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REACTIONS TO THE PROPOSED EMPLOYMENT TERMINATION ACT*

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ABSTRACT

A survey was conducted to determine the reactions of a national sample of 785 human resource management professionals to the proposed act governing employment terminations drafted by the National Conference of Commissioners on Uniform State Laws. Survey results indicate that while respondents favor arbitration of termination disputes over jury trials, they are generally opposed to the act on the theory that it erodes management control over employment decisions.

Economic efficiency dictates that firms of all sizes maintain control over the right to reduce their workforce. During the past decade, the frequency of mergers, acquisitions and attendant corporate downsizing resulted in the need to eliminate

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Subsequent to acceptance of this article for publication, the National Conference of Commissioners on Uniform State Laws adopted a Model Employment Termination Act (ETA). The Conference decided to change the ETA from a uniform to a model act, suggesting that it is not likely to be adopted by states in a uniform fashion. Its provisions are the same as those of the proposed uniform ETA.

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employee redundancies. Government deregulation, and now the increasing competition from foreign companies and domestic companies manufacturing goods abroad have forced companies to further reduce labor costs. In response to rapidly changing economic and technological environments, firms have been forced to pare down layers of bureaucracy in their organizations. In addition, pressures for improving product quality and enhancing customer service leave little corporate tolerance for substandard performance. A major consequence of these business trends has been the elimination of positions and the termination of many employees. To maintain the flexibility in adjusting the size of the work force, employers have relied on the common law doctrine of "employment at will." According to this holdover from the British common law, employers may dismiss employees at any time for good cause, bad cause or for no causes at all [1]. Unless protected by contract, union agreements, statute or common law exceptions to the doctrine, and regardless of seniority or performance, employees are subject to dismissal under employment at will.

The strength of the at-will doctrine in the United States is unique among western industrialized nations, all of which have abandoned the theory, including its originator, Great Britain. Countries such as France, Germany, Sweden, Italy, Canada, and Japan, which once adhered to the doctrine, have all replaced it with a national statutory standard prohibiting termination without just cause [1].

The fact that the "employment at will" doctrine still predominates in the United States has generated a number of problems for both the employer and the employee, suggesting that it is time to adopt a uniform statute covering wrongful discharge. First, although such a rule clearly promotes economic efficiency for the employer, it has been subject to gross abuse. Employers have, for example, fired employees just prior to receipt of an earned commission [2] or for serving on jury duty [3] or for filing a worker's compensation claim [4]. In many instances where management has asserted its prerogatives to terminate at will, employees have responded with lawsuits. The basis of these lawsuits is a recently developed legal theory, that of wrongful discharge, or discharge in the absence of "just cause," a concept borrowed from union contracts. The incidence of these suits has grown dramatically over the last decade. According to Youngblood and Bierman the incidence of wrongful discharge cases each year in the United States exceeds 58,000 [5]. Average damage awards are estimated to be as high as $650,000, with the cost of attorney's fees running well over $100,000 [6].

The costs of bringing a wrongful discharge lawsuit place a huge financial burden on both the employer and the employees. In most instances of abusive discharge, the jury renders an award for punitive damages, imposing an extra tax on the employer. These damages are designed to punish the employer over and above any award made to compensate the employee for lost earnings. In addition, such damages are perceived as a deterrent to corporate misbehavior as well as an incentive to lawyers to represent employees with limited means.

Under current common law, employees may piggyback claims, seeking damages in wrongful discharge cases for such related claims as slander, libel, intentional infliction of emotional distress, negligent infliction of emotional distress, interference with contractional relations and interference with a prospective business advantage.

A number of other costs to the employer are associated with wrongful discharge litigation. To avoid such litigation, employers may provide high severance payments or retain poor performers. In times of expansion, employers may turn to independent contractors of part-time employees. Employers may also incur higher administrative and personnel costs in response to the fear of a wrongful discharge lawsuit. Further, a reluctance to fire employees could discourage companies from purchasing labor-displacing equipment or engaging in high-risk ventures [6].

