Fair Termination in an At-Will World

Rachel S. Arnow-Richman

Available at: https://works.bepress.com/rachel_arnow_richman/2/
FAIR TERMINATION IN AN AT-WILL WORLD:  
FROM JUST CAUSE TO REASONABLE NOTICE IN THE 
QUEST FOR WORKER PROTECTION  

Rachel Arnow-Richman* 

“A distinction must be drawn between a right to a job and a right to the job.”

ABSTRACT

This Article proposes a fundamental shift in the movement to reform employment termination law. For forty years, there has been a near consensus among employee advocates and worklaw scholars that the current doctrine of employment at will should be abandoned in favor of a rule requiring just cause for termination. This Article contends that such calls are misguided, not (as defenders of the current regime have argued) because a just cause rule grants workers too much protection vis-à-vis management, but because it grant them too little.

A just cause rule provides only a weak cause of action to a narrow subset of workers -- those able to prove they were fired for purely arbitrary reasons. It fails to account for the justifiable, but still devastating, termination of workers for economic reasons, by far the most common reason for job loss today. In this way, the rule is not only inadequate, but anachronistic. Just cause protection is consistent with a mid-twentieth century view of the social contract of employment, one which anticipates a long-term, symbiotic relationship between employer and employee in an economy dependent on internal labor markets. Under such a system, the just cause rule gave legal force to parties’ mutual implicit understanding of their obligations to one another.

In contrast, today’s employers operate principally in an external labor market in which implicit promises of long-term employment have been

* Visiting Associate Professor, Fordham Law School (spring 2009); Associate Professor University of Denver Sturm College of Law; J.D., Harvard Law School. Earlier versions of this project were presented at the 2009 Law & Society Association Annual Meeting, the University of Wisconsin Law School’s 2008 Contracts Workshop, and the 2007 Annual Labor & Employment Law Colloquium. I am grateful for the valuable comments, feedback and support provided by the Colorado Employment Law Faculty (“CELF”) Scholarship Group (Roberto Corrado, Melissa Hart, Martin Katz, Scott Moss, Helen Norton, Nantyia Ruan, Raja and Catherine Smith) and by Diane Burkehardt, Steven Davidoff, Geoffrey England, Douglas Gilbert, Marc Jarsulic, Jose (“Beto”) Juarez, Janice Greer, Richard Squires, Judd Sneirson, and the editorial staff of the Montana Law Week. Student research assistance was provided by Geoffrey Frazier and Lindsay Noyce. The project was made possible by the D.U. College of Law’s 2008-09 Research Professorship Grant.

replaced by implicit promises of long-term employability. Both companies and workers anticipate significant job turnover both in times of economic turbulence, such as the current downturn, in which employers are forced to shed numerous workers due to financial hardship, as well as during economic bubbles, in which companies lay off workers and reorganize for strategic reasons. Given these practices and expectations, the goal of termination law ought not to be protecting individual jobs but rather assisting workers in the inevitable situation of job loss.

To that end, the Article proposes the adoption of a universal “pay-or-play” system of employment termination. Absent serious misconduct, employers would be required to provide advance notice of termination or offer wages and benefits for the duration of the notice period. In contrast to just cause proposals, “pay-or-play” recognizes the necessity and value of employment termination. Rather than encouraging parties to maintain status quo relationships, “pay-or-play” seeks to facilitate transition. It affirms managerial discretion in hiring and firing by eliminating fact intensive inquiries into employer motive. At the same time, it makes real employers’ implicit promise of employability by granting workers a window of income security in which they can comfortably search for the next opportunity.

TABLE OF CONTENTS

Abstract ...................................................................................................................1
Table of Contents ....................................................................................................2
Introduction .............................................................................................................3
I. At Will Reform and The Call For Cause ............................................................8
   A. The Exploitation Critique: Just Cause as the Universal Standard of Decency .............................................................................................................9
   B. The Law and Economics Critique: Making the Case for a Just Cause Default..................................................................................................................11
   C. The Pragmatist Critique: Time for a (Compromise) Statute ......................13
II. Just Cause Protection Verses Worker Protection ...............................................15
   A. The Elusive Victory: Problems of Proof & Deference ..............................15
      1. The Burden of Proving Cause ...........................................................16
      2. Deference to Managerial Discretion ..................................................18
      3. A Pyrrhic Victory? ............................................................................19
   B. Who Are We Helping? Problems of Scope................................................21
      1. The Scarcity of Arbitrary Terminations ............................................22
      2. The Prevalence of Economic Terminations ........................................23
III. Rethinking Wrongful Termination for a “Me, Inc.” Economy .........................26
   A. The “Life Cycle” Story: Just Cause and Implicit Contracts .................26
      1. The Rise of Long-Term Employment .............................................26
2. A Legal Imprimatur

   1. The Social Contract of “Employability”
   2. New Rules, New Strategies
C. Notice as the New Cause: From Justifying Termination to Enabling Job Transition

IV. Pay-or-Play In Practice
   A. Existing Foundations: Unemployment Insurance and Plant Closing Laws
      1. Government Benefits verses Mandatory Severance: The “Pay” Option
      2. From WARN to Universal Notice: The “Play” Option
   B. Modeling a Pay-or-Play Alternative
      1. Canada’s Common Law Rule of Reasonable Notice
      2. The Viability of a Contextual Standard
      3. The “Graded Vesting” Alternative
      4. Picking a Number
   C. Risk Management Under Pay-or-Play
      1. Passing on Costs to Workers
      2. Litigating Serious Cause to Terminate
      3. Requiring Pre-employment Waivers
      4. Avoiding Employment
   Conclusion

INTRODUCTION

On November 17, 2008, CitiBank made history by announcing the imminent layoff of 52,000 employees, the second largest on record after IBM’s layoff of 60,000 workers in 1993. Occurring in the midst of what some have called the most significant stock market collapse since the Great Depression, the CitiBank layoff is just one of many reductions in force (RIFs), mergers, bankruptcies, and fire sales that occurred in the wake of...

---


2 See Mark Jickling, Congressional Research Service, Causes of the Financial Crisis 1 (January 29, 2009); Laura D’Andrea Tyson, In Defense of Obamanomics, WALL ST. J., Mar. 9, 2009, at A19 (stating that President Obama “inherited an economic crisis worse than any the nation has experience since the Great Depression.”); Robert J. Barro, What are the Odds of a Depression?, WALL ST. J., Mar. 4, 2009, at A15 (exploring the scope of the current economic downturn in the United States and concluding that “there is ample reason to worry about slipping into a depression.”).
the mortgage industry implosion and ensuing financial turmoil of 2008. Such events are likely to continue to displace countless workers in the near future until the global economy achieves equilibrium.

Reductions in force within the financial industry are notable not only for their size but for where and why they have occurred. The problem of “plant closings” has long been viewed as the inevitable and necessary conclusion to America’s dying manufacturing industry – a phenomenon associated with rust belt factories and the off-shoring or mechanization of blue collar jobs. But Citibank and other financial industry layoffs tell a different story. These closings and RIFs are taking place in sophisticated, vibrant and globalized industries. They represent not the necessary demise of anachronistic enterprises, but the inevitable risks of industry experimentation. In this version of the plant closing story, a business adopts a new technology, creates a new financial instrument, or pursues some other innovation. Some of these endeavors (like the silicon chip) will herald incredible economic success, even change life as we know it; some (like the credit default swap) will fail miserably and plunge businesses (and workers) into bankruptcy.

Either way, the chance, indeed the likelihood, of economic based termination is part and parcel of a modern, fast-paced, interconnected economy that is constantly reinventing itself. Given this reality, one might think that the rights of workers terminated for economic reasons – whether individually or collectively – would top the agenda of advocates for worker

---


4 See Congress of the United States Congressional Budget Office, The Budget and Economic Outlook: Fiscal Years 2009 to 2019, Jan. 2009, at 2, available at http://www.cbo.gov/ftpdocs/99xx/doc9957/01-07-Outlook.pdf (forecasting that the recession will be the longest and deepest since World War II by lasting into the second half of 2009 with the unemployment rate reaches over nine percent by 2010); Kelly Evans, Jobless Rate Tops 8%, Highest in 26 Years, WALL ST. J., at A1 (hypothesizing that the unemployment rate will be in double digits by the end of the year as 12.5 million more Americans lost their jobs in February of 2009); Conor Dougherty & Kelly Evans, Economy in Worst Fall Since ’82, WALL ST. J., Feb. 28, 2009, at A1 (quoting one economist as predicting a minor economic recovery in 2010 and another economist as saying that a “deep and long recession” cannot be averted).


7 See Summers, Worker Dislocation, supra note at 1033 (“Dislocation of workers is inescapable in anything other than a closed and regimented society which prefers stagnation to increased living standards.”)
protection. But that is not the case. To be sure, for the last fifty years, employment law scholars have evinced a near consensus that employment at will -- the American default rule that permits termination by either party for any reason or no reason\(^8\) -- ought to be abolished.\(^9\) However, they have almost universally advocated for a just cause alternative, one which would proscribe only arbitrary or socially condemnable terminations.\(^{10}\) Under

---

\(^8\) The employment at will default rule is generally attributed an 1877 treatise by writer Horace Wood. See Paul Berks, Social Change and Judicial Response: The Handbook Exception to Employment-at-Will, 4 EMPL. RTS. & EMPLOY. POL’Y J. 231, 235-36 (2000) (describing that employment-at-will first appeared in Wood’s treatise and ‘American courts were quick to adopt ‘Wood’s rule’ and by the end of the nineteenth century, employment-at-will was the dominant doctrine governing the employment relationship.”). Scholars have questioned the extent to which Wood’s assertion of the rule was adequately supported by the precedents of this time. See, e.g., Jay Feinman, The Development of the Employment At Will Rule, 20 AM. J. LEGAL HIST. 118, 126-27 (1976); Deborah A. Ballam, Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine, 17 BERKELEY J. EMP. & LAB. L. 91, 92-94 (1996) (explaining that “the common assertion is that Wood simply made the rule up with absolutely no supporting authority” because “he cited only four American cases as authority ... none of which supported him.”). But see Mayer G. Freed & Daniel D. Polsby, The Doubtful Provenance of Wood’s Rule,” Revisited: 22 ARIZ. ST. L.J. 551, 554 (1990) (contending that Wood relied on four American cases for his black letter rule, and notwithstanding the persistent assertions to the contrary, these cases do indeed support the principle for which Wood cited them.”). Whatever its provenance, however, employment at will is in fact the established law in all American states other than Montana, which has modified the default rule by statute. See Montana Wrongful Discharge From Employment Act, MONT. CODE ANNO. § 39-2-904(1)(b) (2007) (making discharge wrongful if “the discharge was not for good cause.”). See generally Mayer G. Freed & Daniel D. Polsby, Just Cause for Termination Rules and Economic Efficiency, 38 EMORY L.J. 1097, 1097 (1989) (explaining that employment at will is the general presumption, and “in the private sector and in the absence of unions, employment is almost always at will.”); Jisa J. Bernt, Finding the Right Jobs for the Reasonable Person in Employment Law, 77 UMKCL L. REV. 1, 7 (2008) (stating that “employment-at-will is still the default rule in almost every jurisdiction in the United States.”).

\(^9\) Articles condemning the American at-will rule are legion. See, e.g., Lawrence E. Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404, 1404-05 (1967) (advocating the position that employment-at-will threatens the individual freedom of employees); Clyde Summers, Employment At Will in the United States: The Divine Right of Employers, 3 U. PA. J. LAB. & EMP. L. 65, 77-78 (2007) (discussing that exceptions to the at-will rule that could provide employees with protection from unfair discharge have been narrowly applied by courts and questioning why the at-will doctrine still dominates when just cause protection is accepted in collective agreements); Theodore J. St. Antoine, A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower, 67 Neb. L. REV. 56, 65-70 (1988) (rebuiting the arguments of defenders of the at-will rule); Cynthia L. Estlund, How Wrong are Employees about Their Rights, and Why Does it Matter?, 77 N.Y.U. L. REV. 6, 9-10 (2002) (providing evidence that employees believe they have more legal protection than actually provided by employment at-will which allows employers to benefit from employees erroneous expectations without the cost of actual heightened employee protection); Cass R. Sunstein, Switching the Default Rule, 77 N.Y.U. L. REV. 106, 121 (2002) (reasoning that employees overestimate their legal rights because employment at-will is the default rule and, therefore, workers would have a better understanding of the law were the default rule shifted in favor of employees and informed bargaining occurred).

\(^{10}\) See, e.g., Blades, supra note 7, at 1410 (endorseing a just cause rule for employee discharge as protecting employees from discharges for no reason, discharges for ulterior reasons, and discharges for “reasons erroneously believed by the employer to be justified.”); Summers, supra note 7, at 85 (proposing ways to provide more legal protection to workers, including collective bargaining because such agreements typically adopt a just cause discharge rule); St.Antoine, supra note 7, at 70-71 (advocating new legislation using just cause language to protect employees from unjust discharge); Estlund, supra note 7, at 30 (promoting waivable or mandatory just cause protection of employees, particularly if the costs of enforcing such a rule could be minimized); Sunstein, supra note 7 (proposing that a default rule that discharge of employees be for cause would enhance employees’ knowledge of their rights). In addition, there are a number of recent articles that, while not specifically condemning at-will or championing the just cause system, recommend the adoption of a statute that limits employers’ ability to terminate without justification. See, e.g., Jeffrey M. Hirsch, The Law of Termination: Doing More with Less, 68 MD. L. REV. 89 (2008); Nicole B. Porter, The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause, 87 NEB. L. REV. 62 (2008).
such a system, courts would continue to defer to employer discretion with respect to their business needs and performance assessments, and the consequences to employees terminated for “legitimate” reasons would be born primarily by the individual. Employers’ obligations to such workers would be limited to their attenuated contributions to the unemployment compensation system, and the modest notice requirement imposed under federal law solely in a mass layoff event.

This Article challenges the existing orthodoxy of at-will reform scholarship, arguing that the dominant approach to termination reform – the call for a universal just cause standard for termination – is misguided. Such an approach, while more favorable to workers than the current system, provides only a weak cause of action to a relatively narrow subset of terminated workers. It protects those workers fired for purely arbitrary reasons, and only those who are able to prove as much in a court of law. It fails to adequately account for the tremendous practical challenges that arbitrarily terminated workers will face in establishing the absence of cause in proceeding against their employers, and it does nothing to address the justifiable, but still devastating, termination of workers for economic reasons. In short, the Article argues against just cause protection not, as defenders of at will argue, because it grants workers too much protection vis a vis managerial discretion, but because it gives them too little.

Instead, this Article calls for the adoption of a “pay-or-play” approach under which an employer would be required to provide meaningful advance notice of termination, or, at the employer’s election, offer wages and

---

11 See Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129, 146-47 (2005) (describing that unemployment insurance is funded by an employer tax based on the employer’s history of layoffs called an experience rating, and suggesting that employers pass most of this cost of doing business onto the labor force via paying lower wages or hiring fewer employees); Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces*, 76 IND. L.J. 29, 39-40 (2001) (explaining that because experience rating is imperfect in that the actual cost of unemployment insurance for a discharged worker is not taxed on the discharging employer, it encourages “temporary layoff unemployment” whereby the worker’s income is subsidized by unemployment funds during slow times).

12 The WARN Act, 29 U.S.C. §§ 2101-09 (1988), requires large employers to provide sixty days advance notice to workers who will be effected by a plant closing or mass layoff, defined as more than fifty employees or one-third of the workforce. See 29 U.S.C. §§ 2102, 2101(3). The Act is generally perceived as being too narrow to meaningfully help workers. See, e.g., McHugh, supra note at 64-70 (proposing longer notice period, expanded coverage, administrative enforcement and enhanced remedies, among other improvements); Evan Hudson-Plush, *WARN’s Place in the FLSA / Employment Discrimination Dichotomy: Why a Warning Cannot be Waived*, 27 CARDOZO L. REV. 2929, 2932 (2006) (discussing that most employers subject to the WARN Act circumvent the notice requirement by having employees sign waivers of their rights under WARN upon discharge, and courts have upheld such waivers and releases of liability under WARN); Parisis G. Filippatos & Sean Farhang, *The Rights of Employees Subjected to Reductions in Force: A Critical Evaluation*, 6 EMPL. RTS. & EMPLOY. POL’Y J. 263, 325-26 (2002) (criticizing the WARN Act for being too narrow, providing too many exceptions, and being “toothless” and suggesting amendments that would increase the scope of WARN and provide incentives for more private litigation); Jane Friesen, *Mandatory Notice and the Jobless Durations of Displaced Workers*, 50 IND. & LAB. REL. REV. 652, 653 (1997) (giving evidence that the number of workers reporting having received notice of layoff did not increase after the passage of WARN in 1988).
benefits for the duration of the notice period. Under this proposal, issues of employer motive – the touchstone of just cause approaches – would be largely irrelevant. Absent serious misconduct, employers would be obligated to provide notice or pay for a period designed to approximate the amount of time necessary for the employee to find a comparable alternative position irrespective of the reason for termination. Instead of the subjective and fact intensive question of whether termination was justified, the approach would look to termination process – whether the employer has provided an amount of notice or pay that can minimize the inevitable loss to the worker.

As this description suggests, a pay or play proposal rests not only on practical considerations, but on a normative view of worker dislocation that differs fundamentally from that which underlies just cause proposals. The hallmark of collective bargaining relationships, just cause protection aims to enforce a particular social contract of employment, one which anticipates a long-term, symbiotic relationship between employer and employee in an economy dominated by internal labor markets.

This model of employment was at its height in the mid-twentieth century, roughly in tandem with the height of union density in the United States. In such a system, just cause approaches give legal force to parties’ mutual expectations of continued employment and privilege job preservation as a societal value. In the current economy, however, many companies have reverted to an external labor market approach to employment in which lateral movement of workers within and among employers is anticipated and even prized. For many employers, flexibility to hire and fire is critical to staying competitive in a fast paced, globalized marketplace, and for many workers current employment is primarily a source of training and experience that will enable subsequent career moves. In this environment, efforts to protect workers that rest on traditional notions of job security may be both infeasible for employers and even inconsistent with worker expectations.

