

**EMPLOYMENT AT-WILL:
AN INVALID INTERPRETATION OF
THE MODERN EMPLOYMENT AGREEMENT**

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ABSTRACT

Although the doctrine of employment at-will controls the majority of today's employment relationships, it does not reflect the realities of modern employment agreements. Employment at-will developed at a time when employment relationships were both simple and short-term in nature. Today's employment relationships are more complicated and long-term in nature. Exchanges of goods for money, services for money, and labor for money all share the basic elements required to make a contract. The law, however, recognizes the first two transitions as a contract, and the third as an "at-will" agreement. This distinction is both irrational and destructive. Current employment at-will law deprives employers and employees of the rights and protections of contracting parties. By rejecting the employment at-will presumption and recognizing the employment agreement as a contract, the law will be in harmony with the realities of the modern employment relationship and properly protect the rights of employers and employees.

"A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty" [1]. This is the general definition of a contract as set forth in the Restatement, Second, of Contracts. Loosely translated, section one states that where two individuals agree to exchange either goods or services for goods or services the law entitles each party to certain rights, protections, and remedies [2]. Sections twenty-four, fifty, and seventy-one of the Restatement set forth the basic

requirements of contract formation [1, §§ 24, 50, 71]. Under these three sections, a contract exists where offer, acceptance, and consideration appear. Consequently, where a transaction consists of an offer, acceptance, and consideration, it is generally presumed that a contract exists and the parties involved in the transaction have certain rights and duties under the law.

There is one type of exchange, however, in which all of the elements of a contract exist but the law does not always recognize the transaction as a contract [3, p. 246]. This exchange is the exchange of labor for money [3, p. 244]. In an *employment at-will* state, a transaction of labor for money can contain the three critical elements of contract formation but the courts will not recognize the right of the contracting parties to a remedy for a breach [3, p. 244]. In an employment at-will state one can expect certain rights and legal protections when selling or purchasing a car or other consumer goods. One can expect certain rights and legal protections when contracting to act as a lawn service to another for a month or a year. However, in an employment at-will state, one cannot expect those same rights and protections when agreeing to run a machine in another's factory [3, p. 244]. In an employment at-will state one cannot expect those rights and protections when agreeing to design bridges for an engineering company. And, in an employment at-will state one cannot expect those rights and protections when agreeing to manage a department in another's business [3, p. 244].

The remainder of this article attempts to show that the employment at-will interpretation of the modern employment agreement is no longer valid and should be replaced by a more long-term contractual interpretation. The employment at-will presumption evolved at a time when the employment relationship was a simple arrangement. Modern employment is vastly different from the employment relationship recognized by the employment at-will presumption. The modern employment relationship includes factual elements that clearly establish employment relationships are not at-will but are more long-term. While employment at-will was good social policy at one time, it is no longer. A long-term interpretation of the employment agreement will benefit employers, employees, and society in general. The modern employment agreement has all the legal elements commonly associated with a contract. By dispensing with the employment at-will presumption and acknowledging that employment agreements are actually contracts, the legal system will be able to translate the factual reality of today's employment relationship into law. Finally, the author offers the suggestion that the best method for implementing the contractual interpretation of the employment relationship is through the administrative law process. By governing the employment relationship through an administrative process we can avoid placing an additional burden on an already heavily burdened court system, and insure the expedient and efficient disposition of suits for breach of the employment contract.

EMPLOYMENT AT-WILL

The law of employment at-will in the United States derives from an archaic American treatise written during the late 1800s on the subject of master and servant [4, p. 3].

The fundamental premise of the employment at-will doctrine in the United States stems from a late nineteenth century treatise authored by Horace G. Wood. In his treatise, Wood articulated the following rule, now often referred to as “Wood’s Rule.” With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at-will, and if a servant seeks to make out a yearly hiring, the burden is on him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that is was for a day even, but only at the rate fixed for whatever time the party may serve. . . . [I]t is an indefinite hiring and is terminable at the will of either party, and in this respect there is no distinction between domestic and other servants [3, p. 246].

PAST EMPLOYMENT AGREEMENTS

It is possible that in the 1800s “Wood’s Rule” was an appropriate interpretation of the employment relationship as it then existed. The economy of the nineteenth century was very different from the modern American economy [3, p. 248]. During that time there were few large corporate employers [3, p. 248]. Much of the economy consisted of small business and self-employed individuals [3, p. 248]. Therefore, the employment agreements of the 1800s were most likely very different from modern employment agreements.