Researchers have suggested that the concept of employment at will clashes with what some have called the coming revolution in workplace rights [7-8]. According to Osigweh, more professional, better educated workers will demand greater job security. Workers will expect their employers to honor an implied contract of good faith and fair dealing in return for high performance. Ewing notes that attraction and retention of the best employees will require worker guarantees of due process in resolving disputes and grievances.

A final problem with the employment at will doctrine is that it presents a moving target. Although it continues to be a strong and viable doctrine in this country, it has lost favor over the last several decades. More than forty states have already limited the scope of the doctrine, and new statutes are constantly being enacted at the state and federal level to limit it further. Increasingly, courts are recognizing more theories of wrongful discharge under both implied contract and tort claims. Statutory and judicial constraints on the doctrine thus vary from state to state, confounding its application. The increasing incidence of state court challenges to the doctrine are set forth in Table 1. The table indicates that the number of states adhering to the employment-at-will doctrine has decreased

Table 1. State Court Rulings: Challenges to Traditional Doctrine

Prevailing Doctrine	1979	1982	1991[a]
Employment at will	32	28	7
Public policy	19	23	42
Implied contract	0	2	47
Good faith covenant	0	1	13

[a]Dertouzos, Holland & Ebener's 1985 data were replaced with figures obtained by aggregating data from Harrison & McQuire [9].

dramatically over the last decade, while the number of common law exceptions to the doctrine have increased substantially, but not uniformly, among the states.

With such a patchwork of problems as a backdrop, the National Conference of Commissioners on Uniform Laws is in the process of drafting a Proposed Uniform Employment Termination Act ("ETA") designed to alleviate many of the problems caused by the original doctrine and the subsequent limitations on its application. The act is primarily designed to protect employees from arbitrary termination by creating a forum for arbitration of wrongful discharge cases. The act also benefits employers, however, by shielding them from costly trial with the potential for high punitive damage awards.

It is important to assess managers' reactions to the proposed act while it is still in draft form. Of particular importance is the reaction of human resource professionals who will have the ultimate responsibility for implementing the act and monitoring organizational compliance. By assessing the reaction of a heterogeneous national sample of human resource managers, it is possible to ascertain how receptive managers are to relinquishing their right to discharge at will in exchange for protection from punitive damage awards and a more expeditious settlement of wrongful discharge cases. Accordingly, this article presents the results of a survey designed to measure the perceptions of human resource managers to the act's provisions.

BACKGROUND ON EMPLOYMENT AT WILL AND THE PROPOSED UNIFORM EMPLOYMENT TERMINATION ACT

Since the early 20th century, there have been increasing legislative restrictions on the employment-at-will doctrine at both the federal and state level. Federal legislation protects employees from discriminatory discharge, (e.g., Title VII, the Consumer Credit Protection Act, the Rehabilitation Act of 1973 and the Age Discrimination in Employment Act). Other federal legislation protects employees in their exercise of statutory rights (e.g., the Occupational Safety and Health Act, the Employee Retirement Income Security Act and the Fair Labor Standards Act). A third category of federal legislation includes statutes that protect certain employees from discharge without cause, such as the Vietnam Era Veterans' Readjustment Assistance Act. There is, however, no statute that protects *all* workers from wrongful discharge. The proposed act would correct this deficiency.

At the state level, a number of statutes have been enacted that protect employees from discharge for whistle blowing, for serving on jury duty, for failing to take a lie detector test, and for filing workers' compensation claims. Every state has at least one statute limiting the employer's right to discharge [9]. In addition to statutes at both the state and federal level, numerous common law exceptions to the rule that have been carved out by state courts may serve as the basis for a

wrongful discharge lawsuit. A number of states have created causes of action for wrongful discharge based on one of three categories: violation of public policy (42 states), breach of contract (47 states) and breach of the implied covenant of good faith and fair dealing (13 states) [9].