In contrast to just cause proposals, a pay-or-play approach recognizes the necessity and indeed the benefits of employment termination. It values not longevity in employment, but fluidity. Rather than encouraging parties to maintain status quo relationships, it seeks to facilitate transition. In this way, a pay-or-play approach complements employer and employee interests in a transient labor market. The system affirms managerial discretion in hiring and firing decisions by eliminating fact intensive inquiries into employer motive, while providing a meaningful and appropriate form of

---

13 See Nancy Morrison O’Connor, “Promises and Pye-Crusts”: State Statutes Threaten Broadcast Noncompetes, 21 COMM. LAW. 3, 5 (2003) (explaining that a pay-or-play clause, in the context of broadcasting, is where “the employee recognizes that the employer has fulfilled any contractual obligation as long as the employer pays the employee and has no obligation to play the employee.”).
security to workers in an economy dependent on external labor markets: it
grants workers a window of income security in which they can comfortably
search for the next opportunity. Finally, a pay or play system, like the just
cause approach places a legal imprimatur on mutual expectations and
voluntary practices, albeit contemporary ones. It elevates the standard
business practice of providing severance to workers terminated for non-
performance reasons to a legal rule.

The remainder of this Article proceeds as follows: Part I provides an
overview of the scholarly consensus in favor of just cause reform. Part II
demonstrates the limits of just cause approaches in protecting workers. Part
III argues that just cause proposals make sense in an historical context, but
are fundamentally at odds with the emerging social contract of employment.
Part IV turns to the question of crafting an alternative approach to worker
protection, drawing on domestic and foreign legal contexts in which
reasonable notice is required to terminate employment or other indefinite
relationships.

I. AT WILL REFORM AND THE CALL FOR CAUSE

To read the current scholarship it is surprising that employment at will
still exists. There is a wide body of literature, dating at least to the 1960s,
calling for reform against a mere handful of voices defending the status
quo. Central to all of these critiques are the limits of maintaining an at
will system, which is considered both exploitive and inefficient. While they
cite legitimate problems in the current regime, however, these critiques
implicitly assume without serious examination both the value and
inevitability of a just cause alternative in the event that at will employment
is dismantled. Thus, they impose a dichotomy between at-will and just
cause systems without considering whether just cause, while more
employee-friendly than at will, is the best way to protect worker interests.

This section offers a survey of the at-will reform literature. It identifies
three themes in the scholarship supporting the just cause alternative: worker
exploitation, economic efficiency, and legal pragmatism. Exploring this
work makes apparent that the notion that just cause protection is the
alternative to an at-will system was imported reflexively from the union
model of the mid-twentieth century. It has since framed the debate over at
will reform with little to no evaluation of its efficacy by its supporters.

14 The seminal article is Blades, supra note --. See also Summers, supra note --; Antoine, supra note --; Estlund, supra note --; Sunstein, supra note --.
A. The Exploitation Critique: Just Cause as the Universal Standard of Decency

The key strain in the early just cause literature is the inherent unfairness of an at-will system and the potential for employer abuse. Scholars cite workers’ financial dependence, minimal mobility and emotional investment in their work as reasons why individual employees are vulnerable to abusive terms and the threat of discharge. In this respect, the call for reform is set within an explicit and legitimate critique of existing power structures.

In setting forth an alternative framework to at will, early reform literature drew explicitly on the collective bargaining model of just cause only termination. This move was appropriate to the way in which such literature characterized the problems associated with an at-will regime. Consistent with their exploitation critique, early just cause advocates presented at-will employment as enabling arbitrary, malicious and even socially harmful employer behavior. Thus, the problem of arbitrary termination was conflated with the condemnation of morally reprehensible employer motives. For this reason, a just cause approach requiring an objective justification for discharge offered a responsive solution.

In addition, the collective bargaining setting was perceived at the time as a viable and modestly successful model for leveling the power imbalance inherent in employment relationships. In negotiating collective terms of employment, unions almost uniformly seek and achieve just-cause protection for their workers, a fact widely observed in the just cause literature.

Thus the just cause standard emerged as an “accept[ed and]
essential element of a tolerable and humane employment relationship.”

If just cause was what workers achieved when structural impediments to negotiated were eliminated, such thinking assumed, then just cause must certainly be protective of workers’ interests. In this way, the early exploitation literature sought explicitly to bring the established protections of the union setting to the general workforce. It endeavored to eliminate, what it termed, a “cleavage in [American] industrial jurisprudence.”

Since that time, however, the landscape has changed dramatically in two important respects. First, union density has declined dramatically. The first articles calling for importing the just cause standard to the individual employment relationship appeared in the 1960s on the heels of the collective bargaining movement’s strongest decade. By the time the calls for “universal” just cause were penned, union influence was already cycling downward. Few have expected a significant turn around, even before the recent collapse of the heavily unionized industries. Second, since the advent of the just cause movement there has developed a wide range of tort law and statutory causes of action aimed at addressing the most reprehensible forms of at-will terminations. These include, most notably, antidiscrimination and public policy wrongful claims that address the type of unchecked managerial discretion that inspired the initial call for just cause reform in the first instance. Termination for refusing to commit


22. See Hutchison, supra note ___ at 802-04 (discussing the rise in union membership in the mid-1900s and the subsequent decline).

23. See id. at 803 (stating that “private sector decline appears … irreversible”); Hylton, supra note ___ at 686 (noting that “there is no obvious reason to believe that this decline will not continue in the foreseeable future.”). The prognosis is worsened by the inevitable decline of the United Auto Workers in the wake of the 2009 General Motors and Chrysler bankruptcies. See, e.g., Steven Greenhouse, Unions Look for New Life in World of Obama, N.Y. TIMES, Dec. 29, 2008, at B6 (reporting that United Auto Workers membership has decreased to under 500,000 from 1.5 million members in the late 1970s while overall union membership has fallen from 21 million to 15.7 million over the same period).


25. See Estlund, Wrongful Discharge, supra note ___ at 1659-62 (describing the antidiscrimination exceptions to employment at-will which require some bad motive by the employer); McGinley, supra note ___ at 1494
perjury, for filing workplace injury claims, and for refusing to take part in illegal activities are unlawful today notwithstanding the absence of a universal just cause standard.\textsuperscript{28}

Of course, neither of these developments means that further reform to the at-will system is unnecessary. To the contrary, the demise of the labor movement means that the default rules and statutory law that govern individual relationships play an increasingly important role in protecting workers, and the advent of new causes of action certainly do not address the myriad ways in which employees can be terminated unfairly. The point rather is that such developments challenge the idea that just cause is the appropriate, indeed the inevitable, alternative to the current system. Scholars can no longer legitimately cite collective bargaining agreements as the benchmark for decency and fairness in employment. Meanwhile, the growing litany of unlawful reasons for termination call into question the utility of a system that replicates this inquiry into employer motive.\textsuperscript{29} At a minimum contemporary scholars ought to have reexamined the fit between just cause and the goal of enhanced legal protection for workers in carrying the at-will reform movement forward into the modern era. As detailed in the next sections, that is not what has happened.

\section*{B. The Law and Economics Critique: Making the Case for a Just Cause Default}

Recent scholarship criticizing the at-will system has justified the need for reform on different grounds from earlier scholars, albeit still in support of a just cause alternative. Richard Epstein’s widely-cited 1984 essay “defending” employment at will largely recast the debate in law and economics terms.\textsuperscript{30} According to Epstein, the relative scarcity of explicit just cause contracts attests to parties’ desire to maintain employment at will. If workers wanted just cause protection, they would be willing to “pay” for it in terms of lower wages, but almost invariably they accept the at-will

\textsuperscript{28}See Richard E. Moberly, \textit{Sarbanes-Oxley’s Structural Model to Encourage Corporate Whistleblowers}, 2006 B.Y.U. L. REV. 1107, 1126 (2006) (examining the expansive anti-retaliation protection provided to employees under Sarbanes-Oxley when an employer discharges, demotes, suspends, threatens, harasses, or discriminates against a whistleblower); Estlund, \textit{Wrongful Discharge, supra} note \textsection at 1660-61 (pointing out that there is already federal and state whistleblower statutes to protect employees against such retaliatory terminations).

\textsuperscript{29}That said, some scholars believe this state of affairs cuts the other way and suggest that universal just cause makes sense as a means of standardizing the legal inquiry into the permissibility of any particular termination. See Jeffrey M. Hirsch, \textit{The Law of Termination: Doing More with Less}, 68 MD. L. REV. 89, 100 (2008); Nicole B. Porter, \textit{The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause}, 87 NEB. L. REV. 62, 84-85 (2008). I discuss such proposals in Part I.C., infra.

\textsuperscript{30}Epstein, \textit{supra} note \textsection.
default.\textsuperscript{31} In response to this argument, scholars have leveraged Epstein’s own tools to undermine his conclusion, questioning whether employees are sufficiently knowledgeable of the background law to “choose” employment at will, even assuming they would have the bargaining to effect a contrary preference.\textsuperscript{32}

Thus a body of literature has emerged arguing in favor of a just cause default framed in terms of economic efficiency. These arguments rely on empirical research demonstrating that most workers assume the law protects them against arbitrary discharge, believing that employers must legally have cause to terminate a worker.\textsuperscript{33} Such workers further overstate the protection that an actual just cause regime would afford, assuming for instance that a termination in order to hire a replacement at a lower wage would be unlawful.\textsuperscript{34} If workers believe they are subject to just cause protection as a matter of default law, then the prevalence of at will arrangements cannot be said to reflect a preference for that regime.\textsuperscript{35} In such situations, the economics-based critics of at will suggest the law align itself with the expectations of workers.\textsuperscript{36} Establishing just cause as the background rule, would in effect serve as a “penalty default,” requiring employers to disclose their desire for at will and purchase that right through higher wages.\textsuperscript{37}

\textsuperscript{31} Id. at 954-55.
\textsuperscript{32} See Estlund, supra note 7, at 9 (explaining that “most employees believe that they enjoy something like ‘just cause’ protection even in the absence of any contractual protection.”); Sunstein, supra note 7, at 119-20 (contending that workers “have a false and exaggerated understanding of their legal rights.”); Pauline T. Kim, Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World, 83 CORNELL L. REV. 105, 1997 [hereinafter Kim, Bargaining] (claiming that workers in fact believe “that they have far greater rights against unjust or arbitrary discharges than they in fact have under an at-will contract.”); Pauline T. Kim, Norms, Learning, and Law: Exploring the Influences on Workers’ Legal Knowledge, 1999 U. ILL. L. REV. 447, 479-80 (1999) [hereinafter Kim, Norms, Learning, and Law] (hypothesizing that employees overestimate their rights because they “confuse law and norms” and thereby wrongly think “that the law prohibits what fairness forbids” particularly with regard to discharge); Guy Davidov, In Defence of (Efficiently Administered) “Just Cause” Dismissal Laws, 23 INT. J. OF COMP. LAB. LAW & IND. REL. 117, 122 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=911961 (pointing out that “employees tend to believe that the law provides more job security for them than it actually does.”).
\textsuperscript{33} Kim, Bargaining, supra note 4, at 133-35; Kim, Norms, Learning, and Law, supra note 7, at 456-57.
\textsuperscript{34} Kim, Bargaining, supra note 7, at 112-14 (using empirical evidence to show that end results are likely to closely resemble to the default rule due to endowment effects).
\textsuperscript{35} See also Sunstein, supra note 7, at 9-10 (stating that “employees’ widespread and systematic misunderstanding of the law seriously undermines most defenses of the employment-at-law default rule.”); Kim, Bargaining, supra note 7, at 106 (using empirical evidence to contradict the assumption of employment-at-will defectors that employees bargain with perfect information). See also Sunstein, supra note 7, at 112-14 (using empirical evidence to show that end results are likely to closely resemble to the default rule due to endowment effects).
\textsuperscript{36} Kim, Bargaining, supra note 4, at 154 (advocating a just cause default rule because workers do not understand their default legal rights are at-will); Davidov, supra note 4 (arguing that a just cause default rule would mitigate “information asymmetries” because a just cause rule is more aligned with workers’ expectations).
\textsuperscript{37} See Kim, Bargaining, supra note 4, at 152 (referring to the imposition of a just-cause rule as a “penalty default” would cause employers to share their “superior information about the relevant legal rule” with employees). For an explanation of “penalty default” rules, see Ian Ayres, Ya-Huh: There Are and Should Be Penalty Defaults, 33 FLA. St. U. L. REV. 589, 605 (2006) (defining a “penalty default,” in the area of contract, as “a judicial construction of a contract that is unfavorable to the drafter in order to create an incentive for the drafter, and other similarly situated drafters, to make more clear the legal relationship that the contract actually creates.”);
Such arguments, however, merely call into questions the descriptive premises of the law and economics defense of employment at will. This line of scholarship does not question whether, if workers were fully informed, both about the absence of protection under an at-will system and the relative value of just cause protection, they would in fact chose just cause. Neither does it offer any independent assessment of the value of just cause protection vis-à-vis at will or any other termination rule. Thus, arguments in favor of “switching the default” do not engage the merits of economists’ conclusion that employees ought rationally to prefer at will to just cause, nor do they question the way in which the law and economics literature frames the issue as a choice between these two alternative regimes.

C. The Pragmatist Critique: Time for a (Compromise) Statute

Yet a third set of reform proposals takes a pragmatic view. Building on the existing array of at-will exceptions, these proponents of just cause seek to impose such a standard as a means of integrating and simplifying current law for the benefit of both workers and management. Currently, employers must navigate a complex patchwork system of statutory and common law termination rules in dismissing employees and can, in any event, anticipate being called to account for their decisions in one forum or another. At the same time, the absence of a general just cause standard means that terminated employees, particularly those fired under objectionable, but not unlawful circumstances, are either left out or must grasp at claims that are only remotely viable under the circumstances.

Eric Maskin, On the Rationale for Penalty Default Rules, 33 FLA. ST. U. L. REV. 557, 557 (2006) (explaining that a “penalty default” is a rule that causes “one contracting party to reveal socially valuable information that, with transaction costs, she would supposedly keep to herself under a ‘nonpenalty’ default rule.”).


38 See St. Antoine, A Seed Germinates, supra note ___ at 68-69 (suggesting that “the prevention of arbitrary treatment of employees may be not only humane but good business” and explaining that stating that evidence suggests that expenses associated with altering the current rule would not be exorbitant); Porter, supra note ___ at 65-66 (describing a reform plan in which employers would experience a limited risk of litigation but employees would benefit because certain reasons for termination would be unlawful); Hirsch, supra note ___ at 91-92 (stating that the article’s proposal would “supplant all rules regulating terminations with a single, non-waivable, universal law” that would be more effective than current law); Befort, Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment, 43 B.C.L. REV. 351, 429 (presenting a reform proposal that “would have the benefit of eliminating the burden of multiple claims and multiple forums by transferring all employment termination challenges into a single just cause claim subject to resolution in an expeditious arbitration proceeding.”).

40 See St. Antoine, A Seed Germinates, supra note ___ at 69 (discussing the “crushing financial liability incurred by companies that have felt the wrath of aroused juries under our existing, capricious common-law regime.”); Porter, supra note ___ at 71 (noting that the unpredictability of the current system leads to more litigation and makes it difficult for employers to create a uniform plan across state lines); Hirsch, supra note ___ at 96 (noting that “it is often difficult for employers to predict ex ante the consequences of any given termination decisions” under the current system of at-will exceptions).

41 See St. Antoine, A Seed Germinates, supra note ___ at 58-64 (discussing the various judicial theories of
Thus, scholars have argued that antidiscrimination law is overused by victims of unfair, but not discriminatory, terminations, resulting in low plaintiff success rates under these provisions and potentially trivializing or diluting their importance. Indeed, the use of discrimination laws in this manner may actually create or exacerbate bias against minority workers.

For these reasons, some reformers have sought a uniform rule mandating just cause protection that simultaneously imposes some type of procedural or substantive limitation on worker claims. The archetype of this compromise approach is the 1993 Model Employment Termination Act (META), which proposes a uniform just cause rule in exchange for limited remedies. In the same vein is the Montana Wrongful Dismissal in Employment Act (WDEA), the only just cause proposal to have been enacted as law, which not only limits recovery, but preempts most common law wrongful termination claims. A wave of recent proposals has exacted more novel compromises, such a uniform just cause law or set of codified at-will exceptions that supplants some portion of federal discrimination law.

In contrast to the economic-oriented critiques that seek to reverse the common law default, the pragmatist proposals are statutory, offering the advantages of transparency, uniformity and increased adminsterability. To

---

unjust discharge and the downfalls of these causes of action); Porter, supra note ___ at 71-75 (citing examples of “egregious terminations cases” in which the plaintiff did not have a remedy under the at-will exceptions); Hirsch, supra note ___ at 89-90 (noting that very few employees have the resources to navigate the complexities of the current termination laws and this complexity leaves many employees without a claim).

42 See Hirsch, The Law of Termination, supra note ___ at 141 (presenting evidence that “employee claims brought under an antidiscrimination statute generally have a significantly lower chance of success than other claims”); Porter, The Perfect Compromise, supra note ___ at 75-76 (expressing that, because the at-will rule precludes other claims, employees bring discrimination claims for unfair but not discriminatory terminations, and this results in a low success rate for discrimination claims).


44 See, e.g., Hirsch, supra note ___ at 107-08 (explaining the proposal’s procedural and substantive standards and arguing that “the procedural requirements would reduce the information asymmetries currently prevalent in the workplace, while providing ex ante clarity that would help to focus disputes over termination decisions,” and “the substantive standard would impose an exclusive restriction on employers’ ability to terminate employees by prohibiting terminations that cannot be justified by a valid business reason”); Model Employment Termination Act § 5 (1991); Stephen F. Befort, supra note ___ at 424 (proposing a statute adopting a “unitary, just cause standard for termination”); Montana Wrongful Discharge from Employment Act, Montana Code Ann. § 39-2-911 (1987); Porter, supra note ___ at 84 (proposing a statutory enactment that would supersede all common law termination claims).

