a State appellate court, shall not automatically stay enforcement of the arbitrator's decision.

Section 9. Contempt.

An employee or employer, who disobeys a lawful order for enforcement of an arbitrator's award issued by any court of this State, may be held in contempt. The punishment for each day that the contempt occurs shall be a fine as set forth by the court, imprisonment, or any other enforcement measure deemed appropriate.

Section 10. Conflict With Other Acts.

Initiation of procedures pursuant to this act shall preclude an employee or employer from instituting similar proceedings under any other act. The remedies and procedures of this act shall be exclusive and shall not be construed to duplicate any other act or be in addition thereto.
Section 11. Notice of this Act.

(a) Posting of Act. An employer shall post a copy of this act in a prominent place of the work area.

(b) Copy of Act to Employee. Where the employer terminates the employment relationship, a copy of this act shall be provided along with the written notification provided for in section 4(b).

Section 12. Effective Date.

This act shall take effect 90 days after enactment and shall cover any termination of employment that occurs on or after the effective date of this act. This act shall not be retroactive.

Analysis of Statutory Proposal

In comparison with statutory schemes that have been suggested within other jurisdictions for the regulation of at-will employment, this proposal is unique. Its scope is much broader than merely an attempt to abrogate at-will employment. The proposal is an all-encompassing attempt to set forth procedures for terminating the employment relationship by both employees and employers. In an effort to regulate this area, employee and employer rights must be considered and balanced. Employees must be protected from improper employment terminations initiated by employers. Likewise, employers should be accorded an equal recourse against improper employment terminations.

The proposal is intended to cover all employees and employers in the public and private sectors. Only limited exclusions are provided for employees: (1) covered by a collective bargaining agreement that contains a final and binding grievance arbitration procedure for the review of employment terminations; (2) protected by a statutory civil service or tenure procedure; (3) who have a written employment agreement that contains a final and binding grievance arbitration procedure for the review of employment terminations; or (4) who are in a probationary status.

The standard to evaluate an improper termination by either an employee or employer is simple; i.e., was there a valid reason for the termination that is not arbitrary, capricious, or discriminatory. This standard is broad yet specific in that a "valid reason" for the termination must exist.

Notice of an employment termination is required by both employees and employers. This must be given orally and in writing. A cause of action for an improper termination occurs from the date the written

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89. See supra notes 66–67 and accompanying text.
notice is received by certified mail return receipt requested. Where no notice is given nor timely received, the period for filing a complaint is increased. This is done to encourage the giving of written notice. Otherwise, potential backpay liability is extended.

The initiation of the complaint is simple. Only a request for arbitration need be filed. One of two methods for appointing an arbitrator may be selected. This may occur through the services of the State's Bureau of Mediation of the Department of Labor and Industry, or through the local County Court in the county where the improper employment termination occurred.

The proposal places no additional burden on the Bureau of Mediation that is significant for the administration of this act. In most cases, they already have available lists of arbitrators they consider competent to handle these disputes. The only duty of the Bureau is to appoint an arbitrator. An employee and employer are given no discretion in the selection of the arbitrator. This is solely the responsibility of the Bureau of Mediation.

An additional, yet not overburdensome, requirement is placed on the County Court. It must develop a list of attorneys it feels are qualified to serve as arbitrators. These individuals should have the experience, knowledge, and familiarity to deal with employment relations. This is an effort to develop a pool of individuals who may be called upon later to serve as labor arbitrators for other disputes.

The arbitration is to be conducted like any other labor arbitration. An arbitrator's award is to be considered final and binding on the parties. It can be set aside only through the same standards that apply to the review of any arbitration award. Failure to conform with an arbitration award carries a severe contempt penalty.

90. For example, in Pennsylvania, court appointed arbitrators are already used to hear and decide civil cases. PA. STAT. ANN. tit. 42, §7361 (Purdon’s 1982). This pool of arbitrators may provide the training ground for what eventually could become a labor court. See infra note 91.

91. An even bolder approach would be to establish a separate system of labor courts within a state to deal with any labor-related problem. This suggestion has been previously advanced by other commentators for use within the United States. See Jones & Smith, Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments, 62 MICH. L. REV. 1115, 1122 and n. 11 (1964). A system of specialized labor courts has been successful in Denmark, Germany, and Sweden. These courts could be operated with a simplified procedure like that used in small claims courts. In this way, cases could be readily presented by personnel managers, union representatives, or other laypersons without the necessity of being represented by attorneys. In simple cases, the use of attorneys may only obfuscate and complicate what is readily apparent. These courts also would be equipped to hear complex cases to give full scope to representation by legal counsel. See P. Hayes, Labor Arbitration — A Dissenting View 116-118 (1966).
To discourage the appeal of other than the most legitimate cases, no automatic stay to enforcement is provided. This lends further to the finality and binding quality of any arbitrator's decision. If a stay is to be granted, it is assumed that a party must demonstrate some likelihood of success on appeal or extreme prejudice.