Employment agreements in Wood’s day were simple and lacked even a hint of a long-term relationship. There was little the average employee could use to show s/he had a reasonable expectation in long-term employment. Employee compensation was simple. In the nineteenth century, most employees were paid by the day; some were paid by the hour; few were paid by the year. Additionally, health and life insurance were not an issue. The employment agreements probably did not include profit sharing or retirement plans. The employer did not take any responsibility for administering plans that insured the future financial stability of the employee. The employer paid the employee at the end of the day; at that point the employer’s relationship with the employee ended. Neither party had any expectations beyond being paid for their day’s wages.

In Wood’s day the type of work performed by most employees did not reflect a long-term dependency between the employer and the employee. Most employment agreements were simply for general labor and not for specialized talents. An employee expected to be working for the employer, doing whatever the employer needed during that day. Few employees were hired for specific tasks. Since the

employee had no special talents for a specific job, the employee realized that his/her job was susceptible to the whim of the employer. Finally, most employees were capable of sustaining themselves between jobs [3, p. 248]. If employees were fired from the job, they could return to the farm at home and work until they found another job [3, p. 248]. Termination in the nineteenth century had only mild consequences [3, p. 248].

All of these factors led employees to realize they had been hired from day to day until the employer no longer wished to have their services. Most employees did not expect any type of long-term employment; consequently they did not structure their financial lives around a long-term expectation of employment. Therefore, an at-will interpretation of the employment relationship made sense.

MODERN EMPLOYMENT AGREEMENTS

The realities of today's employment relationships do not comport with Wood's interpretation of employment relationships in the 1800s [5]. Today's employment agreements contain many factual elements that, at a minimum, establish that the agreement is not at-will but is a longer-term engagement. Modern systems of employee compensation imply that the employee is hired for a long period of time. The type of skill required in today's workplace also implies that the employee is valued as long as his/her skills continue to be satisfactory. These aspects of the employment agreement were not present in Wood's time. Since they are present in the modern employment relationship, a presumption of at-will employment is no longer valid.

Many aspects of the modern employment agreement imply that the employer hires the employee in a long-term agreement. Modern systems of employee compensation are based on the presumption that the employee will be with the employer for a long period of time. One example of this inference is the modern salary compensation system. In today's marketplace it is common for an employer to offer a yearly salary to an employee instead of an hourly or daily payment. While the employer may break down the salary into monthly or bimonthly payments, the employer offers the job (and the employee considers it) on the basis of what the job pays per year. By offering a job on a yearly salary the employer gives the impression that, absent economic failure of the business or the employee's own incompetence, the employer is interested in keeping the employee for at least a year. Additionally it is rather common in today's workplace that the employer provide for a probationary period where the employer can fire the employee if they don't get along personally. This period further shows it is reasonable for the employee to hold an expectation of long-term employment.

Another aspect of the modern workplace that supports the implication of long-term employment is the modern concept of employee compensation through employee benefit packages. In the modern workplace employee compensation

systems often include long-term benefit packages. These packages can include retirement packages such as pension plans, profit-sharing plans, and "401K" plans. They also include medical, dental, vision, and other health plans. In the case of pension and other retirement plans the plan benefits increase the longer the employee works for the employer. Often these plans are not highly valuable in the short term, but become extremely valuable in the long term. The fact that the employer is offering a retirement plan is another factor that demonstrates the long-term nature of the employment relationship.

Health plans and insurance plans are also long-term in nature. These plans are not for immediate compensation. They are designed to protect the employee in the future against unforeseen personal problems. They are usually based on yearly contributions and in many cases the employee has the option of changing plans after one year. Again, just by the fact that the employer offers these plans as part of an employee compensation plan the employer creates the appearance that the employment relationship is long-term in nature [6]. When the modern employment agreement is examined in the light of the modern employee compensation system, it becomes clear that nearly all agreements are reasonably susceptible to a long-term interpretation and that an at-will interpretation of these agreements is invalid.

The skills required in the modern workplace also work to create the presumption that a hiring is not at-will, but is a longer-term arrangement. Today's job market requires that employees have certain highly specialized skills. Many employers hire employees today for a specific talent the employee has. And often, employers make it known to the employee that they are being hired because they are the best employee the employer could find at completing some task. Before the employer hires the employee, the two parties sit down and discuss the work involved in the position offered. Often the employer limits the employee's job to a specific task, such as packaging, running a machine, or managing a certain department. The employer encourages the employee to mold his/her talent to meet the specific needs of the employer.