45 Model Employment Termination Act § 3 (1991) (providing that “an employer may not terminate the employment of an employee without good cause,” unless otherwise validly provided in certain employment agreements); § 7(d) (prohibiting damages from being awarded “for pain and suffering, emotional distress, defamation, fraud, or other injury under common law; punitive damages; compensatory damages; or any other monetary award.”).

46 Montana Wrongful Discharge from Employment Act, Montana Code Ann. § 39-2-905(3) (1987) (barring damages for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages, except as specifically provided for in the Act.); § 39-2-913 (preempting common law discharge claims arising from tort or contract).

47 See Hirsch, supra note ___ at 107 (explaining that the article’s proposal would do away with all common law claims); Porter, supra note ___ at 107 (requiring plaintiffs to chose between current statutory discrimination claims or claims under the statutory proposal put forth).
the extent that they are explicitly compromise proposals, however, it is
unclear how much they will offer workers above and beyond the limited
rights they currently enjoy.48 Recent proposals in particular emphasize
the way in which such legislative initiatives help employers, noting how
the current state of legal uncertainty limits employers’ planning ability,
resulting in costly litigation.49 In short, the pragmatist critique, while
supportive of workers, has as its primary goal the reform of a broken system
as opposed to an independent goal of establishing a just cause regime.

II. JUST CAUSE PROTECTION VERSUS WORKER PROTECTION

All three of the above critiques sound legitimate themes against the
existing status quo and make a strong case for adopting an approach that
moves away from the at-will model. They contribute to a stronger
understanding of the problems of the current system, both in terms of the
limited protection it affords workers, and in the case of the pragmatist
critique, the costs it imposes on employers, which may be equivalent or
even greater than the costs associated with just cause.

What is not at all made clear in any of these critiques is why a just-cause
style system is the logical alternative to the at-will system and, more
importantly, the best alternative for workers. This section considers two
serious impediments to the success of a just cause system in achieving
adequate protection for terminated workers: the limited ability of workers
to challenge arbitrary terminations under current legal standards (the proof
& deference problem), and the large numbers of workers who are
terminated for cause but who nonetheless deserve some amount of
protection upon termination (the scope problem). It argues that, however
helpful to some workers, just cause protection will grant most terminated
employees a cause of action in name only, and will do nothing to address
the needs of workers terminated for legitimate reasons not owing to their
own performance.

A. The Elusive Victory: Problems of Proof & Deference

As J.H. Verkerke states in his defense of employment at will: “The

48 See Daniel J. Libenson, Leasing Human Capital: Toward a New Foundation for Employment Termination Law, 27 BERKELEY J. EMP. & LAB. L. 111, 133 (criticizing META as a compromise that no one
wants and therefore lacking any support).

49 See St. Antoine, A Seed Germinates, supra note ___ at 69 (promoting “a more rational, systematic method
of dealing with improper terminations” to avoid unpredictable jury verdicts); Porter, supra note ___ at 70-71
(explaining that the confusion and unpredictability of the current state of employment law leads to more litigation
and “makes it difficult for national companies to have a national policy regarding termination decisions”); Hirsch,
supra note ___ at 95-96 (discussing that the current system of multiple laws creates uncertainty and imposes costs
on all parties involved).
value of just cause protection depends on the ability to enforce that protection in the event of an unjust discharge." Just cause supporters have long recognized that an affordable forum and appropriate remedy are intrinsic to any system designed to redress baseless terminations. They have not, however, paid much attention to whether employees will actually prevail under a just cause rule. In contrast to the system of enforcing collective bargaining agreements, universal just cause, as envisioned by most supporters of at-will reform, requires employees both to prove the absence of any cause for their termination, and to do so under a definition of cause highly deferential to management interests. This one-two punch of procedural and substantive hurdles to success significantly diminishes the value of a just cause rule to its intended beneficiaries. In short, just cause supporters have not adequately heeded Professor Verkerke’s warnings.

1. The Burden of Proving Cause

At least some procedural obstacles to employee just cause claims have been considered and addressed by at will critics. There is a strong awareness that any just cause system must be structured to limit the enforcement costs imposed on aggrieved employees. Early exploitation-based critiques of employment at will, once again drawing heavily on the structure of unionized relationships envisioned the equivalent of industrial arbitration for adjudicating wrongful discharge. Contemporary statutory initiatives, such as the Montana Wrongful Discharge in Employment Act (MWDEA) and the Model Termination of Employment Act (META) create incentives for parties to choose private arbitration. Those proposals that allow or favor judicial access generally include mechanisms for workers to recover costs and attorneys’ fees.

Whatever the value of these components, they recognize only part of the problem. Success for worker interests is not just about accessibility; it is also about vindication. In the collective bargaining arena, the procedural apparatus for enforcing claims of breach is carefully calibrated to allow workers to seek redress on a level playing field. Proceedings occur in a

---

51 See, e.g., Summers, Time for a Statue, supra note ___ at 521-23 (proposing that “legal protection against unjust dismissal can best be built upon the standards and procedures of our existing arbitration system.”).
52 Montana Wrongful Discharge from Employment Act, Montana Code Ann. § 39-2-914 (1987) (providing that “a party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action … is entitled … to reasonable attorney fees” and “a discharged employee who makes a valid offer to arbitrate that is accepted by the employer and who prevails in such arbitration is entitled to have the arbitrator’s fee and all costs of arbitration paid by the employer.”); Model Employment Termination Act § 6 (1991) (making arbitration the default for of resolution for wrongful termination cases unless the parties agree to some other form of adjudication).
53 Model Employment Termination Act § 7 (1991)); Hirsh, supra note ___ at 128; Porter, supra note ___ at 113.
specialized venue in which workers enjoy free and experienced representation by a union advocate.\textsuperscript{54} Most critically, workers are relieved of the burden of proving cause, which falls to the employer.\textsuperscript{55}

This is not the procedural environment one would expect to see under a universal just cause system. Almost all contemporary proposals, even those that encourage resolution by arbitration, reject the idea of a specialized tribunal for employee claims.\textsuperscript{56} In addition, they almost uniformly place the burden of proof on the worker to establish that the discharge was in fact wrongful.\textsuperscript{57} Notably, the first sustained call for a just cause regime, Professor Blades’ seminal 1967 article, proposed that employees satisfy a clear and convincing evidence standard on the issue of cause in recognition of the need to defer to management on their asserted business justifications for termination.\textsuperscript{58}

The point is not to suggest that just cause proposals ought to incorporate a different proof structure. Placing the burden of proof on the plaintiff makes sense from a basic civil liability perspective. It is precisely what the extant common law of implied contracts requires once a worker establishes the existence of contract for job security.\textsuperscript{59} Furthermore, from a practical perspective, it would be unrealistic to expect a plaintiff-friendly allocation of proof on top of such a fundamental shift of baseline rights in favor of workers.\textsuperscript{60}

Rather, the point is that proponents of just cause ought to take stock of the practical realities of such a system. A just cause system inevitably

\textsuperscript{54} See ABA Section on Labor and Employment Law, The Developing Labor Law.

\textsuperscript{55} See Fischl, \textit{supra} note ___ at 185 (noting that employers typically bear the burden of proving just cause in collective bargaining agreements).

\textsuperscript{56} See Model Employment Termination Act § 8 (1991) (providing for judicial review of arbitration decisions); Hirsch, \textit{supra} note ___ at 124 (arguing that because of the costs of mandatory arbitration and specialized labor and employment courts, “existing courts are the best, albeit imperfect, forum for law of termination claims.”); Porter, \textit{supra} note ___ at 115 (recommending “a private right of action by employees in state or federal court.”). \textit{But see} Ann C. McGinley, \textit{Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy}, 57 OHIO STATE L.J. 1443, 1512 (proposing federal just cause legislation that would require arbitration).

\textsuperscript{57} See e.g., Model Employment Termination Act § 6(e) (1991) (placing the burden on the employee of “proving that a termination was without good cause.”); Porter, \textit{supra} note ___ at 110 (proposing a statute under which the employee would have the initial burden of proving a termination occurred, then the employer would have to come forth with the reason for termination, and finally the employee would have the burden of proving that the employer’s reason is pretext.”); Hirsch, \textit{supra} note ___ at 122 (allocating the burden of proof “by giving the employer the burden to show that it satisfied the procedural requirements and giving the employee the burden to show that the employer’s stated rationale for the termination did not constitute a reasonable business justification.”). \textit{But see} McGinley, \textit{supra} note ___ at 1513-14 (proposing federal just cause legislation that would place burden on employer both to prove a reason for termination existed and that it motivated the employer’s decision).

\textsuperscript{58} Blades, \textit{supra} note ___ at 1429 (contending that a heavier burden of proof is required to avoid “restrict[ing] too greatly the employer’s prerogative to dismiss an employee.”).


\textsuperscript{60} See, e.g. Porter, \textit{supra} note ___ at 84 (mentioning that a just cause standard is politically infeasible, if not impossible, because employers understand the difficulty of the burden of proving just cause); Hirsch, \textit{supra} note ___ at 114 (acknowledging that for a reform proposal to be politically possible, “significant employer discretion is needed to gain employer support or at least dampen employer resistance.”).
places the burden on workers to prove a fact intensive question on an issue on which the employer holds all of the relevant information. While generous discovery rules and information-forcing adjustments to the standard of proof might ease this burden somewhat, employee would remain in the difficult position of proving a negative – the absence of cause – by a preponderance of the evidence.

2. Deference to Managerial Discretion

Perhaps this allocation of proof would not be so detrimental to workers if the standard for cause were relatively exacting. But that is not the case. In addition to the burden of proof problem, universal just cause efforts generally propose or presume a standard for cause that significantly limits inquiry into employer discretion.

In the collective bargaining context, decisions are rendered by labor experts charged with taking into account the “law of the shop” in rendering judgment. For this reasons, arbitrators are justified in examining and questioning employer decision-making, an exercise that will often inure to the benefit of workers. They take into account, not only whether actual cause existed, but will also consider such things as whether the employer’s response was proportionate, whether the employee was adequately warned, and whether, if a rule was violated, the rule itself is fair and consistently enforced.

In contrast, calls for a switch in the default rule implicitly assume that the common law standard of cause, applied in cases of an implied contract, would become the background rule. The usual common law definition contemplates that the employer will terminate on the basis of a “fair and honest cause or reason, regulated by good faith.” Statutory proposals set forth similar language. In practice, courts applying such standards defer

---

61 See McGinley, supra note ___ at 1506 (critiquing META’s allocation of burden of proof on the plaintiff for “plac[ing] the procedural disadvantage on the party with fewer resources and less access to the information he needs to meet the burden”); cf. Richard W. Power, A Defense of the Employment at Will Rule, 27 ST. LOUIS U. L.J. 881, 886 (1983) (describing proof challenges as a reason not to adopt just cause).
62 See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (declaring that labor arbitrator’s must interpret and apply the collective bargaining agreement “in accordance with the industrial common law of the shop.”).
63 See Lisa B. Bingham & Debra J. Mesch, Decision Making in Employment and Labor Arbitration, 39 INDUS. REL. 671, 674 (2000) (noting the perception that labor arbitrators favor employees, and therefore employers prefer to exclude labor arbitrators from employment arbitration).
64 See Whirlpool Corp., 58 Lab. Arb. (BNA) 421 (1972) (describing “seven questions” to be asked by labor arbitrators in determining presence of cause).
66 See, e.g., Montana Wrongful Discharge from Employment Act, Montana Code Ann. § 39-2-903(5) (1987) (defining good cause as “reasonable” grounds based on a legitimate business reason); Porter, supra note ___ at 86-87 (codifying common law exceptions as unlawful because such terminations offend human dignity or are contrary to public interest); Hirsch, supra note ___ at 111 (advocating a substantive standard that would make unlawful “any termination that was not actually motivated by a reasonable business justification.”).
significantly to employers’ exercise of judgment in their business interests. In many jurisdictions the common law just cause standard does not even require the employer to be right in its factual determination of the basis for discharge; all that is required is that it acted in good faith on information that it reasonably believed.

While there is no available research on the success rate of employees on just cause claims generally, at least one empirical study supports the supposition that an individual just cause rule will not provide workers the benefits they enjoy under collective bargaining agreements. Researches presented a hypothetical dismissal case to a group of arbitrators. In one version, the case was presented as a labor discipline grievance under a collective bargaining agreement. In the other version, the identical set of facts was presented as a wrongful termination claim brought by an individual nonunion worker under META. Holding for type of arbitrator, decision-makers were statistically more likely to reinstate the worker in the collective bargaining context than in the wrongful dismissal suit.

3. A Pyrrhic Victory?

What the empirical research suggests is born out anecdotally in existing jurisprudence. The California Appellate Court’s landmark decision in *Pugh v. See’s Candies* provides a telling illustration of the degree to which plaintiffs can expect to succeed under an individual just cause rule. Hailed as a significant inroad into at will, *Pugh* threw out the much criticized “additional consideration” requirement under which employees had to noted that META purports to apply the same standard as unions, but it adopts a common law definition and the considerations that are the common law of arbitrators is in the comments. Model Employment Termination Act § 7(4) cmt. (1991) (setting out the common law factors for determining good cause). See Bingham & Mesch, supra note ___ at 679 (suggesting META’s good cause is a less deferential standard to workers than labor law just cause). The one exception is McGinley who proposes placing the burden on the employer to prove there was a legitimate business interest for the termination and that the employer gave the employee notice of the policy as well as a warning to cease the behavior. See McGinley, supra note ___ at 1514.

67 See *Pugh I*, 116 Cal. App. at 330 (“Care must be taken…not to interfere with the legitimate exercise of managerial discretion. ‘Good cause’ in this context is quite different from the standard applicable in determining the propriety of an employee’s termination under a contract for a specified term. And where…the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope for the exercise of subjective judgment.”)

68 See, e.g Cotran v. Rolling Hudig Hall Intern., Inc., 948 P.2d 412, 414 (Cal. 1998) (holding that the better standard is whether the employer acted “fairly, honestly, and in good faith” rather than “whether the alleged misconduct occurred as a matter of fact.”); Abdullah v. State, 2009 ND 148, P14 (N.D. July 29, 2009) (holding that “a reasoned conclusion on the part of the employer is sufficient”); Donna R. Mooney, *The Search for a Legal Presumption of Employment Duration or Custom of Arbitrary Dismissal in California 1848-1872*, 21 BERKELEY J. EMP. & LAB. L. 633, 636 (explaining that “modern courts define good cause as a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power and not trivial, capricious, unrelated to business needs or goals, or pretextual.”).

69 See Bingham & Mesch, supra note ___ at 687-88 (discussing empirical evidence that suggests arbitrators act more favorably towards employees under a just cause standard in a contractual collective bargaining context than in a statutory context).

70 See Bingham & Mesch, supra note ___ at 683 (finding support for the hypothesis that reinstatement will occur more frequently under collective bargaining just cause than under META).
prove they had provided the employer with something more than their mere agreement to serve in order to support a contractual claim to job security.71 Instead, the California court set forth an employee-friendly, multi-factored test which examines the totality of circumstances that might reflect employer intent to provide job security.72

That rule was articulated against a compelling factual backdrop. Pugh had served the defendant-employer for thirty-two years, beginning his employment as a dishwasher and working his way up the corporate ladder to vice president and member of the board of directors.73 His career ended abruptly when he was unceremoniously fired, without severance and without explanation, upon the conclusion of a family trip with his boss.74 That termination occurred despite years of praise, assurances, and positive performance evaluations, including the fabled “gold watch” for his “years of loyal service.”75

All of these facts were enough to allow Pugh to succeed before a jury in proving that he had a contractual right to continued employment absent just cause, but not to an ultimate victory.76 On the factual question whether the contractual promise was breached, however, a jury found against Pugh.77 It credited testimony of Pugh’s boss that Pugh was “rude, argumentative, belligerent, and uncooperative” on their trip to Europe and testimony of other See’s employees that Pugh was “disrespectful to his superiors and subordinates, disloyal to the company, and uncooperative with other administrative staff.”78 The jury therefore concluded that the termination occurred with cause.79 Notably absent from the analysis on appeal is any consideration of the absence of warning, evaluation of applicable workplace rules, or assessment of consistency and proportionality, all of which would be explicit components of a labor arbitrator’s ruling.

This is not to say that the adoption of an implied contract theory of job

71 See Hanson v. Central Show Printing Co., 130 N.W. 2d 654, 657 (Iowa 1964) (explaining that “in the absence of a consideration in addition to the services to be rendered, contracts for permanent employment are indefinite hirings, terminable at the will of either party” and “giving up the opportunity to take other employment cannot be held to be an additional consideration.”); Skagerberg v. Blandin Paper Co., 266 N.W. 872, 874 (Minn. 1936) (holding that “good consideration additional to the services contracted to be rendered” is necessary). The additional consideration rule was famously derided by Professor Summers: countering that “as any first semester law student knows … one performance can be consideration to support two or even twenty promises. The work performed could be consideration for both the wages paid and the promise of future employment.” See Clyde W. Summers, The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment At Will, 52 FORDHAM L. REV. 1082, 1099 (1984).
72 Pugh I, 116 Cal. App. at 327 (holding that these include the duration of plaintiff’s employment and performance history, assurances of supervisors, company practices and policies, and industry standards).
73 Id. at 315.
74 Id. at 316-17.
75 Id. at 316.
77 Id. at 748.
78 Id. at 756.
79 Id. at 748.
security is not valuable, or that a universal just cause standard would not improve the plight of workers. Certainly implied contract jurisprudence has enables some plaintiff successes, and many more employees have likely benefited from more cautious on conscientious termination policies adopted in response to such decisions by risk averse employers. But that does not mean that a just cause system offers workers their best alternative to employment at will. The economic defense of at will has asserted that rational and informed employees are better off selecting at-will employment than paying for costly just case rights they have little chance of enforcing to their benefit.\textsuperscript{80} Just cause advocates have done much to challenge the notion that employees are informed. Those employee-advocates however done little theorizing on the implicit second question whether an informed employee would be better off choosing just cause.\textsuperscript{81} The procedural and substantive obstacles to succeeding on a just cause claim offer good reason to doubt it.