Confronted by rising numbers of lawsuits based on unjust dismissal, a dozen states including California, Illinois, and Michigan are considering drafting their own wrongful dismissal laws. Montana is the only state so far that has enacted a wrongful discharge statute [10]. It provides nonunion employees with basic protection against arbitrary dismissal. The Montana statute broadly forbids firing without "good cause" as determined by a court. It also places a limit to the amount of damages an employee can win in such cases. The law limits remedies to no more than four years' worth of lost wages and benefits and excludes recovery for emotional distress. The act also outlaws punitive damages in most cases unless employer fraud or malice is proven. The statute has passed judicial challenges by the Supreme Court of Montana. The Virgin Islands also has a statute that describes permissible grounds for dismissal and provides for reinstatement and back pay remedies under certain circumstances [11]. A Puerto Rico statute provides employees serving under an indefinite term contract who are discharged without good cause any back pay due, one month's salary, an "additional progressive indemnity equivalent to one full week for each year of service" [12].

Several years ago, the National Conference of Commissioners on Uniform Laws began to draft a uniform employment termination act [13]. The uniform law commissioners are lawyers, judges, and law professors representing each state. They meet twice annually to identify areas in which states may need uniform laws. Study committees form to examine the introduction of new uniform laws or revision of existing ones. One such committee continues to work on a proposal for a new uniform law on employee termination. A final version of the ETA was to be submitted for a vote at the conference's annual meeting in late July 1991. The proposed act provides uniform standards for employee terminations. It is designed to protect employees from arbitrary termination while at the same time offering employers the opportunity to be protected from costly court fights in the event of disputes over what constitutes a termination for good cause. As currently drafted, the act has the following provisions:

1. An employer may not terminate an employee without "good cause" if the employee has been employed for a year or longer.
2. "Good cause" means (i) a reasonable basis for the termination in light of all relevant factors and circumstances, including the employee's duties and responsibilities, the employee's conduct and employment record and the appropriateness of the penalty for the conduct involved; or (ii) good faith management judgment as to the legitimate economic needs of the employer to organize or reorganize operations. . . .

3. Termination includes a dismissal, a layoff for more than two months, retirement or a quitting by an employee induced by intolerable acts of the employer.
4. In the event of a dispute over termination, the employee may demand arbitration of the disputed termination according to the arbitration act of the state.
5. In the event that the arbitrator finds in favor of the employee, remedies are limited to reinstatement and back pay or severance pay for a period not exceeding five years.
6. Attorney's fees will be awarded to the prevailing plaintiff, or to a prevailing employer if the arbitrator finds that the complaint was frivolous.
7. The employee is precluded under the act from seeking damages for pain and suffering, emotional distress, defamation, fraud, or other injury under common law, or compensatory, punitive or other damages beyond those specified in the act.
8. The act preempts all state common law rights and claims of an employee against his employer sounding in tort, contract or otherwise if the claim is based on the termination of employment.

A summary of the act's major provisions was sent to human resource management professionals, and their responses formed the basis of our research. The next sections set forth the research methodology and results.

Methods

Survey Sample

Reactions to the ETA were collected in the context of a survey on employer and employee rights. A random national sample of 3,800 names was drawn from the national membership roster of a human resource management professional association. Survey packages containing a cover letter, survey questionnaire, and self-addressed, post-paid return envelope were mailed to selected members. By the survey deadline, 785 usable questionnaires had been returned from all regions of the country. Information about the participating organizations and respondent characteristics are shown in Table 2.

Organizations representing a diverse group of industries responded. Forty-five percent of the organizations employed fewer than 500 workers, 19 percent employed between 500 and 999 workers, and the remaining 36 percent employed more than 1,000 workers. Less than 30 percent of the organizations were unionized.

Respondents included an almost equal number of men (53%) and women (47%). Participating human resource managers had an average age of 42.1 and an average of 12.7 years of professional experience.