This specialization of the job market did not exist to the same extent as when at-will employment developed. At that time employees could float from job to job because the skills required to do the most prevalent work were interchangeable. When an employer discharged an employee the employee did not have to worry about looking for work in a specific field or finding training to work in a new field. Today, however, because of the increasing specialization of the workplace, employees will require more and more training to change jobs. The fact that an employee is agreeing to mold his/her talents to the specific needs of the employer is another indication the employment relationship is to last more than an hour or a day. When the modern relationship is examined in the light of the specialization of the modern American workplace, it becomes clear that the modern employment relationship is long-term in nature and that an at-will interpretation of these agreements is invalid [7].

The at-will employment rule was developed at a time when the employment relationship was simpler and of smaller scope. The typical at-will employment relationship exists where the parties have no other connection than a day's wages and the work done that day. The modern employment relationship is more complex, is of greater scope, and has a greater effect on the employer and the employee than ever before [8]. Today's employment relationship does not comport with the typical at-will relationship. For this reason it should not be treated as the same as the at-will relationships of the past.

THE MODERN EMPLOYMENT RELATIONSHIP: A CONTRACTUAL EXPERIENCE

The modern employment relationship has all three of the critical elements of a standard contract; it should be treated as such. The modern employment relationship has offer, acceptance, and exchanges of consideration. In the modern employment relationship the employer and the employee are no different than other parties who contract for services and money. The difference between transactions involving goods, services, and labor are minimal. The modern reasons for continuing employment at-will are centered in notions of economic efficiency and business autonomy [9, p. 681]. However, a contractual interpretation of the employment relationship will support economic efficiency, social stability, and will not infringe on legitimate business decisions [3, pp. 248-249]. In any case, economic efficiency and business autonomy do not justify ignoring the legitimate contractual rights of employees as parties to a transaction. The two different classes of exchanges, those involving goods and services and those involving labor and money, contain the same contractual elements. Legally, an exchange of labor for money is not different from exchanges of goods and services. For this reason the law should recognize the employment relationship as a contract.

The following three hypothetical scenarios demonstrate the similarities of exchanges of goods and money, services and money, and labor and money. These scenarios are typical factual scenarios involved when people make a contract for goods, services, and labor. All the scenarios share the legal elements of offer, acceptance, and consideration. The law treats the two classes of transactions differently. When compared and contrasted, the three hypothetical scenarios show this disparate treatment of parties contracting for labor is legally irrational.

SCENARIO ONE: THE EXCHANGE OF GOODS FOR MONEY

Mr. Jones enters a car dealership intending to purchase a car. A sales associate approaches and cheerfully offers to show the prospective customer any car in the showroom. The two stroll around the showroom looking at all the new cars. Jones takes note of the various cars' size, color, and style. The sales associate tells the

prospective customer about all the vital statistics such as gas mileage, engine size, acceleration, and “hot looks.” The two continue to look around the showroom. The sales associate keeps the small talk going by telling Jones about the associate’s upcoming vacation to Florida.

Mr. Jones decides on a certain Japanese car and asks the sales associate what the dealer will take for the car. The associate offers the sticker price of \$24,000 as if he is announcing the deal of a lifetime. Mr. Jones shrugs at the price, saying, “I really can’t spend that much money; I could offer you \$17,000, however.” The associate winces, as if the offer has physically wounded him, and reluctantly offers the reduced price of \$23,500. Mr. Jones still looks sheepish, saying that \$17,000 is really all he can afford, but since he likes the car so much he will pay \$18,000, if the associate throws in the “top model stereo.” The associate says he definitely can’t sell “this beauty” for \$18,000 with a CD player and eight-speaker stereo, but Mr. Jones can take that model home “today” for the price of \$22,500. Jones, sensing that the sales associate needs this commission to pay for the associate’s upcoming vacation, makes his “final offer” at \$19,500. The associate indicates he wants to make the deal but has to talk it over with his manager. The associate leaves. Jones waits. Finally, the associate returns with the manager.