\subsection*{B. Who Are We Helping? Problems of Scope}

The previous section questioned the value to workers of a just cause system given the challenges they will face in sustaining a claim for wrongful termination. This critique, however, does not dictate that just cause reform be abandoned in favor of a wholly different structure of worker protection. As previously noted, at-will opponents have proposed just cause approaches that aim to address access issues by, for instance, channeling disputes in to alternative, non-judicial fora and providing for attorneys’ fees awards.\textsuperscript{82} To make a just cause regime even more plaintiff friendly, one might add to these access-enhancing features certain procedural and substantive advantages, such as a more searching review of employer cause, a lesser burden of proof, or other features of a the collective bargaining system that have aided workers to positive outcomes in that system.\textsuperscript{83}

Setting aside the fact that such features would likely doom these reform proposals politically,\textsuperscript{84} a just cause system would still have a far more

\textsuperscript{80} See Epstein, supra note ___ at 956-57 (arguing that at will employment works for the mutual benefit of the employer and the employee and a just cause rule is more costly); Verkerke, supra note ___ at 838 (contending that “data strongly support a uniformly applicable default rule of employment at will” and urging courts to reaffirm the at will rule); Power, supra note ___ at 898-99 (describing the costs of a just cause rule and positing that a switch from at will to just cause would not be beneficial for employees).

\textsuperscript{81} But see Estlund, supra note ___ at 15-26 (speculating that employees do not choose just cause contracts because they do not trust employers to comply and do not trust courts to bring them to justice).

\textsuperscript{82} See supra Part II.A.1

\textsuperscript{83} Several of the most recent contributions to the at-will reform literature incorporate such features in their proposals. See, e.g., Hirsch, supra note – at 109-10 (employer must supply worker written explanation of reason for termination); Porter supra note – at 110 (employee need prove only that employer’s proffered reason for termination is pretextual rather than that the real reason for termination was unlawful).

\textsuperscript{84} Management supported MWDEA
fundamental limitation – it only protects worker fired without cause. No matter how strict a definition of cause one might adopt, there is no dispute that under a universal just cause system, as in the union context, employers would be free to terminate for legitimate economic reasons unrelated to performance. Thus, employers could continue to lay off workers as a result of a cessation of operations, partial closings, takeovers or mergers, strategic changes in direction, or any number of business reasons.

In light of this background assumption, an evaluation of just cause alternatives must consider who is being included within that system of protection and who is left out. On this issue two related and important questions present: first, what percentage of employee terminations are in fact arbitrary as a proportion of overall terminations; and, second, to what extent should termination policy be concerned about the wellbeing of workers fired for rational business reasons.

1. The Scarcity of Arbitrary Terminations

The economic defense of employment at will sets much by the first point. Scholars have argued against the imposition of a just cause system based in part on the notion that most employers operate under implicit contracts -- self-enforcing, non-legal understandings that workers will be retained absent just cause. Employers have every reason to retain effective, productive employees who will help them achieve their bottom line. They also have relatively strong incentives to retain marginal workers so as to avoid the costs of training a replacement.

However, it would be wrong to assume that employers never terminate arbitrarily. Even accepting the general structure of incentives posed by defenders of at will, employers will at times have incentives to behave opportunistically. Law and economic scholars have recognized that at various points in the employment relationship, employees may make uncompensated investments in the company (such as acquiring firm specific skills and accepting pay below their opportunity wage) in anticipation of deferred compensation. An employer might seek to terminate such an

---

86 Id.
87 Id.
individual without justification merely to avoid paying the amounts owed which may at that point exceed the worker’s marginal product.  

Furthermore, companies encounter agency problems when it comes to achieving the best results for the corporate bottom line. A worker may be productive, but widely disliked. Although retention would be in the best interest of the employer, a supervisor may select that worker for termination for her own idiosyncratic reasons. In other situations, a supervisor may simply make an error of judgment. In those scenarios, a just cause standard actually prevents inefficient results that are counter to employers interests but which might otherwise go uncorrected.

The question is not whether workers are terminated without cause, but whether this is the most pervasive problem of termination that worker advocates should be grappling with. It is almost impossible to know from labor statistics what number of documented terminations occur under circumstances that would be actionable under a just cause standard. A widely cited estimate, particularly among early exploitation-based critiques of at will, is that 150,000 to 200,000 terminations per year are without any discernable cause. What is often not cited by such commentators is that the source of the estimate -- a 1985 article by Professor Jack Stieber -- identified that number of arbitrary terminations from among an estimated 2 million terminations at will. In the other 1.8 to 1.85 million at will terminations, the just cause approach would offer workers nothing.

2. The Prevalence of Economic Terminations

Here then is the other consideration in evaluating the just cause approach to worker protection. No doubt there are justifications for legal interference in arbitrary terminations over economic ones. The former are likely to create inefficiencies, of the type described above, whereas the

---

This is most likely the case at the tail end of a long-term relationship. The degree to which such “career” models apply in the contemporary economy has been called into question by some scholarship. See, e.g., PETER CAPPELLI, THE NEW DEAL AT WORK: MANAGING THE MARKET DRIVEN WORKFORCE 5 (1999) (suggesting that competition and reduced lead time, making long-term investments in employees impractical for companies); Rachel Arnow-Richman, Accommodation Subverted: The Future of Work/Family Initiatives in a “Me, Inc.” World, 12 Tex. J. Women & L. 345, 402-09 (2003); Stewart J. Schwab, Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?, 76 Ind. L.J. 29, 31 (2001) (predicting firms will be increasingly reluctant to hire specialized workers under implicit long-term contracts due to risk that skills will become superfluous in changing global market). I will return to this issue in Part III.B, infra.

See St. Antoine, A Seed Germinates, supra note – at 67 (“[the law and economics] analysis admits of no living, breathing human beings, who develop irrational antagonisms or exercise poor judgment”); Summers, Time for a Statute, supra note – at 520 (calling it “naïve or disingenuous” to assert that employers don’t terminate arbitrarily, based on arbitration decisions).


latter, if the employer’s assessment of its business circumstances is legitimate, will correct them. In addition, returning to the language of early exploitation critiques, arbitrary terminations may be viewed as morally wrong or at least easily ascribed to employer fault. In such instances, unlike cases of economic termination, it is uncontroversial and normatively appropriate to hold the company responsible.

That said, the consequences to the individual – unemployment and its attendant costs – fall equally on both groups.\(^{93}\) Indeed, in making the case for just cause protection, the exploitation based critics draw explicitly from literature on the psychological effects of workplace closings.\(^{94}\) These extend not only to individual workers, but to whole communities. As a matter of social policy then, it would seem the broader problem of economic terminations should garner higher priority than arbitrary ones within the worker protection movement. It is puzzling that the just cause system championed as the key to civilized and humane workplace relationships would entirely neglect the situation of the vast numbers of economically terminated workers, who suffer equivalent harms and whose terminations create wider social problems.

In fact, workers terminated for economic reasons are in many ways worse off than arbitrarily terminated workers under the employment at will regime. Currently the only protection available to economically terminated workers is notice of termination in the case of a mass layoff. Under the federal WARN Act, workers must be given sixty days notice of a layoff that will result in an employment loss for one-third of the workforce or fifty or more employees.\(^{95}\) In the event of a violation an employee is entitled to payment for the number of days of notice that the employer failed to provide.\(^{96}\) In contrast to this meager protection, state and federal employment law is riddled with exceptions to employment at will all of which limit, for one reason or another, the possible motives for which employers may terminate. Thus discriminatory terminations on the basis of a protected status or characteristic is has been broadly proscribed at the state and federal level, as have other morally condemnable terminations, such as those seeking to coerce unlawful behavior, chill whistleblowing, or

\(^{93}\) This is true except for a subset of workers discharged for economic reasons whose terminations are part of a statutory mass layoff or plant closing for which advance notice is required. See, infra n. \_ and accompanying text.

\(^{94}\) See, e.g., St. Antoine, A Seed Germinates, supra note – at 67 (noting that “numerous studies document the increases in cardiovascular deaths, suicides, mental breakdowns, alcoholism, ulcers, diabetes, spouse and child abuse, impaired social relationships, and various other diseases and abnormal conditions that develop even in the wake of impersonal permanent layoffs resulting from plant closures in his discussion of fairness literature on the effects of plant closings” and suggesting that “such effects are at least as severe when a worker is singled out to be discharged for some alleged deficiency or misconduct”).

\(^{95}\) 29 U.S.C.\$ 2102.

\(^{96}\) 29 U.S.C.\$ 2104(a).
otherwise adversely affect the public interest.\textsuperscript{97} This is not to suggest that we are, as some have argued in a de facto just cause regime, but rather that there is some meaningful back-stop against arbitrary terminations that does not exist in the case of small scale or individualized layoffs.

To be sure, scholars have called for expansions of WARN Act, but they are far fewer in number that the vast chorus seeking universal just cause protection.\textsuperscript{98} This neglect is particularly unusual given the previously described reliance of the collective bargaining context among at-will reformists. Just as union contracts require termination to be justified by cause, they also recognize the need to cushion necessary economic terminations. Most collective bargaining agreements set out the process for selecting workers for layoff (“first in, first out”) and provide rights to recall and transfer.\textsuperscript{99} They thus offer workers a modest degree of predictability about job loss. More importantly, many collective bargaining agreements provide that workers will receive notice of an impending layoff\textsuperscript{100} and some amount of severance pay and benefits continuation upon termination.\textsuperscript{101} These amounts are generally modest – one week per year of service is common\textsuperscript{102} – but they offer a modest cushion for workers in undertaking a search for new employment. They also reflect an expectation that the employer bears some responsibility for the consequences of job loss even when termination is justified where that justification is not owing to employee fault.

Thus, the collective bargaining arena, on which the call for cause is rooted, captures and accounts for the possibility of both arbitrary and economic based terminations, and provides accordingly. Just cause advocates, in their haste to emulate the protections of a unionized workplace, have let fall a critical component of that environment’s system of protecting workers, one that likely reaches far more workers than the number who suffer an arbitrary discharge.

\textsuperscript{97} See supra Part I.A.


\textsuperscript{99} See \textit{Bureau of National Affairs, Basic Patterns in Union Contracts} 67-69 (14th ed. 1995) (reporting that ninety-four percent of sampled collective bargaining agreements used seniority as a factor or determinative factor in selecting workers for layoff, sixty-three percent provided “bumping” rights to laid off employees, and eighty-five percent provided for recall after layoff).

\textsuperscript{100} See \textit{BNA, Basic Patterns, supra} note – at 68 (reporting that forty-nine percent of sampled collective bargaining agreements provided for notice of layoff to the union and/or affected workers).

\textsuperscript{101} See \textit{id.} at 42 (reporting that thirty-nine percent of sampled collective bargaining agreements provided for severance pay, forty-seven percent in the case of a shutdown in operations).

\textsuperscript{102} See \textit{BNA, Basic Patterns, supra} note – at 42.
The preceding critique of the just cause model of employment terminations gives rise to an inevitable question: why, given its limitations, did just cause become the unitary focus of the at-will reform movement? This Part answers that question, and, in so doing, lays the groundwork for a new approach to worker protection. Just cause approaches gave voice to the internal labor market structure that pertained in non-unionized industries during the mid-twentieth century. In that context, they served as a legal imprimatur on employers’ implicit promises of long-term work. In contrast, today’s companies and employees operate in what I have describe elsewhere as a “Me, Inc.” economy – one in which workers are encouraged to take responsibility for their own careers, benchmarking success against an external labor market. In this environment, giving legal effect to parties’ social contract of employment requires rules that support market transition rather than privileging job attachment.

A. The “Life Cycle” Story: Just Cause and Implicit Contracts

The just cause approach to termination reflects a particular view of employment relationships, one that held sway for a relatively brief period of time in American labor history. During the 1940s and 1950s companies adopted a unique social contract of employment, reflecting the dominance of internal labor markets. In that context, the notion of long term employment absent just cause for dismissal was the basis for much of employers’ and employees’ mutual understanding about the nature of their relationship.

1. The Rise of Long-Term Employment

This social contract of the mid-twentieth century was a necessary outgrowth of the industrial management practices of the previous generation. Throughout the nineteenth century, as American industry and

---

104 See id. at 374 (“[T]oday's work relationships are defined by a “Me, Inc.” work culture--an employment environment in which workers are increasingly independent, short-term employment relationships predominate, collective action is all but absent, and employer reliance on contingent labor has dramatically expanded. [It is] an economy where employees' futures depend not on their current employer but on the value of their human capital within the external labor market.”).
106 See generally KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 51-63 (2004). I draw heavily on this monograph and Professor Stone’s research in the sections that follow.
infrastructure expanded, labor was relatively mobile and, in the case of skilled workers, highly autonomous.  

The at-will rule, penned in 1877, reflected the reality that work relationships were contingent, unstable affairs and that a mutual expectation of long-term commitment was the exception rather than the norm.  

The situation changed, however, with the advent of full scale mechanization and the birth of industrial management. Beginning in the early twentieth century, many companies implemented a system of labor control founded on Frederick Taylor’s theory of scientific management.  

The Taylorist approach dissected the production process into sharply differentiated jobs, involving minimal skill and repetitive work.  

This structure gave management a strong degree of control over workers and the work product, but also engendered serious problems with employee morale and reliability given the deskilled and monotonous nature of the work employees were expected to perform.  

The solution was the creation of elaborate rewards and benefits tied to longevity rather than performance and innovation. Companies instituted fixed promotion ladders and a tradition of hiring from within for all but the lowest ports of entry, creating an intricate internal labor market heavily dependent on firm specific training.  

Along with this structure came implicit promises of advancement and security.  

Workers could look forward to consistent promotions and rising pay by providing reliable performance and investing in firm specific skills. At the same time, employers could depend on a competent and consistent workforce significantly reducing the risk of shirking, turnover and sabotage.  

2. A Legal Imprimatur  

Importantly, this implicit social contract was merely that – an understanding drawn against the backdrop of employment at will. Indeed, it was only because of the at-will default rule that employers’ implicit promise of long term job security resonated as an employment benefit.  

---  

108 See id. In fact, one employee-friendly consequence of the rule was the abolition of the whole contract doctrine. This change ensured that workers would receive fair pay for work performed regardless of whether they remained long enough to complete the job.  
109 See STONE, supra note – at 28-38.  
110 See id.; Finkin, supra note – at 740-41.  
111 See STONE, supra note – at 27-28 (describing management’s “labor problem” at the turn of the twentieth century as the dual issue of dealing with low worker morale combined with worker inclination to organize); Finkin, supra note – at 740 (“Turnover came to be seen as an evil to be dealt with.”)  
112 See STONE, supra note – at 38-44  
113 See id.  
114 See STONE, supra note – at 49 (describing at will rule as a “precondition for the effective operation of internal labor markets”).
changed in two respects. First, unions, then at the height of their power, adopted the symbiotic vision of the dominant social contract. Unions routinely bargained for clauses requiring just cause for dismissal, as well as an array of protections aimed at preserving status quo relationships and restricting managerial discretion. The typical features of collective bargaining agreements – set job classifications and promotion ladders, structured pay scales and seniority systems, work preservation clauses, and elaborate grievance and arbitration procedures – dovetailed with what management had already put in place. In this way, collective agreements made explicitly contractual parties’ otherwise implicit agreements.

Second, courts ultimately did the same thing for unrepresented workers through implied contract jurisprudence. By the 1970s, companies found themselves unable to sustain the implicit promises of the previous generation, and by the early 1980s appellate courts began to face termination claims by workers on the losing end of such understandings. A series of cases, primarily from employee friendly jurisdictions in which union density is relatively strong, sought to remedy these “breaches” by recognizing the viability of an oral or implied contract to job security as an exception to employment at will. Many of the decisions, most notably *Pugh v. See’s Candies*, were promulgated on facts that on their face track the type of implicit understanding that management had inculcated. They set forth rules that explicitly take account of the company’s culture of employment, enabling workers to base contractual rights on shared but implicit understandings. Further, they relied on the established tradition of collective bargaining agreements, insofar as they articulated the terms of the implied contract as including a commitment to continued employment absent just cause for termination.

Thus emerged a strong social expectation, as well as a legal norm, that employers should insulate workers against job loss. Employment relationships should withstand the various human and economic changes

---

115 See STONE, supra note – at 61-63.
116 See id.
117 See Stone, *The New Psychological Contract*, supra note , at 615 (noting that one of the main functions of unions has been to enforce “psychological contracts”).
118 See, e.g., *Pugh v. See’s Candies*, 171 Cal. Rptr. 917 (App. 1981); *Shebar v. Sanyo*, 544 A.2d 377 (N.J. 1988); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257 (N.J. 1985); *see generally Finkin, supra note – at 750-51* (suggesting that courts recognizing the enforceability of job security promises in personnel manuals were engaged in the legitimate use of contract doctrine to conform to the internal labor market practices adopted by firms in the post-war era); *Schwab, supra note – at (suggesting that the contract exceptions to employment at will can be understood as a form of judicial policing of opportunistic employer behavior, particularly vis-à-vis long-term employees).*
119 See *Pugh*, 171 Cal. Rptr. at 918-19 (describing how the plaintiff worked his way up the corporate ladder from dishwasher to vice-president in charge of production and member of the board of directors” over thirty-two years of employment); see also *Cleary v. American Airlines*, 111 Cal. App. 3d 443 (1980).
120 See *Pugh I*, 116 Cal. App. at 327 (holding that the presence of an implied contract for employment absent cause to terminate depends on such factors as the assurances of supervisors, company practices and policies, and industry standards).
that occur over the course of an employee’s life. Dismissal absent good cause violated this notion, and employer motive for termination was consequently a legitimate source of judicial (or arbitral) scrutiny. In contrast to an earlier era in which rugged individualism reigned, a system of long term, stable employment solidified, bound workers to single employers, ostensibly in the interest of both parties.


Since the development of implied contract jurisprudence in the 1980s, however, the American labor market has moved away from the life cycle model of employment on which such court decisions were grounded. A new ethic of worker-firm relations has taken hold, one which prizes industry flexibility and worker mobility.