Table 2. Background Information

	Percent
Organizational Characteristics	
Industry	
Manufacturing	31.5
Banking/Investment	13.2
Health/Education	13.1
Government	5.3
Transportation/Utility	5.1
Retail/Wholesale	4.7
Other	27.1
Geographic Region	
Northeast	36.9
Central	11.0
South	21.5
West	15.7
Multiple	14.8
Size of Company	
Small (under 500 employees)	45.0
Medium (500-999 employees)	19.0
Large (1,000 or more employees)	36.0
Union Status	
Unionized	29.3
Non-union	70.7
Respondent Characteristics	
Gender of Respondent	
Male: 52.6%	
Female: 47.4%	
Age	
Mean age: 42.1 years	
Years Professional Experience	
Mean years experience: 12.7	

Assessment of Reactions

Participants read a summary of the major provisions of the proposed ETA. They were then questioned on their reactions to the proposal. Participants recorded their reactions on a series of 5-point scales, ranging from (1) strongly disagree to (5) strongly agree. In addition, many participants expanded on their evaluations through additional written comments.

Results

Evaluations of the proposed ETA are shown in Table 3. The first and second items assessed whether respondents perceived that the proposed act strengthened or weakened management. Over 63 percent disagreed or strongly disagreed with the statement, "The proposed legislation favors management." Similarly, over 57 percent agreed or strongly agreed with the statement, "The proposed legislation weakens management." Clearly, the overall reaction to the proposed act was not favorable.

The next three questions examined reactions to specific features of the proposed act. One provision of the act calls for the resolution of wrongful discharge claims (other than those involving a contract) by an arbitrator rather than by the courts. More than 42 percent of respondents agreed or strongly agreed that arbitrators would do a better job of resolving termination disputes than would juries. An additional 31 percent were neutral on this issue.

A second provision significantly limits the magnitude of financial settlements currently available to employees in wrongful discharge cases. However, only 30 percent of respondents agreed or strongly agreed with the statement, "The proposed legislation will save management time and money." On the other hand, over 63 percent of the respondents agreed that the act would create expensive bureaucratic problems. The pattern of responses seems to suggest that the perceived advantage gained by having an impartial arbitrator rather than a jury resolve wrongful discharge claims is outweighed by fears of a costly, bureaucratic process.

The last subset of questions examined perceptions of the costs and benefits of greater job security afforded by the act. Recall that under the proposed legislation, after one year, an employee could not be terminated without good cause. Only 31 percent of respondents agreed or strongly agreed with the statement, "The proposed legislation will help insure justice for individual workers." In addition, only 13 percent of respondents agreed that greater job security would lead to increased workforce productivity.

Analysis of Open-ended Comments

Open-ended comments focused on three issues: 1) reactions to arbitration, 2) the proposed act's impact on job security, and 3) the definition of good cause.

Table 3. Reactions to the Employment Termination Act

Question	Strongly disagree or disagree (percent)	% Neutral (percent)	Strongly agree or agree (percent)
The proposed legislation favors management.	63.1	26.2	10.7
The proposed legislation weakens management.	42.9	20.7	57.1
Arbitrators will do a better job resolving termination disputes than will juries.	24.5	33.3	42.2
The proposed legislation will save management time and money.	50.1	20.0	29.9
The proposed legislation will create expensive bureaucratic problems.	17.8	19.0	63.2
The proposed legislation will help insure justice for individual workers.	39.8	29.1	31.1
Greater job security will lead to greater work force productivity.	67.2	19.8	13.0

Reactions to resolution of wrongful discharge disputes by an arbitrator were divided, with strong opinions expressed on both sides of the issue. Opposition to arbitration is reflected in the comments of one respondent who stated, "Arbitrators are god-like. They are generally biased toward the poor little employee versus the big bad company." Others raised questions about the qualifications of arbitrators to make these critical decisions. On the other hand, respondents favoring the use of arbitrators reported advantages such as "cheaper," "faster," and "less emotional." One respondent favored an arbitrator over a jury because, "a dart board at 50 feet is more reliable and consistent than a jury."