The manager says he wants to make Jones happy, but can’t sell the car for less than \$20,500. Mr. Jones accepts the offer and gives the manager a down payment on the car. The manager, the associate, and Mr. Jones fill out the paperwork and complete the written contract. They agree Mr. Jones will pick up the car and make the final payment in two days. Upon Mr. Jones’ return, the dealer says that, because of the overnight drop in the American dollar, he can’t truly sell the car for \$20,500 and that the best he can do is sell it for \$23,000. They argue, but to no avail.

Jones knows that the dealer made a contract with him, and that he had a right to the car at the agreed price. Jones contacts a lawyer who agrees to take Mr. Jones’ case. Jones sues the dealership, the dealer, and the sales associate for breach of contract. The court rules in Jones’ favor, holding that by their writings and by their actions the dealer and Mr. Jones formed a contract. The dealer cannot simply change the terms of the contract and refuse to uphold his end of the bargain. Jones is awarded relief.

SCENARIO TWO: THE EXCHANGE OF SERVICES FOR MONEY

To pay off his new Japanese sports car Mr. Jones starts a one-man lawn service. Jones invests in a new mower and other lawn equipment. He offers to mow lawns weekly or as needed. He also agrees to perform other yard maintenance tasks such as weeding, edging, mulching, fertilizing, and watering as needed. For his services Mr. Jones charges \$30.00 a week, plus the costs of mulch and fertilizer. Mr. Jones makes up flyers and sends the advertisements to his friends and neighbors. Soon

Jones gets calls from several neighbors wishing to take advantage of Jones' Lawn Service.

One neighbor who chose to take advantage of Mr. Jones' services is Mr. Kawalski, the owner of the townhouse apartment complex two blocks from Jones' home. Mr. Kawalski offers Jones \$25 per lawn, plus costs, if Jones will mow the one hundred lawns in his development. Each lawn is fifty square feet in area. Jones counteroffers with the price of \$27.00 per lawn, and Kawalski accepts. Kawalski asks whether Jones will accept half of the cost for the service at the beginning of the month and half at the end of the month, for the first month. Jones agrees. Mr. Kawalski writes Jones a check and Jones starts his services the next day. To have time to mow Mr. Kawalski's one hundred lawns, Jones has to turn down many other neighbors who wanted to take advantage of Mr. Jones' services.

Jones mows Kawalski's lawns for the entire month, and upon the arrival of the end of the month Jones meets with Mr. Kawalski and asks for his payment. Mr. Kawalski states that many of his tenants pay bimonthly and asks if he can pay next month. Jones grudgingly agrees that "just this one time" he will accept the bimonthly payment, but thereafter Kawalski must pay monthly. Kawalski thanks Mr. Jones and agrees to the payment schedule. Another month goes by, and Mr. Kawalski admits that he cannot pay Mr. Jones and states that if Jones wants his money he'll have to sue him for it.

Jones knows he has a valid contract with Mr. Kawalski and that he has performed his services properly. Mr. Kawalski does not refute that Jones performed; he simply states he does not have enough money to pay. Jones again calls his lawyer and they file in court for a breach of contract. Meanwhile the bank forecloses on Jones' new Japanese automobile. Eventually the court holds that Mr. Kawalski made a contract with Mr. Jones and then breached it. The court orders Mr. Kawalski to pay damages.

SCENARIO THREE: THE EXCHANGE OF LABOR FOR MONEY

After closing his lawn maintenance business, Mr. Jones decides it is time to get employment that is more stable than the seasonal service contracting business. Mr. Jones looks through the employment section in the newspaper for just the right job. Several weeks go by when Mr. Jones spots an add seeking an engineer to design bridges for a local construction company. Mr. Jones decides it's time he put his undergraduate degree in civil engineering to work. He answers the advertisement by sending in his resume and a cover letter. Time passes and one day, just before Jones leaps off his living room chair and hangs himself to escape the unrelenting hounding of the collection agencies, a letter drops in Jones' front door slot. The letter is from the Covert Construction Company, the company Jones sent his resume and cover letter. The letter is from a Paula Brown, president of Covert

Construction. The letter states how happy the company was to receive Jones' letter. It also asks Jones to call and set up an interview. Jones goes down to the pay phone and calls Covert collect.