1. The Social Contract of “Employability”

Much has been written about the economic and infrastructural changes that have given rise to new workplace practices.\textsuperscript{121} Many of the service and technology jobs that currently dominate the economy are less susceptible to Taylorist management structures than the manufacturing jobs that gave rise to them.\textsuperscript{122} At the same time, American employers have begun operating in a globalized economic community, requiring them to quickly develop new products and services to meet fluctuating demands and compete against a broader pool of international competitors.\textsuperscript{123} In this environment, employers require innovative, self-motivated workers with access to the newest and most marketable skills, skills that are likely to change frequently over time.

This reality has necessitated the adoption of different, if not entirely new, personnel practices. In a rapidly fluctuating market, employers prefer

\textsuperscript{121} For a more detailed discussion of the causes of the trends described, infra, and their effect on the work relationship see generally \textsc{Cappelli}, supra note 124, at 4-5; Arnow-Richman, supra note 123, at 1198-1202; Green, \textit{supra} note 125, at 99-104; Stone, \textit{supra} note 115, at 553-72.

\textsuperscript{122} See \textsc{Richard Sennett}, \textsc{The Corrosion of Character: The Personal Consequences of Work in the New Capitalism} 51 (1998) (describing modern approach of “flexible specialization,” which seeks to deliver more varied products more quickly to the market, as “the antithesis of the system of production embodied in Fordism”); Anthony Carnevale & Donna Desrochers, Training in the Dilbert Economy, 53 Training & Dev. 32, 33 (1999) (noting that unlike manufacturing, in which success was measured by the achievement of high volume at low cost, success in the new economy demands more complex skills, and, consequently, more complex performance standards).

\textsuperscript{123} See \textsc{Cappelli}, \textit{supra} note --at 4-5 (attributing recent changes in work practices to, among other things, increasingly competitive product markets and pressures to create market niches); \textsc{Sennett, supra} note--at 52 (positing that “[t]he most strongly flavored ingredient in the new productive process is the willingness to let the shifting demands of the outside world determine the inside structure of institutions”); Stone, \textit{supra} note --at 549 (noting significance of increased trade and global competition and pressures to achieve short-term cost reduction in explaining contemporary labor management trends).
short term labor that allows them to fill immediate personnel needs while maintaining future flexibility.\textsuperscript{\textsuperscript{124}} Consequently, recent decades have witnessed an increase in explicitly contingent employment relationships as well as decreased expectations of long-term attachment between companies and their “permanent” workforce.\textsuperscript{\textsuperscript{125}} Through statements of managerial strategy, human resources policy, and company hiring and firing practices, employers have inculcated in workers the notion that employment is relationships are always contingent on financial success and the needs of the business. For this reason, workers’ financial security ultimately depends not on their employer of the moment, but rather their external marketability.

This movement away from internal labor markets likewise requires a shift away from the “social contract” of employment that went along with it. In many employment relationships, the implicit understanding between employee and employee in is no longer premised on long-term employment, but on the prospect of long-term marketability. Companies do not expect loyalty from workers in the traditional sense of a lifetime relationship, rather they seek a zealous commitment to the work itself.\textsuperscript{\textsuperscript{126}} In exchange, workers can look forward to employability.\textsuperscript{\textsuperscript{127}} Employers’ implicit promise to its workforce is that the employment relationship, however long it might endure, will provide valuable experience and the opportunity to cultivate marketable skills.\textsuperscript{\textsuperscript{128}} While continued employment with any particular company in any particular capacity cannot be assured, the worker reasonably expects that he or she will be well positioned to take advantage of new opportunities once the relationship ends.

2. New Rules, New Strategies

To be sure, this description or contemporary workplace expectations is far from universal. Long term relationships remain the norm in some industries, and even the most flexible employers require a modicum of workforce stability to maintain continuity of operations and retain

\textsuperscript{124} See CAPPELLO, supra note --, at 5 (noting that such competition reduces market lead time, making long-term investments impractical for companies); Stewart J. Schwab, Predicting the Future of Employment Law: Reflecting on Refracting Market Forces?, 76 Ind. L.J. 29, 31 (2001) (predicting firms will be increasingly reluctant to hire specialized workers under implicit long-term contracts due to risk that skills will become superfluous in changing global market).

\textsuperscript{125} For this reason, Professor Stone uses the term “precarious employment” to refer to any individual employed with no express or implicit promise of job security. See Stone, supra note -- at 542.

\textsuperscript{126} See Stone, supra note -- at 556-60 (describing employer desire for good corporate citizen behavior).

\textsuperscript{127} See Stone, supra note -- at 569 (describing “a model employability contract, by which the firm promises to upgrade worker skills and to help provide new job opportunities should those at the firm disappear”).

\textsuperscript{128} See CAPPELLO, supra note -- at 29 (noting that “[t]he most crucial part of the [new] deal—and the one apparent element of reciprocity—is the promise on the employer's side to help support the development of employee skills” that will yield some security in the external labor market); Stone, supra note -- at 525 (“One of the most important terms of the new psychological contract is the promise of employers to give employees general skills and training. This is known as the promise of employability security, and it is treated as a substitute for the former promise of employment security.”).
institutional knowledge. The point rather is that there is significant
degree of anticipated movement in labor market that must be understood in
considering the evolution of current legal rules and devising future
strategies for worker protection.

Indeed, the implied contract jurisprudence appears to be undergoing a
shift. Whereas two decades ago courts relied heavily on contract law to
enforce workers’ expectations of long term security absent cause for
dismissal, today they are increasingly reluctant to recognize such claims.
This resistance has takes the form of greater judicial deference to employer
disclaimer language in cases based on personnel manuals, and, more
strikingly, the recognition of at will recitals as a bar to claims based on
explicit, individual promises on which employees actually relied.

Thus, for example, in Dore v. Arnold Worldwide, the court rejected the
claim of a worker who relocated to California from Colorado on the basis of
assurances that the work would be long-term. The California Supreme
Court deferred instead to language in the employer’s “offer letter”, received
and signed only after the plaintiff had accepted employment, to the effect
that termination was “at will” and refused to allow the case to go to a
jury. In another California decision, the employer promised the worker
he could continue to reside out of state and would cover of his travel
costs. When the employer subsequently had a change of heart,
terminating the plaintiff for refusing to relocate, a California appellate court
refused to allow a claim for breach of contract. It found that at-will
language in the company’s “offer letter” unambiguously allowed the
employer to end the relationship for this reason and that the worker had
failed to raise an issue of fact on the existence of a contractual breach.

Such decisions, particularly from an historically pro-plaintiff jurisdiction,
like California, may reflect a degree of judicial discomfort with the notion
of a long-term contract absent just cause as the appropriate legal translation
of contemporary workplace understandings.

Change is also afoot in the collective bargaining arena. The standard
terms and bargaining strategies on which unions have long relied, and
which formed the explicit basis for the initial call for a universal just cause

\[ \text{See Sanford M. Jacoby, Kenneth M. Piper Lecture: Melting Into Air? Downsizing, Job Stability, and The} \\
\text{Future of Work, 76 CHI.-KENT L. REV. 1195, 1219-20 (2000) (asserting that despite modest declines in job} \\
\text{tenure in the 1990s, employers continue to offer career-type work that offered benefits, training and the prospect} \\
\text{of continuity).} \]

\[ \text{130} \]

\[ \text{131} \] See id. at 62.

\[ \text{132} \] See id. at *22.

\[ \text{133} \] See id. at *12, *16, *20.

\[ \text{134} \] See id. at *22.
system, are increasingly being called into question in light of contemporary workplace dynamics. Labor relations scholars have noted the incongruity between traditional union demands for hierarchical, seniority-based promotion and wage progression and the flattened management structures and external labor market practices of today’s employers. Such contract provisions constrain flexibility to hire from outside, promote workers laterally, and tie pay to performance. Scholars have also called for legislative revision to change basic features of labor regulation to reflect changing workplace dynamics. Even unions themselves are responding, increasing efforts to organize contingent and marginal workers and negotiate terms that address the needs of mobile workers.

None of this is to say that just cause protection, as a feature of an individual or collective contract, is per se inconsistent with current market dynamics. It is entirely possible for an employer to adopt an external labor market strategy and still abide by a promise of “just cause only” termination. Economic downturns, the need for newer skills, changes in market direction and so forth always have and can continue to constitute just cause for termination. The point is that the implicit rules of workplace relationships that gave rise to this model of worker protection have eroded and that the legal infrastructure that evolved to enforce those understanding has been increasingly strained. Given these developments, along with the previously described practical limitations of a just cause system as a tool of worker protection, it makes little sense for workplace reform efforts to continue its unitary focus on the need to constrain arbitrary termination. It is time for scholars and advocates to set aside the rhetoric of just cause and consider alternative means of protecting workers that take account of current workplace practices and economic realities. The next session attempts to do this.

C. Notice as the New Cause: From Justifying Termination to Enabling Job Transition

Perhaps the most important feature of the new social contract of employment for purposes of re-imagining worker protection is the increased expectation of possible job loss. If, as a general matter, employers no longer implicitly offer workers long term job security and employees no longer expect to remain in the same job for their lifetime, the guiding theory of worker protection ought to focus on enabling continued labor market

---

136 See STONE, supra note –, at 198-206.
137 See id.
138 See id.
participation rather than on preserving particular jobs.

One way to do this would be to legislatively impose a universal “pay or play” obligation upon termination. Under such a system, employers would be obligated to provide workers advance notice of termination or, at the employer’s election, continued pay and benefits. This would allow the employee a period of income continuity in which to search for new employment or, in the event the employer elects severance pay, to invest in retraining. In the next section I will offer preliminary thoughts on how the requisite amount of notice/pay might be determined and how the pay or play obligation would intersect with extant law. For present purposes, however, I wish merely to suggest the normative value and practical implications of such an approach as compared to the widely championed model of just cause termination.

The events and publicity surrounding the November 2008 shuttering of Republic Window & Door is illustrative. On November 30, the Chicago based employer announced that it would be closing its facility due to a sudden credit freeze by its large lenders.140 Workers were informed that their jobs would end Friday, December 3, just three days later.141 When Friday ended, however, the workers did not leave. Instead they began a peaceful occupation of the employer’s facility.142 The workers’ chief complaint was the absence of any meaningful warning of the imminent closure; their goal, to obtain severance pay and accrued vacation pay.143 The company had granted neither.144

In the days that followed, as more than two hundred of Republic Windows’ 250 workers continued to occupy the premises through the weekend, their quest became a minor cause celebre. National media picked up the story describing the workers as the face of the economic downturn,145 civil rights advocates compared the workers to Rosa Parks,146 and union organizers and left-leaning news sources linked them to the history of class struggle and worker solidarity.147 A multi-party negotiation ensued

140 Monica Davey, In Factory Sit-In, an Anger Spread Wide, N.Y. TIMES, December 8, 2008, at A16.
141 Id.
142 Davey supra note 1, at A16; see also Union says sit-in at factory not over, CHI. DAILY HERALD, December, 10, 2008, at 19.
143 Davey supra note 1, at A16; see also Six counties in 60 seconds, CHI. DAILY HERALD, December 8, 2008, at 9.
144 Id.
146 Id.
147 See Charles Rachlis, Republic Window and Door workers show the way!, available at http://open.salon.com/blog/charles_rachlis/2008/12/08/republic_window_and_door_workers_show_the_way (“A one sided class war with the capitalist class firing all the shots has got to end. The working class has been silent too long. The workers of the
between creditors, union leaders, and government officials. In the end, creditors agreed to lend the company $1.75 million for purposes of paying off the employees. Each worker received eight weeks of severance and accrued vacation.

The Republic Windows debacle offers a snapshot of societal expectations of employer fairness in the context of economic volatility. The employees’ demands were modest. They did not question the company’s decision to fold, although information surfaced that cast some doubt on the claim that the closure was compelled by the actions of outside creditors. According to some sources, the company had for some time been relocating equipment to a new, presumably non-unionized, location. However, such information appears to have been invoked merely to debunk the company’s claim that precipitous events precluded any ability to pay workers what they perceived was owed, not to cast doubt on the legitimacy of the company’s motives. In other words the workers’ objections (and the public outrage that ensued) were not about why the workers had been terminated so much as how they had been terminated. The company, at a minimum, ought to have paid amounts earned as well as provide a modicum of income continuity.

The Republic Window workers’ legal rights to their perceived entitlement, however, were far from certain, albeit better than those of most terminated workers. The Republic Window workers had the advantage, as it were, of being terminated in workplace closure covered by the federal WARN Act. Had the workers successfully proved a violation, they would have received backpay for the notice period, effectively a grant of retroactive severance pay. However, the WARN Act contains a broad exception for unforeseeable circumstances, a provision which the employer would no doubt have invoked, citing the actions of its creditors.

---

148 Lisa Donovan & Maudlyne Ihejirika, Standoff ends; Each factory worker gets about $6,000 in pay, benefits after banks OK loans, Chi. SUN-TIMES, December 11, 2008, at 43.
149 Id.
150 Davey supra note 1, at A16 (“Others said managers had kept their struggles secret, at one point before Thanksgiving removing heavy equipment in the middle of the night but claiming, when asked about it, that all was well.”).
151 Republic Window far exceeded the requisite threshold of employing at least one hundred employees, see 29 U.S.C. 2101(1) (defining "employer"), and the closure clearly constituted a “permanent… shutdown of a single site of employment”. See 29 U.S.C. 2101(2) (defining “plant closing”).
152 See 29 U.S.C. 2102(b)(2)(A) (“An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.”) This exception is discussed further in Part IV.A.2., infra.
the vacation benefits, entitlement to such amounts are determined by private contract. Here again, the Republic Window workers were likely better off in terms of their legal rights than most. Because they were unionized, they had the advantage of a collective bargaining agreement that would likely have spelled out the employer’s obligation in such circumstances.

What is clear, though, is that the existing legal regime barely speaks to, let alone protects, workers’ expectations of income continuity in the face of job transition. Absent the special case of a planned closure or major reduction in force, employers have no obligation either to notify or workers or provide income continuity. Workers are cast immediately into the public benefits system; the partial wage replacements through public unemployment insurance, which in most cases will grant them at most only about half their salary (and no benefits). Even clearer is the fact that just cause reform, with its focus on employer motive and its goal of job preservation, would do nothing to change that. In contrast, pay-or-play reform would advance an entirely different set of goals and expectations. As illustrated in Table 1, where just cause would foster job retention, pay or play would seek to ease employment transitions. It would recognize and give legal force to employers’ implicit promise not to long term employment, but rather to long-term employability in the external labor market. Thus, where just cause obliges employers to justify termination, in effect to defend their deviation from expectations of continued employment, a “pay or play” system would translate the implicit promise of marketability into a legal obligation, forcing employers to directly underwrite the costs of re-employment.


\[\text{Almost all collective bargaining agreements grant vacation benefits and a large majority address the consequences of separation on workers’ entitlement), see Bureau of National Affairs, Basic Patterns in Union Contracts (14th edition 1995) (finding 92 percent of surveyed CBAs provided vacation with 79 percent explicitly addressing the impact of separation) 101, 110. Of these, most grant workers a right to earned vacation depending on the reason for separation. Id. at 110.}\]
Table 1

Comparison Between “Just Cause” and “Pay-or-Play” Reform

<table>
<thead>
<tr>
<th></th>
<th>“Just Cause”</th>
<th>“Pay-or-Play”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Systemic Goal:</td>
<td>Job Retention</td>
<td>Job Transition</td>
</tr>
<tr>
<td>Employer’s</td>
<td>Long Term Employment</td>
<td>Long Term</td>
</tr>
<tr>
<td>Implied promise:</td>
<td></td>
<td>Employability</td>
</tr>
<tr>
<td>Obligation imposed:</td>
<td>Employer Justification for Termination</td>
<td>Employer Support for Reemployment</td>
</tr>
</tbody>
</table>

The epilogue to the Republic Windows story takes the point further. Following closure, the remains of Republic Windows were sold to a California company.155 In February 2009, the entity announced plans both to reopen the facility and to hire all of the laid off Republic Window workers.156 This development corresponded almost exactly to the final weeks of severance payment the Republic Window workers had negotiated under the 2008 settlement.157 Between the severance payments and the subsequent sale, Republic Window story presents almost an ideal of what ought to happen in a competitive twenty-first century economy. Unsuccessful business and dying industries fold; other entities reap the benefits of these losses. The pressing question is what will happen to workers in the process. While it is not realistic to think that transitions will be as seamless as the Republic Window purchase suggests, given the implicit promises of the new economy, the system ought to aspire to that end.

IV. PAY-OR-PLAY IN PRACTICE

The previous section argued that requiring employers to “pay or play” – either to provide notice or pay severance upon termination -- is a more appropriate means of protecting workers than requiring just cause for termination given the temporary social contract of employment. This section turns from theorizing the basis for such a policy shift, to posing some preliminary questions about what a pay-or-play system might look like. It places such a system within the context of existing laws that already

---

156 Id.
157 The eight week settlement was reached December 10, 2008, and the reopening of the plant under new ownership announced February 26, 2009, 11 weeks later.
advance in part the job transition policy set forth in this Article, then considers the laws of several foreign jurisdictions whose termination rules offer possible models for formulating an American “pay or play” system. In considering these examples, the section lays the initial groundwork for future federal legislation or model laws.

A. Existing Foundations: Unemployment Insurance and Plant Closing Laws

As previously described, a pay-or-play system of termination would have two principle features: First, a statutory mandate requiring employers to provide meaningful notice of termination in all instances absent employee misconduct, and second, an option for employers to “buy out” of that obligation with severance pay. The employer would effectively be given the choice to “play” the worker, allowing him or her to continue to work for the duration of the obligatory notice period, or terminate the worker immediately, but continue to “pay” in the form of continued salary and benefits for the applicable period.¹⁵⁸

In this way, a pay-or-play approach would augment two extant statutory systems: the jointly administered state-federal unemployment insurance system, granting modest income replacement to terminated workers unable to find reemployment,¹⁵⁹ and the federal WARN Act, requiring notice of termination in the case of a mass layoff or plant closing.¹⁶⁰ The scope and limitations of each of these systems is considered in turn, as is the ways in which “pay or play” would augment current law.