This procedure is not intended to duplicate any other remedies that are available for improper employment terminations. Notice of the act must be given to all employees and employers. Finally, the effective date of the act is postponed for 90 days. This is done for the purpose of allowing employees and employers to prepare for the act's implementation.

This proposal is an effort to provide a quick, efficient, and economical means for resolving employment termination disputes between employees and employers without unduly placing an extra strain on the courts. It cannot be denied that, as this area of the law continues to develop during the next ten years, legislatures will be called upon increasingly to regulate this area by both employees and employers. The proposal is intended to be a beginning point for immediately addressing the needs of both employees and employers in the termination of any employment relationship.

PERSONNEL POLICIES TO AVOID AT-WILL EMPLOYMENT LITIGATION.

No employer is desirous of engaging in litigation if it can avoid it. This is particularly true of suits brought by former employees charging wrongful termination. Even when an employer prevails, it may suffer damage from poor publicity. Because courts and legislatures are altering at-will employment, many employers may be left unprepared. Termination practices that once were acceptable may suddenly no longer be adequate.

Lawsuits, whether justified or not, generate poor public relations for employers. Consequently, many employers settle out of court to avoid negative publicity. Realizing this, more and more attorneys are ready to pursue at-will employment cases on a contingency basis because the likelihood of monetary settlement has increased.

It is only human nature for an employee to classify a termination as unjust. Regardless of how just or unjust terminations are, they often cause deep-seated emotional problems. Because of this, the desire to sue for damages is not surprising. In view of the growing evidence of judicial and legislative sympathy for terminated employees, litigation surely will increase during the 1980's.

Despite this, employers can lessen their exposure to involvement in these cases. The following suggestions may aid in minimizing any
employer liability:

1. Put in writing whatever the grounds may be for termination and circulate this information to all employees. This may protect against charges of termination without proper warning.

2. Document every termination action. Keep precise records of conferences, warnings, probationary notices, remedial efforts, and other steps that precede termination.

3. Refine performance evaluations to give honest appraisals of each employee’s weak and strong points. The courts are especially sympathetic to documented evidence that a terminated employee had previously received favorable annual assessments.

4. Give advance warning that an employee has taken a course possibly leading to termination unless changes occur in his/her performance. Put these notices in writing, or have witnesses present at oral admonitions.

5. Watch for signs of an employee’s work problems. Job-related stress or discontent over working conditions may turn a once satisfactory performer into a termination possibility. Signs include a drop in productivity, a tendency to slow down on the job, and an increase in the number of complaints. Try to reclaim such an employee, before termination becomes necessary.

6. Involve two or more persons in the termination process. This practice can minimize suits that allege malice or personality conflicts between a terminated employee and supervisor.

7. Review severance-pay policies. If a terminated employee considers a severance payment fair, he/she may be less likely to initiate litigation. Any extra money expended usually amounts to only a fraction of what a court might award.

8. Develop a severance package that includes continuance, for a limited time, of health and life insurance benefits. Such courtesies may preclude any charges of vindictiveness and may help to mollify any injured feelings.

9. Terminate only when you must, with care and compassion. In general, an exit interview should be conducted away from other employees to avoid embarrassment. The reason(s) for termination should be explained clearly and the nature of any reference to be given should be described.

10. Consider buying “defense and judgment” insurance. This relatively new form of coverage protects employers against lawsuits arising from cases other than personal-injury or property-damages suits covered under conventional insurance policies.
Remember, an employer should be able to document that a termination was for "cause" if lawsuits are to be prevented, unemployment compensation claims are to be contested, union challenges are to be defended, or discrimination charges are to be successfully litigated. In addition to keeping written records, an employer should follow clear-cut, well-publicized procedures for all disciplinary actions.

Proper attention to an employee's problem, or the employer's problems with him/her, may save the employee's position and save the employer future trouble and expense. If the cause of an employee's problem is personal, counseling is sometimes the answer; if the problem is vocational, a transfer or retraining may help. It pays to postpone a termination until all other possibilities have been examined. But if termination is unavoidable, the employer should proceed slowly and carefully; everyone will benefit in the end.

**CONCLUSION**

The foregoing examination of at-will employment and its abrogation through legislative means has not purported to offer the only, or necessarily the preferable, method of dealing with this increasingly important question. However, it is believed that statutory regulation realistically offers the most concrete manner in which to confront this matter. The need for immediate and thoughtful study in this area is clear. Until the impact or viability of regulating employment terminations through statute is assessed, courts will continue to develop a common law that encourages overburdening the judicial system by failing to set forth specific guidelines. This will be costly for employees, employers, and an already overtaxed judicial system.

The time is now for all interested parties to begin a thoughtful and realistic examination of this developing area. No longer can employers ignore the impact of these disputes. Courts have already set forth sufficient warning signals for the initiation of legislative action.