Two days later Jones is in Ms. Brown's office interviewing for the position. Ms. Brown is impressed with Jones' credentials and offers him a position. Ms. Brown explains that the position requires that Mr. Jones develop an expertise in bridge design and construction. Covert offers a yearly salary of \$75,000 that is broken down into biweekly payments. The offer also includes medical and dental insurance, and a retirement package. The retirement package is based on the number of years with the company and the average salary over the employment period of the employee. Jones gratefully accepts and begins work the next day. Ten years go by and Mr. Jones designs many excellent bridges. Unfortunately Mr. Jones' relationship with his employer sours. Jones is an outstanding employee, but he does not get along with Paula Brown. Eventually Paula fires Jones. She claims that Jones was fired because he was an inept engineer. However, the actual reason is because she hates Jones' incessant telling of knock-knock jokes.

Distraught over the loss of his employment, his salary, benefits, and retirement package, Mr. Jones contacts his lawyer. They sue for breach of contract. Mr. Jones lives in an employment-at-will state. While Mr. Jones is successful in showing the offer of a job, the acceptance of the offer, and the exchange of consideration, Mr. Jones cannot recover any damages for his termination. The law does not recognize his relationship with his employer as an employment contract.

In the first scenario the elements of the contract are clear, and the court responds by recognizing the contract. In this scenario Mr. Jones wants to buy a car. The auto dealership offers to sell the car to Mr. Jones for \$20,500. While the offer was thrown in among an amount of dickering, there was a clear offer made. Mr. Jones accepted the offer both verbally and through the written contract. The exchange of consideration was in Mr. Jones' down payment and the dealer's promise to deliver the car to Mr. Jones. This scenario is a typical sale-of-goods contract. Courts have no trouble recognizing the existence of a contract in the sale-of-goods scenario. They also have no trouble recognizing Mr. Jones' rights to a remedy for the dealership's breach.

In the second scenario the elements of the contract are clear, and the court responds by recognizing the contract. In this scenario Mr. Jones starts a lawn maintenance business and contracts out his work. This time Mr. Jones makes the offer to maintain the lawn of a neighboring community. The neighbor accepts. The consideration exists in Mr. Jones' labor and the neighbor's promise to pay. Mr. Jones maintains the lawn of the neighbor for two months but his neighbor fails to pay him. Mr. Jones brings his complaint to the court. This scenario is a typical sale-of-services contract. Courts have no trouble recognizing the existence of a contract in the sale-of-services scenario. Courts also have no difficulty recognizing Mr. Jones' rights to a remedy.

In the labor-for-money scenario the elements of the contract are clear; however, for some reason, the court has difficulty recognizing the contract. The offer, acceptance, and consideration in this scenario are factually similar to the offer, acceptance, and consideration in the previous scenario. The elements in the third scenario also meet the legal definitions of offer, acceptance, and consideration in the Restatement. Clearly, there is little or no difference in the basic contractual elements in these scenarios.

The facts in the third scenario are sufficient to establish an offer. Factually, the offer in the third scenario is as well-established as the offers in the previous scenarios. In scenario one, Mr. Jones offers to give the author dealer \$20,500 in exchange for a car. In the second scenario, Mr. Kawalski offers to give Mr. Jones \$27 in exchange for each lawn he mows. In the third scenario, Ms. Brown offers to give Mr. Jones \$75,000 over the period of one year, in exchange for his services as an engineer. As additional compensation Ms. Brown offers health and retirement benefits. This existence of the offer is confirmed merely by the fact that Ms. Brown actually gave Jones work to do, paid Mr. Jones, and fulfilled her promises about the benefits packages. The offer in the third scenario is as factually well-established as the offers in the first two scenarios.

The offer in the third scenario meets the legal standard for an offer in the Restatement, Second, of Contracts. The Restatement, Second, of Contracts defines an offer as “the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it” [1, § 24]. Paula Brown offered Mr. Jones \$75,000 for a year of his services as an engineer. As additional compensation, Brown offered a benefits package including health and retirement benefits. Clearly, Ms. Brown wanted Mr. Jones to work for her. Ms. Brown is the president of a construction company, and she is in charge of hiring new engineers. When she spelled out the terms of her offer it was reasonable for Mr. Jones to expect they were entering into a bargain. The bargain consists of Brown’s money and benefits for Jones’ services as an engineer. The offer in this case is legally no different from the offers in the previous scenarios. Mr. Jones was just as justified in believing a bargain existed as in the previous scenarios.