1. Government Benefits verses Mandatory Severance: The “Pay” Option

Currently, the costs of job transition are funded largely by the social security system. Government sponsored unemployment insurance (“UI”) provides workers with twenty-six weeks of partial income replacement in the event they become unemployed for reasons not owing to their own misconduct.¹⁶¹ Extensions may be authorized by Congress in times of

---

¹⁵⁸ Used in insurance context—San Francisco health ins law; entertainment concepts
¹⁵⁹ UI was established by created by the Social Security Act of 1935. See 42 U.S.C. § 501 et seq. The Federal Unemployment Tax Act, which imposes an annual payroll tax on employers, permits employers to credit against their federal tax obligation any contributions to approved state unemployment funds. See 26 U.S.C. 3301, 3302. States with conforming programs receive the benefit of federal administrative support and lower tax rates for their businesses. See generally Gillian Lester, Unemployment Insurance and Welfare Distribution, 49 UCLA L. Rev. 335 (2001) (describing operation of UI system and interaction between state and federal components).
¹⁶⁰ See 29 U.S.C. § 2101 et seq.
¹⁶¹ Lester, supra note 2, at 340 (“Unemployment insurance is a joint federal and state program that provides workers with up to twenty-six weeks of partial wage replacement in the event of layoff.”); see also Rossi, supra note 2, at 178 (“The unemployment insurance program is designed to help maintain the income of workers during
economic hardship.\footnote{38} The UI system serves many of the same goals as the “pay or play” approach advanced in this Article. Like “pay or play,” UI alleviates to some extent the hardship of wage interruption. It facilitates transition to new, appropriate work by enabling the worker to fund a selective job search.\footnote{162} Although UI is a government benefit, it is not need-based; entitlement stems from the individual’s past labor market attachment.\footnote{164} Thus like “pay or play”, UI offers a source of (partial) income replacement to previously employed workers: the system recognizes the inevitability of job separation and the need for an economic cushion when it occurs.

That said, the compensation provided is relatively modest. Workers receive an amount equal to approximately half of their weekly earnings, subject to a state-imposed cap. This may be as low as $230 in some states, although some states allow substantially more.\footnote{165} The goal is not wage replacement, \emph{per se}, but rather to advance a combination of social and economic ends. UI reduces the risk of significant downturns in consumer spending by putting cash in workers’ hands,\footnote{166} it modestly disincentivizes layoffs though its “experience rating” mechanism of taxing employers,\footnote{167} and it offers a safety net to laid off workers who might otherwise become impoverished.\footnote{168} In this last respect, UI serves as an alternative to periods of ‘temporary’ unemployment. Benefits should be provided for at least 26 weeks in a benefit year to cover these periods of temporary, involuntary unemployment for most claimants during periods of “normal” unemployment.”).\footnote{169}

\footnote{38} Rossi, \emph{supra} note 2, at 178-79 (“Under the Federal-State Extended Unemployment Compensation Program, benefits may be extended during periods of high unemployment; the extension represents 50 percent of the original benefits up to 13 weeks, or a total of 39 weeks of regular plus extended benefits.”)

\footnote{162} Lester, \emph{supra} note 2, at 343 (“The delay would also, in theory, give him an opportunity to engage in a more rigorous job search. Rather than having to take the first job that came along just in order to make ends meet, the worker could hold out for a job better matched to his skills and training.”).

\footnote{165} Lester, \emph{supra} note 2, at 346 (“Recall that UI, in contrast with welfare, is targeted at workers with a stable attachment to the workforce. This is motivated by the desire to provide benefits only to those workers who have "earned" them through some minimum level of past workforce participation.”); Rossi, \emph{supra} note 2, at 177 (“Benefits should be available to all workers who have a demonstrated and recent attachment to the covered labor force in the event of involuntary unemployment.”).

\footnote{169} MSN Money, \emph{How much jobless pay would you get?}, February 23, 2009, http://articles.moneycentral.msn.com/SavingandDebt/LearnToBudget/how-much-jobless-pay-would-you-get.aspx (listing maximum weekly unemployment benefits by state with Mississippi lowest at $230 per week and Massachusetts highest at $628 per week.

\footnote{166} This has been referred to as the “consumption smoothing” effect of UI. See, e.g., Jonathan Gruber, \emph{The Wealth of the Unemployed}, 55 IND. & LAB. REL. REV. 79, 80-81 (2001) (“[T]he consumption of the unemployed in the United States falls little given the existence of UI but would fall substantially if UI were not present, implying that UI benefits are fairly adequate. In contrast, Browning and Crossley, using Canadian data, found that the consumption of the unemployed falls substantially and UI plays little consumption-smoothing role, suggesting that UI is not very adequate.”) (emphasis added); Walter Nicholson, \emph{The Evolution of Unemployment Insurance in the United States}, 30 COMPL. L. & POL’Y J. 123, 124 (2008).

\footnote{167} Lester, \emph{supra} note 2, at 344-45 (“[E]ach state must impose an experience-rated component of the tax, meaning that an individual employer’s tax rate must vary depending on its history of layoffs. States use a number of different techniques for experience rating, but the common goal is to tax each employer in a manner proportionate to the costs it imposes on the insurance pool.”)

\footnote{168} Lester, \emph{supra} note 2, at 341 (“UI would be an important way to reduce the hardship of wage interruption.”).
welfare.\textsuperscript{169}

What UI does not do is concern itself with the normative question of the employer’s obligation, contractual or otherwise, to its terminated workers.\textsuperscript{170} Its benefits are not tied to termination itself, but rather are triggered by the inability to find replacement work. Workers must endure a waiting period following termination, during which the individual is expected to finance his or her own job search. This period is often short, as little as one week in some states, but its existence reflects a fundamental distinction between unemployment insurance and mandatory severance. UI is a government sponsored system of pooling funds to hedge against the risk that new work might not available. In this way it is triggered by labor conditions that are not attributable either to the worker or the employer. The system is silent on the employer responsibility in exercising the right to terminate, recognizing that some gap between positions is inevitable no matter what the conditions.

Pay-or-play, in contrast, is a direct mandate to employers aimed at enforcing their implicit promise of marketability. To the extent that employers have eschewed promises of long-term work, encouraging workers to look to the market as their ultimate source of security, it makes sense that they be obligated to provide some amount of income continuity when workers are forced to do just that. That income can come either from continued employment (in situations where the employer provides advance notice of termination) or severance pay. Either way, the obligation would sit comfortably beside the current UI system. Workers would receive full pay from their employers for a designated period of weeks, after which they would collect unemployment benefits. Thus, the worker would not qualify for UI during the notice or severance period under pay or play legislation. This is how, in most circumstances, the current UI system treats voluntarily provided severance pay, as well as how other countries with mandatory

\textsuperscript{169} Kenneth Casebeer, \textit{Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology}, 35 BC L. Rev. 259, 263 (1994) ("[A]ccess to unemployment benefits was accomplished by recharacterizing the original social wage conception of unemployment insurance first, as a public welfare insurance program to combat destitution and, second, as a tool of fiscal stabilization."); Lester \textit{supra} note 2, at 341 ("In contrast to general relief (welfare), a worker would not have to wait until savings and resources were exhausted before being eligible for a cash payment. Although UI benefits would only partially replace wages, they would still reduce the net depletion of personal resources (as well as unpaid bills, cutbacks on spending, new debt, and so on) caused by unemployment.");

\textsuperscript{170} Professor Kenneth Casebeer makes a compelling argument that unemployment insurance in its original incarnation was part of a larger agenda to achieve a fair living wage and greater employer accountability, but that the system has been severed from its roots in labor politics and reinterpreted as a tool of fiscal stabilization. Casebeer, \textit{supra} note 12, at 335-43("[T]he very purpose of the unemployment program was judicially and administratively recharacterized. Initially, unemployment benefits were earned entitlements of the wage worker, a governmentally imposed wage deferral in the form of partial insurance. During and after World War II, the program became one of public welfare in which the recipients were "beneficiaries" of public recognition of their status of deprivation. The sense that benefits were earned dropped out of the discourse. Unemployed workers were considered especially deserving, and temporarily deserving, poor. Their rights were statutory. Finally, in the 1970s, unemployment insurance became increasingly a matter of fiscal stabilization...").
severance laws orchestrate the two systems.  

Of course, employers would have a double obligation – the additional cost of the worker’s salary for the statutory period on top of their continued tax contribution to the UI system. However, there are several ways in which employers’ cost burden might be eased. Adopting pay or play ought to result in a considerable reduction in UI claims and consequent costs. The whole purpose of the system is to avoid unemployment by enabling workers to find new jobs before losing their stream of income. If that goal is achieved, employers would see their tax rate drop under the current experience rating system, and, if savings to the program overall are significant enough, Congress could restructure the tax credit system currently in place to further reduce employer contributions. It is also possible for Congress to create additional tax benefits for employers in stabilizing a pay or play system. For instance, it could make mandatory severance pay, as well as wages paid during the notice period, tax deductible to the employer in the same way that employer contributions to group health plans and other employee benefits are currently treated. Congress could also choose to chip in directly some portion of the overall tab through general tax funds much as it has chosen to do under President Obama’s COBRA assistance initiative.

Finally, it must be remembered that amounts paid to the worker under to the worker under pay-or-play do not represent a pure loss to the employer. The employer can choose to provide notice to the worker rather than severance. Where that option is viable, the employer reaps the benefit of the worker’s continued labor, while still enjoying the consequent reductions in unemployment contributions.

---

171 See Gardner v. Dist. of Columbia Dep’t of Emp. Serv., 736 A.2d 1012, 1015 (D.C. 1999) (“[I]n order to be ‘unemployed’ and be eligible for compensation under the [District of Columbia Unemployment Compensation] Act, an individual must not have performed any services or received any earnings during the period.”); Garcia v. Alstom Signaling Inc., 729 N.W.2d 30, 32 (Minn. Ct. App. 2007) (“[A]n applicant is not eligible for unemployment benefits for any week in which (1) the applicant received or filed for severance pay, if (2) it was paid by the employer because of, upon, or after separation from employment and (3) the payment is considered wages at the time of payment.”). The same is true with respect to any retirement benefit received post-termination. See 26 U.S.C. 3304(a)(15) (“The amount of compensation payable to an individual for any week…shall be reduced … by an amount equal to the amount of such pension, retirement…, annuity, or other payment, which is reasonably attributable to such week.”).

172 For an historical account of why employer contributions to such programs receive favorable tax treatment, see BETH STEVENS, COMPLEMENTING THE WELFARE STATE: THE DEVELOPMENT OF PRIVATE PENSION, HEALTH INSURANCE AND OTHER EMPLOYEE BENEFITS IN THE UNITED STATES (1986). I offer a brief account in Arnow-Richman, Accommodation Subverted, supra note – at 376-77.

173 Michael Cooper, A Smaller, Faster Stimulus Plan, but Still With a Lot of Money, N.Y. TIMES, February 13, 2009, at A14 (explaining a component of the Obama stimulus package in which the federal government will subsidize 65 percent of costs for COBRA health coverage for workers that lose their jobs between September 2008 and December 2009).

174 The degree to which advance notice of termination leads to employee shirking was hotly contested during the passage of the WARN Act and remains unsettled. At least some empirical data suggests that there is no effect.
2. From WARN to Universal Notice: The “Play” Option

To the extent that pay-or-play is, in the first instance, a notice requirement, its clearest predecessor is the federal Worker Adjustment Retraining and Notification Act (WARN). \(^\text{175}\) Under the federal Act, employers must provide sixty days’ notice to any worker affected by a plant closing or mass layoff defined as a reduction in force of at least fifty workers. \(^\text{176}\) A handful of states have adopted mini-WARN Acts that more expansively regulate closures and reductions in force by local companies. \(^\text{177}\)

More so than UI, these statutes directly advance the goal of facilitating worker transition. Adoption of the WARN Act was preceded by congressional study of the effects of plant closing and the role of advance notice in preparing for that event. Lawmakers cited research suggesting that notice would reduce the duration of unemployment and help prepare workers and affected communities for the consequences of widespread job loss. \(^\text{178}\) In this way, the statute is, true to its name, a preventative measure, aimed at avoiding income interruptions rather than simply cushioning their effect.

The problem with the WARN requirements is that they apply to only a fraction of termination decisions. The Act was styled as, and is concerned principally with, the unique situation of a large scale closure. Notice is required only if the termination event affects at least fifty workers. Bureau of Labor Statistics data suggest that such events likely account for less than a third of all terminations. For instance, while mass layoffs resulted in over 500,000 job losses in the first quarter of 2009, \(^\text{179}\) that amount was dwarfed by the number of new unemployment claims for the same period which neared or exceeded 600,000 for each month of the quarter. \(^\text{180}\) Moreover, the number of mass layoff related terminations captured by government data likely exceeds the number of terminations that trigger WARN obligations.


\(^{176}\) See 29 U.S.C. § 2102.

\(^{177}\) New York for instance recently passed a mini-WARN Act that requires ninety days’ notice as opposed to sixty, applies to relocations as well as closings and mass layoffs, and covers employers of fifty or more workers as opposed to one hundred or more workers, the threshold for coverage under the federal law. See McKinney’s (Labor Law) Art. 25-A.

\(^{178}\) See Legislative History citations to Economic Policy Institute, Briefing Paper: Advance Notice of Plant Closing: Benefits Outweigh Costs.


given the statute’s coverage limitations. The Act applies only to companies employing 100 or more employees,\textsuperscript{181} by far the largest threshold for coverage under federal labor standards and antidiscrimination laws.\textsuperscript{182}

Even if a company and a termination event meets the technical coverage thresholds for WARN, an employer may avoid all or some of its notice obligations if one of several exceptions apply. Most notably, the Act permits an employer to close or layoff workers before the conclusion of the sixty-day notice period if doing is the result of unforeseeable business circumstances.\textsuperscript{183} Courts have interpreted this exception broadly to grant companies significant discretion in responding to market fluctuations and economic trends. Department of Labor regulations state that an unforeseeable event is one “caused by some sudden, dramatic, and unexpected action or condition outside the employer’s control,” such as “unexpected termination of a major contract” or a “major economic downturn.”\textsuperscript{184} In making the foreseeability assessment, courts appear receptive to employer arguments that a particular action taken by a third party was unexpected, even where the general state of affairs leading to the business’ decline was well known. Thus, courts have held that a buyer’s decision not to renew its contract or its significant reduction in orders excused the seller’s WARN obligations despite the seller’s awareness that the relationship was in decline.\textsuperscript{185} In one high profile, analogous example, the accounting firm Arthur Andersen succeeded in invoking the defense to excuse its failure to provide notice of its closure following the 2001 collapse of Enron, its infamous client.\textsuperscript{186} The Seventh Circuit accepted the argument that a Justice Department indictment was the unforeseeable, precipitating cause of the firm’s unraveling.\textsuperscript{187} It reached this conclusion despite the fact that the DOJ’s investigation had begun been in progress for more than five months before the indictment was handed down, and Enron itself had imploded months before that.\textsuperscript{188}

The breadth of the unforeseeability exception is understandable given

\textsuperscript{181} The Bureau of Labor Statistics defines a “mass layoff” as one yielding at least fifty unemployment claims in a consecutive five week period, apparently without regard to the size of the employer. See U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, MASS LAYOFF STATISTICS, FREQUENTLY ASKED QUESTIONS, available at <http://www.bls.gov/mls/mlsfaq.htm>.

\textsuperscript{182} The Family Medical Leave Act has the next highest threshold, applying to employers of fifty or more workers. By contrast, federal discrimination laws apply to all employers with fifteen or more employees. In recent months, several Congressional bills have been introduced to expand WARN’s coverage, both by making subjecting smaller employers to the act as well as by bringing layoffs spread across multiple sites of a single entity within the definition of mass layoff. See S. 1374, H.R. 3042; H.R. 277. As of the drafting of this Article, these bills are still pending.

\textsuperscript{183} 29 U.S.C. 2102(b)(2)(A).

\textsuperscript{184} 20 C.F.R. 6398.9(b)(1).

\textsuperscript{185} See, e.g., Gross v. Hale-Halsey Co., 554 F.3d 870 (10th Cir. 2009); Watson v. Michigan Industrial Holdings, Inc., 311 F.3d 760 (6th Cir. 2002).

\textsuperscript{186} Roquet v. Arthur Andersen LLP, 398 F.3d 585 (7th Cir. 2005)

\textsuperscript{187} Id.

\textsuperscript{188} See id. at 586.
the nature of employers’ obligation -- providing advance notice of termination or closure. Companies face legitimate difficulties in predicting whether the immediate economic and business challenges they face will ultimately resolve or require drastic action. Without a deferential standard of reasonable business judgment, employers might choose to layoff workers prematurely to avoid the risk of liability.\footnote{See Watson, 311 F.3d at 765 (“WARN was not intended to force financially fragile, yet economically viable, employers to … close its doors when there is a possibility that the business may fail at some undetermined time in the future. Such a reading of the Act would … harm[ ] precisely those individuals WARN attempts to protect.”)} But this supposes that the essence of the obligation is the warning itself rather than the income continuation that comes along with it. It would be possible to require companies who genuinely fail to foresee the need for a mass layoff or closure to pay affected workers severance in the amount equivalent to what they would have earned had advance notice been feasible.

This is what pay-or-play accomplishes. In addition to making WARN obligations universal, applicable to individual as well as mass terminations, such a system reinterprets the nature of the worker’s right under such laws. Given the nature of the contemporary social contract, workers should be entitled to a period of financial security in which to plan for reemployment, whether that comes in the form of advance notice of job loss or post-termination severance. The employer would have the discretion to choose one or the other depending on how it judges its financial circumstances, the risk that termination will in fact become necessary, and the anticipated value of workers’ post-notice performance.