Respondents were also divided on how enactment of the ETA would affect job security. Some argued that job security would be increased under the act. One human resource manager commented that increased job security would help his organization retain the best employees. Others disagreed that the act would increase job security. One respondent argued that greater job security for current employees would limit opportunities for women and minorities. Many others questioned any link between job security and performance.

The remaining comments concerned the definition of good cause. Several respondents worried about the interpretation of good cause. According to one respondent, " . . . good cause must include the ability to terminate for poor performance or lay off excess capacity."

Organizational Characteristics and Reactions to the Proposed Act

The large, diverse sample allowed for a further breakdown of reactions according to various organizational characteristics. No significant differences in reactions to the ETA were found for organizations differing by size, union status, or region of the country. In addition, we failed to find significant differences for organizations characterizing their pool of qualified applicants as plentiful compared to organizations characterizing their applicant pool as adequate or scarce.

Small but significant differences were found across industries. Specifically, respondents working in manufacturing organizations (31.5% of the sample) held the most negative perceptions of the proposed legislation. It appears that reactions to the proposed ETA reported in Table 2 are quite robust across a wide variety of organizations.

Discussion

The clear message from our survey results is that a majority of human resource managers do not see the proposed ETA as compatible with management's best interests. Perhaps their perceptions are shaped by the belief that the proposed act will significantly limit managerial prerogatives to terminate at will. Yet, these prerogatives have already been substantially curtailed, as mentioned earlier, by statute and common law [1]. Nevertheless, the doctrine remains strong in many states [14]. Moreover, in one state, California, the courts have curtailed punitive damage awards in wrongful discharge cases based on breach of contract, a landmark decision for employers [15]. Survey responses suggest that human resource managers are unwilling to forgo the flexibility afforded by employment at will, in particular, if they perceive that states are limiting punitive damage awards in certain wrongful discharge lawsuits.

The proposed ETA provides for resolving termination disputes through binding arbitration. Survey responses reflect beliefs (by 42%) that an impartial arbitrator will do a better job of resolving termination conflicts than will juries. Yet, the arbitration process is viewed as likely to create expensive bureaucratic problems. This response might be based on the fact that many organizations have developed their own internal mechanisms for resolving wrongful discharge claims before they reach the courts. Recent survey findings indicate that almost 40 percent use a company ombudsman, 25 percent use management grievance committees, and 23 percent provide appeals mechanisms for resolving employee grievances [16]. Human resource managers may perceive that establishing government agencies to arbitrate wrongful discharge cases is unnecessary, given existing internal procedures for resolving disputes.

Fewer than a third of responding human resource management professionals perceived that the ETA would help insure justice for employees. This perception may be based on the belief that existing personnel policies adequately protect employees. The perception may also reflect a belief that increasing employment security is not necessarily a desired outcome. Only 13 percent of respondents expected that greater job security would enhance work force productivity.

In summary, human resource management professionals in our sample held relatively negative attitudes toward the proposed ETA. They saw the proposed act as weakening management, costly, and unlikely to promote job security or work force productivity. Drafters of the current proposal would be well-advised to pinpoint specific management objections and consider possible revisions to increase management acceptance.

Feedback on previous drafts of the proposed act have helped identify areas in need of further study. Issues under commission scrutiny include the substantive standard of good cause, the statute of limitations, the exclusion of very small employers, and the exemption of high-level executives.

In spite of management's resistance to the current version of the act, the question remains whether the proposed changes in the employment-at-will doctrine have a larger social merit. For example, the proposed act has the potential for speeding the resolution of wrongful discharge cases and making them less costly than court trials. Similarly, limiting the amount of punitive damages in particular as well as proscribing damages for pain and suffering, emotional distress, defamation fraud, and compensatory damages other than specified in the act could very well reduce business costs and lower prices for goods and services. From the individual employee's perspective, the proposed act could provide greater protection from arbitrary treatment and further guarantee due process. In other words, the act has the potential for striking a fair and equitable balance between rights of employers and rights of employees. Whether the proposed act accomplishes these objectives is yet to be determined.

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