The facts in the third scenario are sufficient to establish an acceptance of the offer. Just as in the first two scenarios, Mr. Jones accepted the offer from Ms. Brown verbally. In the first scenario Mr. Jones accepted both verbally and in writing. He then demonstrated his acceptance by attempting to retrieve the auto. In the second scenario Mr. Kawalski accepted Mr. Jones’ offer verbally and then demonstrated acceptance by allowing Mr. Jones to mow his lawns. Finally, in the third scenario, Mr. Jones accepted Ms. Brown’s offer verbally. He then confirmed his acceptance by actually working for Ms. Brown. Mr. Jones’ acceptance is factually the same as the previous scenarios. It is also a factually well-established.

The acceptance in the third scenario meets the legal standard for an acceptance in the Restatement, Second, of Contracts. The Restatement defines acceptance as follows, "Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in manner invited to required by the offer" [1, § 50]. In the third scenario Ms. Brown makes the offer: money and benefits for services. She makes the offer at an interview that is typical of all employment offers. The method of acceptance offered at the interview is clearly verbal. Appropriately, Mr. Jones responds with a verbal acceptance. Ms. Brown made an offer and requested a verbal acceptance. Mr. Jones responded appropriately. The acceptance is legally sufficient.

The facts in the third scenario are sufficient to establish an exchange of consideration. In the first scenario Mr. Jones gave cash in consideration for the auto dealer's promise to deliver him the car. In the second scenario Mr. Jones gave his services in consideration of Mr. Kawalski's promise to pay. In the third scenario Mr. Jones gave his labor as an engineer in exchange for Ms. Brown's promise of a yearly salary and benefits. Mr. Jones' consideration in the third scenario is just as real and definite as his consideration in the two previous exchanges. It is at least as factually distinct as the two previous scenarios.

The consideration in the third scenario meets the legal standard for a consideration in the Restatement, Second, of Contracts. The Restatement sets forth the requirement of consideration as:

To constitute consideration a performance or a return of promise must be bargained for.

A performance or return promise is bargained for if it is sought by the promisee and is given by the promisee in exchange for that promise [1, § 71].

Translated, the Restatement's definition says that if a promise is sought by a promise in exchange for performance, the promise and the performance are proper consideration. In this case Mr. Jones sought a promise from Ms. Brown of payment of wages and benefits for his performance as an engineer. Their bargain fits well within the Restatement's definition of consideration.

Each of the three exchanges, goods for money, services for money, and labor for money, is factually and legally similar. Offer, acceptance, and an exchange of consideration are all present in each of the three transactions. Offer, acceptance, and an exchange of consideration are the foundation of all contractual transactions. It is legally inconsistent and irrational for the law to recognize the first two transactions as contracts, and the third as an at-will agreement. The labor-for-money exchange is every bit as much a contract as the sale of goods and the sale of services. Each should be governed by the same principles of law.

THE NEED FOR A NEW RULE

American law needs a new rule to govern the modern employment relationship. The employment-at-will relationship was developed at a time when the employment relationship was a simpler endeavor. When employment-at-will was developed, employers and employees had an attenuated relationship [3, p. 248]. Neither the employer nor the employee had any reason to expect that the employment relationship was more than at-will. The modern employment relationship is more complex and has a greater effect on employees' lives than ever before [3, p. 248]. The modern employment relationship also has all the elements of a contract. The existence of a contract, combined with the long-term nature of the modern employment relationship allows the law to treat the modern employment relationships as a contractual agreement.

There are several major concerns that speak against treating the employment relationship as a contract. The first two concerns come from a business perspective [9]. The first business concern is that at-will employment is necessary to maintain economic efficiency in employment decisions. The second business concern is that if all employment agreements are viewed as contracts, business will be inundated with lawsuits challenging all termination. The third concern comes from a legal perspective. The legal concern is that, while technically all of the elements to a contract exist in employment agreements, the contract is still for an indefinite duration. Since no duration can be determined, none should be assumed. The employment agreement is therefore at-will. While each of these arguments is a legitimate concern, none is insurmountable.

A contractual interpretation of the employment relationship would eliminate baseless termination, and therefore it would actually promote economic efficiency in employment decisions [10]. Under a contractual interpretation, the employer would have to be able to show some just cause for terminating the employee and breaching the employee's contract. The employer would have two options. First, the employer could plead impossibility. Under an impossibility argument the employer would plead that the business is terminating the employee based on economic principles. If the employer shows there is an economic reason driving the termination, s/he may terminate the employee freely. The employer could also plead that the employee breached the contract through his/her incompetence. In this case the employer would show the employee did not meet the standards set in the employment agreement. If the employee is not performing satisfactorily, the employer may terminate. The employer would not be able to terminate the employee for a nonbusiness reason. While this would limit the employer's present ability to terminate an employee, it would not hamper business efficiency. This is so for the simple reason that it is not efficient to fire a qualified employee who is doing his/her job on the basis of a "personal problem." If the termination is based on efficient business behavior, it is legitimate. In this way a contractual interpretation promotes business efficiency.