Of course, this choice does not alleviate the burden some firms will face in complying with a pay-or-play mandate. One argument against such an imposition is that the increased costs will be detrimental to companies on the brink of closure or contemplating the type of mass layoff to which WARN currently applies. As previously described, however, such WARN-triggering events represent a minority of terminations, nor are all such events necessarily a reflection of dire financial circumstances. Mass layoffs and closures may be strategic undertakings from which companies emerge leaner and more profitable.\footnote{Marleen O’Connor.} In such cases, pay or play simply mandates that the interests of the workers should be part of that calculus.\footnote{Otherwise, nothing. O’Connor on extending fiduciarial duties to workers dislocated in financial rather than strategic closures. In effect, the system raises the employees of employees to recognized stakeholders in the business.} If in some cases, pay or play obligations constitute the proverbial straw on the camel’s back, workers may still be better off insofar as they will at have legal entitlements that would be recognized in a sale or bankruptcy.\footnote{O’Connor.}

Republic Window scenario described previously is indicative. The \textit{coup}
de grace precipitating the plant shutdown was a credit freeze by the company’s lenders. For this reason, Republic Window would no doubt have invoked, and would likely have been successful, in arguing unforeseen circumstances had a WARN suit been brought. However, it is likely that the decision of the company’s creditors occurred in the context of ongoing discussions with the company about its financial stability and its future prospects. The risk of a shutdown, while perhaps not probable, was likely within the company’s contemplation, and, if so, the fate of the workers could have been considered as part of the ultimate decision. Indeed, the aftermath of the worker sit-in demonstrates what this might have looked like. The company’s decision-makers took the workers claims under advisement, negotiated with creditors, and emerged with a plan to give workers a piece of what was being unwound. What pay-or-play does is make that process mandatory in all terminations, ensuring that whatever the financial state of the employer, workers have some modest entitlement that must be accounted for at the end of the relationship.

B. Modeling a Pay-or-Play Alternative

Having sketched the relationship between pay or play and current notice and wage replacement laws, the next step is to understand more fully the scope and form of the pay-or-play requirement. It is not the purpose of this Article to propose specific legislation, so much as to provide the normative impetus for its adoption. However, this Part will offer a brief overview of existing models on which such legislation might draw. Mandatory notice and severance rules are an established feature of the worklaw regime of most foreign jurisdictions, and thus an obvious source on which American lawmakers might draw. This Part surveys some of the most prominent examples, in particular the Canadian reasonable notice rule, focusing on the critical question of how to determine the appropriate length of notice/severance. It then offers some brief thoughts on the how employers might respond to a play-or-play obligation, revealing and opining on additional challenges that must be confronted in devising and implementing such a system domestically.

1. Canada’s Common Law Rule of Reasonable Notice

The closest analog to the pay or play system envisioned here is the Canadian rule of reasonable notice. Under provincial common law, as part

---

193 See Monica Davey, In Factory Sit-In, an Anger Spread Wide, N.Y. TIMES, December 8, 2008, at A16; supra Part III.C.
194 See id.; supra Part III.C.
of the implied contractual duty of good faith, Canadian employers are required to give workers reasonable notice of termination (or its equivalent in pay) absent serious worker misconduct. \(^\text{195}\) The amount of notice is based on the totality of circumstances and geared toward enabling the worker plan for the transition.

In many ways, Canada is an ideal source for importing law to the U.S. given the parallels between the two countries’ employment regimes. Although employment at will is considered an American invention, it is unique only insofar as U.S. employers are permitted to terminate both without cause and without notice. Unlike European countries, which affirmatively require an employer to have just cause for termination, Canada permits employers to terminate without cause provided they afford the worker adequate notice or pay. \(^\text{196}\) In this way Canada’s system shares with the U.S. system a degree of deference to employer judgment in rendering termination decisions. Canadian employers, like American ones, are free to fire for good reasons, bad reasons or none at all. In the last two cases, however, they must pay for the right to do so.

The Canadian notice obligation is partially statutory and partially common law and is distinct from plant closing laws and government sponsored “employment insurance.” Every Canadian jurisdiction has enacted notice of dismissal statutes that can be satisfied either by providing “working notice” (in which case the employee continues to work until the notice period ends) or pay in lieu of notice. \(^\text{197}\) These statues mostly require modest amounts of notice tied to the length of the employee’s service. \(^\text{198}\) However, Canada also recognizes a common law duty of reasonable notice which requires the employer to provide notice (or pay in lieu thereof) based on individual circumstances, which is generally construed to require amounts well beyond the statutory minimums. Of paramount consideration in determining the appropriate amount of notice or pay is the likelihood of the employee finding replacement work. \(^\text{199}\) Thus, courts consider such things as the employee’s age, duration of employment, and the transferability of his or her skills. \(^\text{200}\)


\(^{196}\) See id.

\(^{197}\) The length of notice required varies by province but is generally tied to length of service. Thus, in Ontario, an employee receives roughly one week notice per year of service. See Ontario Employment Standards Act, s. 58(1).

\(^{198}\) See id.

\(^{199}\) See England, supra note --; Bird, supra note --.

\(^{200}\) See Bardal v. The Globe and Mail Ltd., 24 D.L.R.2d 140 (1960) (enumerating factors to be considered in determining reasonableness). For a time, an award could also included punitive amounts based on employer conduct. See Wallace v. United Grain Growers Ltd., 3 S.C.R. 701 (1997). But that has been recently overruled by the Canadian Supreme Court, which has clarified that such additional sums require a demonstrable effect on future job prospects. See Honda v. Keays, 2008 S.C.C. 39.
These amounts have sometimes reached as much as 24 months of notice/pay in reported decisions.\(^{201}\) However, trends and customs in determining what is reasonable vary enormously, both as matter of employer practice and judicial decision-making. Importantly, employers must comply with the notice or pay requirements even where economic causes justify termination, although courts will sometimes consider economic circumstances in reducing the amount of notice/pay that would otherwise be owed.\(^{202}\) No notice or pay is required in cases of termination for employee misconduct, but adequate performance-based cause is strictly construed.\(^{203}\)

Canada’s reasonable notice rule offers what is perhaps the most accurate legal translation of the promises implicit in the modern social contract. The rule begins from the premise that workers are freely terminable, thus validating management’s prerogative to make decisions about its need for labor. At the same time, it is the employer’s obligation to facilitate reemployment of the workers it chooses to sever. Consequently, the amount of notice/pay is designed not to compensate the worker for job loss, but rather to pay the costs of his or her transition.\(^{204}\) By applying a flexible standard, the rule ensures that the amount is appropriate to the needs of the employee avoiding over- or under-compensation. Thus, courts generally increase the required notice periods as the employee’s length of service increases and a worker’s skills presumably become more firm-specific. The same is true for older employees or in situations where the employer handles the termination in such a way that reduces the worker’s chances of reemployment.

While foreign to American employment jurisprudence, the Canadian reasonable notice rule has an existing U.S. analog. Under basic contract law, relationships of indefinite duration are construed as terminable at will, subject however to the obligation to provide reasonable notice of termination grounded in the implied duty of good faith.\(^{205}\) Thus, in cases involving long term supply contracts, the law requires the terminating buyer or seller to provide notice sufficient “to afford the party losing the contract

\(^{201}\) See generally DOUGLAS G. GILBERT, ETAL. CANADIAN LABOUR AND EMPLOYMENT LAW FOR THE U.S. PRACTITIONER Appendix F (2nd ed. 2006) (providing rubric from recent cases).


\(^{203}\) In Ontario, for instance, the employee must be “guilty of willful misconduct or disobedience or willful neglect of duty that has not been condone by the employer.” See Ontario Employment Standards Act. Thus it is probably fair to think of the standard as more akin to what an employer must show in the U.S. to preclude unemployment insurance than the common law definition of just cause for termination.

\(^{204}\) In this way it differs from true mandatory severance pay, which exists separately by statute in Ontario. The difference is critical as a practical matter insofar as severance owed for work performed (as opposed to future earnings) would not be subject to any mitigation efforts by the worker.

\(^{205}\) See U.C.C. § 2-309(3) (“Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party.”)
an opportunity to make appropriate [alternative] arrangements.” As with the Canadian employment rule, the amount of required notice is specific to the circumstances and designed to provide the non-terminating party to “get [its] house in order in order to proceed in absence of the former relationship.” Both in its terminology and rationale, the American law of indefinite commercial relationships would appear equally applicable to indefinite employment contracts and could serve as a bridge between the Canadian and American approaches to at-will employment relationships.

2. The Viability of a Contextual Standard

That said, Canada’s approach arguably goes too far in placing the full costs of a worker’s transition squarely on the back of the prior employer. Among the factors it considers in determining what amount is reasonable is the overall strength of the labor market at the time of termination. This arguably goes beyond enforcing the parties’ implicit contract of employment to penalize the employer for conditions outside of its control. If the understanding is that the employee will obtain marketable experience in the course of the relationship, it makes sense to consider the transferability of the worker’s skills set in determining reasonable notice. On the other hand, inability to find replacement work owing to broader economic circumstances is a risk rightly accounted for through the unemployment insurance system. Canadian common law in theory allows courts to take consider economic hardship to the employer in rendering decisions on reasonable notice. However, this is a post-hoc reduction and the exception is only infrequently applied.

Even if that particular criterion were eliminated from the reasonableness calculus, Canada’s approach poses difficult administerability questions. Such an open-ended standard would likely introduce significant legal uncertainty (and consequent costs) into U.S. employment law. Interestingly, this has not been the case in Canada where the reasonable notice rule is long standing. Existing case law coupled with established

---

207 Id.
210 See id.
211 See ENGLAND, supra note – at 311-12.
212 See id.
213 See Libenson, supra note – at 165 (rejecting Canada’s individual assessment of reasonableness in proposing American notice rule for such reasons).
practices have yielded adequate guidance to employers and their attorneys about the appropriate duration of notice in particular cases. The anecdotal experience of Canadian practitioners suggests that most terminations in Canada are handled by voluntary settlement, and litigation over what is reasonable is the exception rather than the rule. However, there is less employment litigation in Canada overall than in the U.S. American litigiousness, combined with the absence of any domestic custom for determining notice, may suggest that a flexible standard would be unadministrable this side of the border.

Furthermore, such conditions of uncertainty would likely enable arbitrary, if not discriminatory, variations in the amount of notice workers receive. To the extent that reasonable duration is negotiated upon notice of termination, the results depend on the status and bargaining power of the particular worker. Poor or financially vulnerable workers are less in a position to object to the amount of notice tendered with the threat of litigation. Such concerns about the effects of preexisting power imbalances are intensified with respect to minority and women workers. Contemporary employment discrimination scholarship has demonstrated how cognitive biases are likely to influence subjective determinations by company decision-makers. Applying the reasonable notice rule requires the exercise of just this type of discretion. Consequently, American adoption of this flexible standard can potentially foster unconscious discrimination, or worse, mask explicit consideration of impermissible factors. Thus, while the Canadian reasonable notice rule provides an example of how an open-ended standard might play out in American employment law, it is an unlikely candidate for full-scale transplant.

3. The “Graded Vesting” Alternative

---

214 See ENGLAND, supra note – at 300 (characterizing the common law on reasonableness of notice “enormously detailed”).

215 See ENGLAND, supra note --, at 122 (noting that the majority of wrongful dismissal suits are settled in negotiations before trial); interview with Douglas G. Gilbert, October 5, 2008 (notes on file with author).

216 ENGLAND, supra note --, at 122 (“The exigencies of bargaining power, rather than legal principles, generally determine the amount of notice that the employee receives…. In practice, lack of financial liquidity, combined with the relatively low returns of a successful action will effectively deter many employees – especially those in low-status occupations – from pursuing their claim to trial, so that they will frequently receive considerably less than their common law entitlement.”). Moreover, common law in Canada explicitly sanctions the award of longer notice periods to upper-level workers, an aspect to the system that has been both controversial and subject to scholarly criticism. See ENGLAND, supra note --, at 129.

If an open-ended notice rule is not practical, U.S. legislators might look to adopt a set out specific rules for the appropriate length of notice. One way to achieve this is through a statutory schedule that ties the requisite amount of notice or pay to longevity, with the statutory period lengthening as the worker’s job tenure increases much the way graded vesting works under private employee benefit plans.\footnote{ERISA requires that qualified plans offer either graded vesting or cliff vesting.} For pay-or-play purposes, length of employment would serve as a rough proxy for reemployment prospects under the assumption that finding new work becomes increasingly difficult as workers age and acquire firm specific human capital.\footnote{See ENGLAND, supra note – at 311.}

A “graded vesting” approach is standard fare in the statutory termination laws of other jurisdictions. Mandatory notice periods in several European countries, including Germany and the United Kingdom, are tied to longevity.\footnote{See Employment Rights Act of 1996, Section 86; German Civil Code, Section 622.} The same is true of Canada’s provincial notice statutes, which exist alongside that jurisdiction’s reasonable notice rule.\footnote{See ENGLAND, supra note – at 290-96.} Of those mentioned, Germany’s is most generous, granting a minimum of four weeks notice, which increases up to seven months’ notice for workers with twenty or more years of attachment.\footnote{German Civil Code, Section 622.} More modest amounts are called for under U.K. law, which requires between one and twelve weeks’ notice, and in the Canadian provinces, which require between one and eight weeks notice.\footnote{See Employment Rights Act of 1996, Section 86; Gilbert, supra note – at (summarizing provisions of provincial laws). But note additional sums are required in some jurisdictions where the termination part of a large layoff.}

Puerto Rican law offers a slightly different take on the graduated vesting concept. Rather than requiring advance notice of termination, Puerto Rico’s Act 80 requires employers to pay and increasingly costly “indemnity” to workers terminated without cause.\footnote{29 L.P.R.A. 185a.} The statutory formula is more nuanced than most jurisdictions, employing a graduated base amount plus a progressive supplement tied to years of service.\footnote{The formula ranges from two months plus one week per year of service to six months plus three weeks per year of service. See 29 L. P.R.A. 185a(a) and (b).} It is also extremely generous to long-term employees; a worker with twenty years of service, for instance, can look forward to nearly eighteen months of continued salary upon termination.\footnote{See id.} Importantly though, the indemnity is required only if the termination is unjustified.\footnote{See id.} Like U.S. common law, Act 80 broadly defines cause to include a broad range of economic circumstances and places the burden of proof on the employee to demonstrate wrongful dismissal.\footnote{See 29 L. P.R.A. 185b; Fonnegra-Tamayo v. Banco Santander P.R. -- F. Supp. 2d -- (2007).}
In this way, Act 80 shares much in common with the only American analog to pay-or-play – the proposed Model Employment Termination Act (META). While META’s principle effect is to impose a just cause requirement, a lesser known provision of the model law allows employers to avoid that obligation through an ex ante promise of severance pay.\footnote{See Model Employment Termination Act (META) Section 4; Fonsegra-Tamayo v. Banco Santander P.R. -- F. Supp. 2d -- (2007).} Section 4 provides that an employee may, by written agreement, waive the right to termination for just cause, provided the employer agrees to pay at least one month’s severance per year of service up to thirty months.\footnote{See id.} This formula, while more simplistic than Puerto Rico’s, offers comparable amounts of pay.\footnote{For instance, an employee with fifteen years of service would receive a minimum of fifteen months’ severance pay under META Section 4 and slightly more than seventeen months’ indemnity under P.R. Act 80.}

4. Picking a Number

As the previous section indicates, there are numerous models on which to base an American pay or play system. The important point to be gleaned from these examples is that the question of the appropriate duration of the employer’s obligation ought to depend, among other things, on the nature of the rule, its purpose and exceptions.

Both META and Puerto Rico’s Act 80, for example, are more just cause rules than pay or play systems, the latter providing a series of statutory penalties for violating the just cause norm. Under both, an employer must have cause to terminate or else must buy out of the obligation at a set price. In such a situation, one would expect payment to be the exception rather than the rule. The employer who chooses in a unique case to terminate without cause (or preserve that option up front, as required under META) might logically be expected to pay a higher price in those instances.

This is particularly so where economic, as well as performance based reasons, constitute just cause to terminate. If the employer is unable or unwilling to show either basis for termination, it is more likely (though not invariable) that the reason for the termination is deserving of condemnation. Hence, one would expect a mandatory severance rule enconced within a just cause system to require greater, albeit less frequent, payments than the no-fault universal rule envisioned under pay-or-play. On the other hand, from both a normative and a practical perspective, a rule requiring payment in all instances of termination absent worker misconduct could exact only smaller, though far more frequent, employer payouts.

In the same vein, the duration of the statutory period ought to take account of the background rights of the parties. This includes the amount of...
protective legislation already in place, as well as the degree to which the reformed termination system insulates employers against other liabilities. Importantly, in Puerto Rico and under META the requisite payout serves as a replacement for what would otherwise be a claim for arbitrary termination. In contrast, in Canadian workers retain the extensive common law notice rights previously described, while in the U.K. and Germany workers’ have extensive statutory protection against unfair dismissal in the tradition of European law.

Thus, the “price” employers pay under a pay-or-play system ought to reflect the degree to which compliance buys out other forms of employment liability. Currently, American common law offers workers several weak, but viable routes to overcoming the at-will presumption, mostly through implied contract theory. Insofar as pay-or-play offers an alternative to just cause protection, it would be appropriate for the law to preempt those termination claims alleging breach of such a promise. After all, it is the purpose of such a system to reaffirm management’s right to terminate at its discretion as much as to require employers to finance worker transition, as both concepts form part of the current social contract of employment. On the other hand terminations that violate existing public law mandates or otherwise offend public policy would appear outside the bounds of the system. Such terminations are currently actionable on the theory that they harm not just the worker but society as a whole. Employers are not likely to be deterred from terminating for such reasons absent the risk of accountability that currently attends such behavior. Thus, the pay or play mandate ought to preempt claims based on oral and implied contracts and promissory estoppel, but not those made unlawful by statute or actionable under a theory of wrongful discharge in violation of public policy.

That said, the degree of preemption, and consequently the benefit to the employer, is far from the only consideration in fixing the amount or duration of the pay or play obligation. It is also critical that the period reflect available data about the optimal amount of notice and severance. Most existing research examines the effectiveness of the WARN Act and thus takes sixty days’ notice as a baseline. We do not know whether the same effects could be achieved with less notice or whether better results

\[232\] See Hopgood v. Merrill Lynch, Pierce, Fenner & Smith, 839 F. Supp. 98 (P.R. 1993) (concluding that there is no recognized a right for at-will employees to sue for wrongful discharge in Puerto Rico outside the remedies given under § 185(a) for discharge without cause); META Section 2(c) (“this Act displaces and extinguishes all common law rights and claims of a terminated employee… which are based on the termination”)

\[233\] However, it could certainly impact the amount of recoverable damages awarded to compensate for future employment in surviving tort claims.

could be achieved with more. At the same time, there is reason to believe that under some circumstances, severance pay can create disincentives to employment. Thus, legislative expertise is needed to examine these matters and perhaps commission further study.

Ultimately then, the form and scope of employer’s obligation will depend on a combination of empirical data, economic realities, and, of course, political compromise. Given these considerations, it is beyond the scope of this Article to offer a prediction about the appropriate duration and schedule of pay-or-play obligations. That said, it is probably fair to suggest that the amount will be well below the extensive payments required under META’s opt-out provision and Puerto Rico’s Act 80, but hopefully above the minimal requirements imposed by British and Canadian statutes where workers enjoy other protections. In this respect, Germany’s provision, requiring a minimum of four weeks and up to seven months for long-term employees may offer a useful halfway point.

C. Risk Management Under Pay-or-Play

As the previous section suggests, specific decisions about the extent of employer’s pay-or-play obligation cannot be made without researching and vetting specific alternatives, a process more appropriately undertaken by a legislative body than an academic article. This Article has focused rather on the rationale for a pay-or-play system given the implicit promises of employers and the needs and expectations of terminated employees. Ultimately, however, the success of such a system, in whatever form it is ultimately enacted, will depend significantly on the ways in which employers implement and respond to their legal obligations. Before concluding this Article, it is therefore necessary to briefly consider the ways in which companies will achieve (or seek to avoid) compliance.

1. Passing on Costs to Workers

One possibility should pay-or-play be enacted is that employers will seek to pass on the cost of compliance to its workers in the form of lower wages. In successful in doing so, the advantages of the system would be offset by a front-end loss of income that might otherwise have used for personal savings.

Leaving aside for the moment the question of how costly the system will prove in practice, employers’ ability to fully pass on that burden to their workforce is circumscribed by other laws. The Fair Labor Standards Act and comparable state statutes prevent employers from reducing wages below the minimum wage. While minimum wage workers represent a
small percentage of the workforce,\textsuperscript{235} their ranks are likely to increase as federal minimums climb.\textsuperscript{236} More importantly, these workers are likely to be among the least equipped to tolerate a gap in income in the event of job loss. Thus, at the very least the most poorly paid workers should reap the full advantage of the new system, gaining the right to statutory notice or pay while maintaining their current income levels.

Outside this segment of the workforce, the cost of the system to workers will depend on the ripple effect of minimum wage laws and the elasticity of supply. Minimum wage increases generally translate into raises up the ranks as employers proportionately reward low wage workers earning above the minimum to preserve their internal pay structure.\textsuperscript{237} Thus, the population of workers insulated from income offsets should be larger than those just at the minimum wage threshold. Beyond that, the effect on salary will depend on the degree to which employees can exercise bargaining power to maintain their income level. At least some portion of higher level workers will be in a position to refuse salaries significantly below the currently prevailing wages in their field. Ultimately, future study of the effects of the pay-or-play on compensation levels must be conducted and legislative adjustments to the system undertaken if necessary.

On the other hand, it is highly possible that the “costs” to firms will be less significant than lawmakers (and firms) might initially anticipate, and that consequently there will be less to pass on to workers. If one assumes that wages already reflect the costs of employment, then workers are currently “paying” the price for the legal uncertainty that pervades the current system of at-will exceptions. Pay-or-play, while imposing a new cost on employers, offers the advantage of increased certainty and predictability in managing terminations. Most obviously, companies gain the advantage of direct preemption of common law contract law. It is also likely that companies will enjoy a decreased risk of other types of litigation as employees feel less need to resort to the legal process to address either the hardship of termination or the perceived unfairness of their employers’ actions.

Finally, it is possible that workers are already to some extent “paying” the costs of anticipated notice or severance benefits. As previously


\textsuperscript{236} The most recent federal minimum wage increase went into effect July 24, 2009, the third of three scheduled increases authorized by Congress in the Fair Minimum Wage Act of 2007. Covered nonexempt workers are now entitled to a minimum wage of not less than $7.25 per hour.

described, the prevailing social contract of employment presumes that employees will obtain marketable skills at their current place of work and enjoy the ability to secure a new position in the event of termination. In light of this, workers likely enter employment relationships anticipating that they will receive some degree of transition support from their employers, and companies may implicitly or explicitly encourage this understanding. Certainly numerous firms offer severance to departing workers as a voluntary practice, although such programs may not be as generous as the pay or play proposal anticipates. Similarly, the standard practice of requiring “two weeks notice” upon termination has likely influenced employees’ understanding of employers’ termination obligations. Such practices and policies, however, are likely not contractually enforceable, given employers’ current ability to disclaim enforceability as well as unilaterally modify existing policies. In other words, employers may currently be reaping the benefit of workers’ expectation of advance notice or severance while at the same time opportunistically “breaching” the parties shared understanding. If so, the effect of pay-or-play would not be to introduce a new cost so much as to create an enforcement system in the event workers fail to receive what they have already paid for.

It is beyond the scope of this Article to fully consider the effect of pay-or-play on wage levels, nor is it possible to anticipate in advance the degree to which employers will seek to pass on any cost of compliance. The point rather is that there are several theories to support the view that workers will not suffer a quid pro quo wage reduction under pay-or-play. At a minimum, such concerns would not justify jettisoning the approach, but rather suggest that the overall economic effects of such a system, once in place, ought to be closely studied.

2. Litigating Serious Cause to Terminate

Another possibility is that employers will seek to avoid the obligations imposed by a pay-or-play system by contending, wherever possible, that serious cause existed to terminate the affected worker. As previously articulated, the obligation to provide notice or severance under the pay-or-play system envisioned here would apply to all terminations absent serious misconduct. Thus, employers may respond to the new law by closely documenting personnel matters and taking a hard line in defending against claims of non-compliance.

If employers were to adopt this approach across the board, it would

---

238 See, supra, Part III.B.
significantly undermine the anticipated advantages of a pay-or-play system over the current regime of at-will exceptions. Employees would lose the benefit of pay in hand and suffer the expense and uncertainties of the litigation process in attempting to secure what they are statutorily owed. At the extreme, the situation could reproduce the problems of the current system in which those workers seek to establish a just cause contract and prove its breach, or else face termination empty handed.

To some extent this is the inevitable risk of any system that allows exceptions. It would be poor policy not to grant employers some leeway in the face of egregious personnel problems. Without a misconduct defense, the system would create moral hazard problems, granting workers license to shirk without fear of an immediate, unqualified termination. In addition, such as system would be troubling from equitable perspective, requiring payouts to the most troublesome employees.

The solution is not to eliminate the exception but to carefully circumscribe it. That is precisely how the current unemployment insurance system works. Under UI, benefits are provided to eligible workers absent statutory disqualification for misconduct relating to employment. Misconduct is narrowly construed in favor of coverage and usually requires a demonstration of willful or wanton misbehavior; mere poor performance is generally not enough. Thus, the system starts from the assumption that workers are covered and it is up to the employer to support any deviation. Pay-or-play ought to adopt a similar substantive standard and proof structure. Like UI (and in contrast to the current system of at will exceptions) pay-or-play creates a background right to a specific termination benefit, and it is appropriate to place the burden on the employer for what is effectively an affirmative defense.

That said, the dangers of hard line employer tactics in refusing to pay-or-play inhere even they are unlikely to be sanctioned in a court of law. In the UI context, employee obtains benefits up and until the employer successfully challenges his or her eligibility. In the case of pay-or-play, benefits come directly from the employer and their ability to assert ineligibility and withhold funds places workers in the difficult position. That said, there is no reason to assume that employers will opt for strategic non-compliance. Employment law scholarship has begun to heed the teachings of regulatory theory which suggests that many if not most firms are compliance-minded, desiring to abide by the law where possible just as most people voluntarily comply with criminal and other social conduct laws. In addition, compliance with pay-or-play has particular advantages.

---

for employers. They avoid the costs of litigation, and, if they deliver required pay with additional funds and a settlement agreement, may avoid other types of future claims as well. That said, there is still likely to be a subset of employers who are frivolous or strategic invocation of the misconduct defense. That is probably best addressed by granting employees a right to attorneys’ fees in the case of a successful challenge to an employer’s non-compliance.\footnote{Many of the statutory just cause reform initiatives include such a provision. \textit{See, supra}, Part II.A.1.}

3. Requiring Pre-employment Waivers

Yet another possibility is that employers will seek to opt out of pay-or-play by obtaining employee waivers of rights in advance of hiring. Employer solicitation of pre-employment waivers is an increasingly common practice of growing concern, particularly in the context of private arbitration. Employers routinely seek worker consent to binding arbitral resolution of future disputes, such as discrimination claims, which could otherwise be litigated before a jury. While this particular practice has received significant scholarly attention,\footnote{See, e.g., David S. Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 Wis. L. Rev. 33, 36 (“Pre-dispute arbitration clauses ... have increasingly found their way into standard form contracts of adhesion.”); Katherine Van Wezel Stone, Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s, 73 Denv. U. L. Rev. 1017, 1037 (1996) (“[M]andatory arbitration provisions are often imposed on workers without even the illusion of bargaining or consent.”).} the problem is part of larger trend toward the use of standard forms to eliminate a wide variety of worker rights, including noncompetition agreements and other restrictive covenants, independent contractor agreements, and recitals of at-will status.\footnote{See generally Rachel Arnow-Richman, Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements, 49 Ariz. L. Rev. 637 (2007) [Rise of Delayed Term]; Rachel Arnow-Richman, Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes, 2006 Mich. St. L. Rev. 963 (2006) [Worker Mobility], as have others. \textit{See, e.g,}, Cynthia Estlund, \textit{Between Rights and Contract}, 155 U. Pa. L. Rev.389, 389 (2006-07).}

These realities suggest that the risk of employer-solicited waivers may well be the greatest threat to the success of a pay-or-play regime. If granted free reign to contract out of pay-or-play obligations, employers could essentially re-impose the current system of employment at will.\footnote{See Libenson, \textit{supra} note – at 174. (“The reality … is that employees will agree to just about anything an employer wants. Whether this is due to employee desperation, inequality of bargaining power, signaling concerns, or lack of information, permitting employers and employees to bargain around the mandatory notice requirement would likely make it worthless.”)} Given the stakes, it is tempting to conclude that pay-or-play obligations should be non-waivable. Such an approach has been recommended by some opponents of employment arbitration who would seek to amend either the Federal Arbitration Act and or Title VII to ensure that the right to a jury trial on such claims is not circumvented.
There are, however, several problems with such a categorical response, many of which have been raised and vetted by law and economic scholars in other substantive contexts. First, prohibiting all waivers fails to account for employers’ genuine needs for flexibility in particular cases. For instance, an employer may know that it needs an influx of temporary workers for a short term project. At least in cases where the parties enter into a written agreement for a fixed term of employment, companies ought to be permitted to waive any severance or additional notice obligations.\textsuperscript{246} In such cases, the parties’ contract serves much the same purpose as pay-or-play, enabling the temporary worker to predict the need to find alternate work at a specified point in the future and engage in a search while still employed.

Second, an out-and-out prohibition on waivers presumes that workers lack any autonomy in choosing terms of employment. As previously described, it is possible that under a pay-or-play regime employers will lower wages in an attempt to pass some of the costs of compliance onto workers. If so, it is likely that a subset of workers will prefer to tolerate the uncertainty of pure employment at will rather than suffer a loss in pay. Respect for individual autonomy suggests that these workers should be free to exercise the preference for higher wages and to self-insure against the risk of an unforeseen (and uncompensated) termination.\textsuperscript{247}

Given the conflicting concerns, some scholars have taken an intermediate stance on issues of waiver, arguing that certain rights appropriately occupy an intermediate position between mandatory and contractually waivable.\textsuperscript{248} Thus, for instance, the law currently allows employees to give up their right to compete with their employer upon termination pursuant to covenant not to compete, as well as to agree to arbitration agreements that waive the right to a jury trial in event of an employment dispute.\textsuperscript{249} In both cases, however, the enforceability of the worker’s waiver is subject to important substantive constraints: an arbitration agreement must set forth a legitimate and fair alternative dispute resolution process that adequately protects the worker’s rights and a noncompete must impose only reasonable restraints necessary to protect a legitimate interest of the employer.\textsuperscript{250}

The issue, of course, is how to ensure that waivers do in fact reflect a

\textsuperscript{246} This is permitted under the Montana Wrongful Discharge in Employment Act and most scholarly proposals for just cause reform that consider the issue.

\textsuperscript{247} See Cynthia Estlund, Between Rights and Contract, 155 U. Pa. L. Rev. 389, 389 (2006-07) ("Making employee rights waivable converts them into bargaining chips that, at least in principle, allow employees to make mutually beneficial bargains with their employers.")

\textsuperscript{248} See, e.g., Estlund, Rights and Contract, supra note at 390.

\textsuperscript{249} See generally Estlund, supra note – at (exposing this commonality between noncompetition and arbitration agreements).

\textsuperscript{250} See generally Arnow-Richman, Delayed Terms, supra n. at 657-60 (summarizing law); Estlund, supra note at (same).
true choice by the employee on fair terms of exchange rather than a unilateral imposition of the preferences of the employer. It is beyond the scope of this article to fully articulate how conditional waivability would apply in the pay-or-play context. However, at a minimum, the system ought to place meaningful constraints on the waiver process. Employers should be required to provide a detailed disclosure of the rights being waived, including a recital of the specific schedule of notice/pay that the worker would otherwise receive upon termination. Enforceability should also be subject to the employee receiving the disclosure and providing the waiver in advance of accepting employment. It is only with such advance notice that an employee is able to make a meaningful and informed decision as to whether to accept work on the terms being offered. Depending on how effective such constraints are in practice, additional substantive limitations on waiver might be considered.

Once employment commences, the problem of policing the fairness of waivers is significantly reduced, if not eliminated. Currently employers have free reign to impose what I have described elsewhere as “cubewrap” terms -- waivers of rights solicited from incumbent employees -- given the background rule of employment at will: the employer may freely terminate the worker who refuses a proffered change in employment terms. In contrast, an employer operating under pay-or-play would not be able to insist on changes in terms on pain of termination, but would have to provide sufficient consideration to secure the employee’s uncoerced consent or else abide by the pay-or-play obligation. In this way, pay- or-play has the potential not only to provide meaningful protection to workers upon termination, but to bolster employees’ bargaining power in existing employment relationships. Indeed, it may reduce or even eliminate the coercive imposition of unfavorable terms on incumbent employees.

4. Avoiding Employment

Finally, employers may seek to reduce the costs of pay-or-play by avoiding employment altogether. Depending on the scope of the statute in terms of who is covered, this could take the form of seeking alternative work arrangements, such as hiring independent contractors, or, if the system broadly covered all work relationships, simply reducing the size of its labor force.


252 See generally id.
Both risks are largely obviated by the previous recommendation to permit, at least as an exploratory matter, the conditional waivability of pay-or-play rights. Independent contractor agreements are effectively a form of waiver in the sense that the worker’s consent to forego employment status places him or her outside the protection of most federal and state employment statutes. That is precisely why the legitimacy of employer designations of particular workers as independent contractors are so contested in the context of non-waivable rights such those conferred by anti-discrimination and minimum wage and overtime laws.

Given the availability of waiver, there is no special need for employers to seek out independent contractor arrangements, at least not for the reasons of avoiding the pay-or-pay regime. Depending on how clear the requirements for conditional waiver are, employers would be wise to choose that route rather than the uncertain and malleable test used by courts to assess independent contractor verses employment status. That is not to say that pay-or-play ought to expressly exclude non-employees. On the contrary, scholars have recognized the stickiness of default rules, owing to such problems as informational barriers, status quo preferences, and other transaction costs. Thus, the statute ought to cover all workers, placing the burden on the employer to request a deviation from the default.

Finally, the availability of conditional waiver should similarly mitigate concerns that pay-or-play will lead companies to reduce employment levels overall. Basic economic principles would predict that companies would lower their consumption of labor in proportion to the increased costs of employment. Interestingly, research on the degree to which protective employment legislation impacts employment levels has not always supported this view. Yet to the extent there is some effect on employer demand owing to the additional burdens of legislative compliance, the conditional wavier offers employers another tool for strategically managing those costs in particular instances rather than limiting hiring across the board.

CONCLUSION

This Article has argued for a fundamental shift in the goals and focus of employment at-will reform. Recent and profound changes in the labor market – the demand for increased employer flexibility, the rise in short-term and contingent labor, and a precipitous decline in union density, – all challenge the premise, implicit in calls for a just cause rule, that continued employment with a particular employer is itself an important end. Indeed,

253 See, supra, Part IV.C.3.
contemporary employers increasingly are encouraging workers to look to the external market and their own skill set as the ultimate guarantors of long term security.

Given this environment of volatility, adopting a just cause rule would likely be of limited use to workers and, in many cases, inconsistent with party expectations. Such a rule requires the worker to prove that termination was arbitrary, a relatively infrequent occurrence that is difficult to establish, while leaving workers terminated for justifiable non-performance based reasons completely vulnerable. A better approach at-will reform, therefore, would aim not to constrain employer discretion to terminate, but rather to assist workers in the inevitable situation of job loss.

The pay-or-play system delineated in this Article would do precisely Under pay-or-play, employers would be remain free to terminate at will, but absent serious misconduct, would be obligated to pay for the right to do so in the form of either notice or severance pay. Such a system would reduce the uncertainty of employment at will and assist workers in avoiding gaps in income, while preserving the flexibility of the current system. More importantly, it would elevate the contemporary social contract of employment to the status of a legal rule. To the extent employers are promising workers marketable skills and experience in lieu of long-term employment, it makes sense that they be obligated to underwrite some portion of their workers’ costs in the event of termination. Finally, pay-or-play would grant workers an immediate and universal benefit that recognizes both the challenges and inevitability of job transition. Rather than compensating a subset of individuals for the arbitrary loss of particular jobs, the system would provide all workers a window of income security in which to comfortably search for the next opportunity.