A contractual interpretation of employment agreements will not inundate business with lawsuits [11]. The second business concern is that a new contractual interpretation will open the "flood gates of litigation," costing business millions to defend each year. This problem is avoidable by implementing the new rule through the administrative law process. Presently, the bulk of our modern employment law is handled through the administrative law process. History shows that administrative agencies have the ability to handle labor disputes faster and with more expertise than the traditional court system. An administrative agency could deal with employee complaints and employer responses in a less formal manner. Perhaps the best option is for the agency to act as an arbitrator in the early stages of the litigation. When an employee believes s/he was wrongfully terminated s/he could take his/her complaint to the agency. The agency could review the complaint and decide whether grounds exist for requiring an answer from the employer. If proper grounds exist for a prima facie case of wrongful termination, the employer could respond to the agency with an answer to the complaint. The agency could then act as an arbitrator between the two parties. If no solution is reached, a more formal litigation could take place. Regardless of the type of system used to handle employer/employee disputes, there will be some increased cost to the employer. However, this is not a reason to ignore the contractual rights of the employee. If employers do their best to limit decisions to contractually justifiable reasons, the costs will be minimal. If the employer insists on terminating for illicit reasons, the costs will be higher.

The final concern is how to deal with the indefinite time period in most employment contracts. It is true that in nearly all employment agreements there is a question as to the duration of the agreement. The answer to this question begins with the basic rules for indefiniteness in standard contract law. In section twenty-nine of his treatise, Professor Corbin spoke of dealing with the problem of indefiniteness.

We must not jump too readily to the conclusion that a contract has been made from the fact of apparent incompleteness. People do business in a very informal fashion, using abbreviated and elliptical language. It is a mere matter of interpretation of their expressions to each other, a question of fact. An expression is no less effective than it is found to be by method of implication. The parties may not give verbal exercise to such vitally important matters as price, place, and time of delivery, time of payment, amount of goods, and yet they may actually have agreed upon them. This may be shown by their antecedent expression, their post action and custom, and other circumstances [12, § 29].

Here Corbin suggested that readers look to the surroundings of the agreement to determine what the intention of the parties is. In the modern employment agreement, the trend is toward a long-term engagement. Again, this is evidenced by the

trend toward yearly salaries, profit-sharing plans, and benefits packages. Courts should use this as a guide to determine the length of the contract. In any case, the contract will be limited to one year. Any greater period of time would conflict with the statute of frauds. In any case there are plenty of guideposts to direct an agency or a court to cure the indefiniteness of the contract.

CONCLUSION

The at-will presumption the law makes of the employment relationship is not valid in the modern workplace. The at-will employment rule was developed at a time when the employment relationship was a simple matter of labor and wages with no expectation of a long-term relationship. In the modern workplace the relationship between the employer and the employee is more complex and far more significant. Today, the employer uses yearly salaries and long-term benefits packages to attract employees. The relationship between the employer and the employee involves much more than just wages and labor. Today employees order their financial life around salary and benefits. The employer is responsible for administering benefits packages that provide for an employee's health and retirement. All of these factors imply the employment relationship in the modern workplace is a long-term relationship.

Today's employment relationship does not comport with the typical at-will relationship; it should not be treated the same as the at-will relationships of the past. The modern employment relationship has all the legal elements required to form a contract. The parties who agree to exchange labor for money are no different from those who exchange goods or services for money. Therefore, the law should recognize the employment relationship as a contract. By acknowledging the contract between the employer and the employee, the law would allow each party to protect its interests in the employment relationship through the protections provided by contract law. This contract-based theory of employment law can be implemented with efficiency and fairness by the administrative law process. Employment-at-will is no longer representative of the typical modern employment relationship. A new rule is required. That rule should lie in contract.

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ENDNOTES

1. American Law Institute, Restatement, (Second) of Contracts § 1, 1964.

2. Admittedly, parties' contractual rights are not recognized or protected in absolutely every exchange. There are many exceptions to the enforcement of a contract, and there are many ways a party can poison the protections provided by contract law. However, generally speaking, parties to a transaction have certain rights, and generally speaking the court system recognizes and protects those rights.
3. *Employment-At-Will in Pennsylvania: Employee Manuals Provide Contract Remedies for Discharged Employees*, 58 Temp. L. Q., pp. 243-248, 1985.
4. K. H. Decker, *The Individual Employment Rights Primer*, Baywood Publishing Co., Amityville, New York, 1991.
5. One of the most significant developments is the rise in the number of large corporate employers, which has caused most workers to become completely dependent on wages from employers for all income. The resulting reduction of self-employed workers in the American workforce has rendered the employment-at-will doctrine a far more potent weapon for employers than when the doctrine originally emerged. The power of employers is further strengthened by the increase in factors that limit employees' mobility among jobs and thereby reduce the ability of employees to resign at-will. *Id.* at 248-9, citations excluded.
6. Another interesting effect of retirement and health plans is that they create a dependency of the employee on the employer. Retirement plans become more and more valuable the longer an employee works for an employer. The value of the retirement package is measurable in two ways. First, as an employee gets within ten years or so of retirement age, his/her pension is most substantial. Indeed, when the employee retires, the pension plan will be the largest source of personal income; the pension will sustain employees through their golden years when they can no longer work. Second, as the employee gets within ten years of retirement, the employee is no longer capable of moving to another job to develop a similar-sized pension. If the employer chooses to fire the employee, the employee only has another ten or fifteen years available to work. His/her old pension is based on thirty years of service. There is no opportunity to make up for the lost time. To the employee (and indeed to most people) the thought of being discharged after thirty years of service, and the resulting loss of retirement benefits seems unconscionable. This dependency did not exist when the at-will employment presumption appeared. This dependency is another factor that leads to the presumption that a hiring in the modern workplace is long-term in nature.
7. The specialized workplace also has the effect of creating a dependency between employer and employee. Where an employee specializes in one particular area of employment and avoids other areas, it can be difficult for the employee to find work in another field. The employee will lack the skills and training necessary to move from job to job as easily as an employee in Wood's day. Often this results in the employee being less valuable to other employers. The longer the employee works for the employer the more specialized his/her talents become and also the less time the employee has to gain training and develop skill at a new job. Thus his/her value within the workplace drops. The effect of a specialized workplace is to support the presumption that the longer an employee works for an employer the more valuable the employee is to the employer and therefore the less likely the employer is to discharge the employee for frivolous reasons. The result supports a presumption of long-term employment.

8. Changes in the employment relationship are also documented by statutes passed to insure more fairness in employment practices. Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disability Act, were all passed to prevent certain wrongful employment practices. All of these acts address practices which are the result of the refusal of the legal system to recognize the employment relationship in a contractual sense. As one commentator states, "In conjunction with the rise of corporate employers is a growing awareness of the need for a fair and productive workplace. The awareness has also cast doubt on the employment-at-will doctrine because work environments in which employers are free to arbitrarily terminate employees may cause at-will employees to doubt their self-worth and create a perception of unfairness resulting from the employers' ability to discharge some employees while other employees enjoy protection from arbitrary dismissal. In response to these changes in social and economic attitudes toward employment relations, various legislatures and courts have taken the initiative to develop exceptions to the employment-at-will doctrine in order to protect at-will employees from arbitrary dismissal" [3, pp. 248-249].
9. R. B. Fitzpatrick, *Employment At-will: Time for an Unjust Dismissal Statute*, C953 ALI-ABA 681, The American Law Institute, pp. 684-686, 1994.
10. "While understandably some American business representatives express concern that a just cause statute will impede their competitiveness, there does not appear to be any empirical basis for this fear. Indeed, there is evidence of a correlation between a secure workplace, and high productivity and quality output" [9, p. 684].
11. "In the author's experience those employers that invest in creating an atmosphere where employees are treated with respect and fairness have a far lower volume of external complaints and drastically decreased legal fees. In addition, increasingly employers have come to the realization that job security is good business. Among the identifiable benefits are:
 - Reduction in recruitment and training costs
 - Employees show greater loyalty and willingness to adapt
 - Employees are more productive
 - The quality of work produced increases
 - Creativity is unleashed as employees are more motivated
 - Workforce is more flexible" [9, p. 685].
12. A. L. Corbin, *Corbin on Contracts* (One Volume Edition), § 29, 1952.

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