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WRONGFUL DISCHARGE REFORM IN THE UNITED STATES: INTERNATIONAL & DOMESTIC PERSPECTIVES ON THE MODEL EMPLOYMENT TERMINATION ACT

by
Todd H. Girshon*

I. INTRODUCTION

Although the United States provides some of the most comprehensive protection in the world for unionized employees, it stands virtually alone as one of the last major industrialized democracies without legislation preventing the wrongful discharge of non-union employees from their jobs.¹ Under the common law employment at-will doctrine, more than two-thirds of the U.S. work force can be fired almost at the unfettered discretion of their employer.² In fact, of the approximately two million unprotected employees that are discharged from their jobs annually, it is estimated that as many as 200,000 would have legitimate claims for wrongful dis-

* Candidate for J.D., Emory University School of Law, Atlanta, Georgia (1993); B.S. with Honors, Cornell University, New York State School of Industrial & Labor Relations, Ithaca, New York (1990); Completed General Course, Industrial Relations Department, London School of Economics & Political Science, London, England (1988-89); Interned with the American Arbitration Association (Summer 1991); Summer Associate (Summer 1992) and will be starting as an Associate after graduation with the national labor and employment law firm of Jackson, Lewis, Schnitzler & Krupman in New York City.

¹ MODEL EMPLOYMENT TERMINATION ACT PREFATORY NOTE, 9A Individual Employment Rights Manual 540:26 (BNA 1991) [hereinafter MODEL ACT PREFATORY NOTE]; Samuel Estricher, *Unjust Dismissal Laws in Other Countries: Some Cautionary Notes*, 10 EMPLOYEE REL. L.J. 286, 286-87 (1984). "This unfair and irrational distinction between organized and unorganized employees should be eliminated." Jack Stieber, *Protection Against Unfair Dismissal: A Compromise View*, 3 COMP. LAB. L. 229, 239 (1980). See also Americo Pla Rodriguez, *Termination Of Employment On The Initiative Of the Employer*, 5 COMP. LAB. L. 221 (1982).

² Clyde W. Summers, *Arbitration of Unjust Dismissal: A Preliminary Proposal*, in THE FUTURE OF LABOR ARBITRATION IN AMERICA 159, 160 (1976); Robin Warshaw, *Issues: The Right to Fire*, WORKING WOMAN, Mar. 1984, at 75. The approximately one-third of the work force that is exempt from the employment at-will doctrine includes: union workers, tenured employees, civil service employees, and other employees working under contract. See *infra* text accompanying notes 22-46 for a discussion of this bifurcated system of wrongful discharge in the United States.

charge if they were afforded statutory protection.³ Without such legal recourse, and because of the psychological and financial costs involved, the wrongful dismissal event is widely acknowledged as one of the greatest tragedies that an American family can face.⁴

In these times of economic recession, filled with mass layoffs and work force reductions, there is a heated debate focusing on whether the United States should follow the conventionally accepted law in the international community on employment termination. Statutes protecting employees against wrongful discharge exist in more than sixty foreign countries, including Canada, Japan and members of the European Community.⁵ Protection in these countries is commonly provided through "just cause" legislation, which generally requires employers to have a good reason before they are allowed to terminate employees.⁶

The International Labor Organization (ILO), a specialized agency of the United Nations which is composed of 150 member

³ MODEL ACT PREFATORY NOTE, *supra* note 1, at 540:23; Aaron Bernstein & Zachary Schiller, *Tell it to the Arbitrator: A national legal panel wants to abolish costly job-dismissal trials*, Bus. Wk., Nov. 4, 1991, at 109; DOUGLAS L. LESLIE, *LABOR LAW AND POLICY* (3rd ed. forthcoming 1991) (manuscript at 1-49, on file with author).

⁴ Paul H. Tobias, *Current Trends in Employment Dismissal Law: The Plaintiff's Perspective*, 67 NEB. L. REV. 178, 191 (1988). A job is one of the most coveted assets that a person can have. This fact is especially true for white-collar workers and professionals who, more so than any other groups of employees, tend to define their identities through their occupations. Bruce Nussbaum et. al., *Downward Mobility*, Bus. Wk., Mar. 23, 1992, at 57; Wendy Trueman, *When Workers Take Root: Job Priority Rights*, Can. Bus., April 1984, at 82.

⁵ Randall Samborn, *At-Will Doctrine Under Fire*, NAT. L.J., Oct. 14, 1991, at 40. This Comment will focus primarily on the law in Great Britain and Canada. On Japanese wrongful dismissal law, see generally Fumito Komiya, *Dismissal Procedures and Termination Benefits in Japan*, 12 COMP. LAB. L.J. 151 (1991); S. Maya Iwanaga, *A Comparative Introduction to Japanese & United States Wrongful Termination Law*, 13 HASTINGS INT'L & COMP. L. REV. 341 (1990). On European dismissal law, see generally, Madeliene M. Plasencia, Comment, *Employment at-will: The French Experience as a Basis for Reform*, 9 COMP. LAB. L.J. 294 (1988); Karen Paull, Comment, *Employment Termination Reform: What Should a Statute Require Before Termination?—Lessons from the French, British, and German Experiences*, 14 HASTINGS INT'L & COMP. L. REV. 619 (1991); Estreicher, *supra* note 1.

⁶ This Comment uses the terms "just cause" and "good cause" interchangeably. According to the drafters of the Model Act, "[i]n using the phrase 'good cause' [as compared to 'just cause'], the proposed Act intends no substantive difference." MODEL ACT PREFATORY NOTE, *supra* note 1, at 540:26.

nations and which attempts to identify and solve global labor problems, has advocated the use of a just cause standard to govern employment termination for nearly three decades.⁷ The goal of the ILO conventions and recommendations that comprise the International Labor Code is to serve as a model and stimulus for national legislation and practice in member countries.⁸ While compliance with ILO standards is voluntary,⁹ many countries have been influenced by them to the extent that they have drafted employment termination protection statutes.¹⁰ For example, the British Government instituted the Donovan Commission in the 1960s to investigate the problem of unfair dismissal. Ultimately, the Commission accepted ILO Recommendation 119 on Employment Termination

⁷ International Labor Organization, *Termination of Employment At the Initiative of the Employer*, Recommendation 119 (1963), Convention 158 (1982), Recommendation 166 (1982). The cornerstone of these documents is the principle that termination has to be for a "just cause" connected to the conduct of the worker, and based on the requirements of the job in question. Recommendation 119, § 2. In the event that a worker feels he was discharged without just cause, the Recommendation states that the employee should be entitled to appeal to a neutral body such as a court, an arbitrator, arbitration committee, or a similar body empowered to examine the claim and render a decision. *Id.* § 4. If the neutral body finds the termination was unjust, it also should have remedial powers to reinstate the employee with or without backpay or to order the employer to pay adequate compensation. *Id.* § 6.

The 1982 Convention and accompanying Recommendation adopt these ideas and expand upon them. Whereas recommendations serve only as guidelines, conventions are similar to international treaties and are subject to ratification. When a member state ratifies an ILO convention, it pledges to bring national legislation into conformity with its terms and provisions. There are currently 150 member countries in the ILO. INTERNATIONAL LABOR ORGANIZATION, FACTS FOR AMERICANS 5 (1989) [hereinafter ILO Facts].

⁸ *Id.* at 5.

⁹ Although the ILO position is binding on member countries that choose to ratify the Convention and the Recommendations that were passed on employment termination, member countries have the discretion to decide whether to ratify. In addition to the voluntary nature of ratification, the ILO lacks the power to compel ratifying countries to comply. The most serious sanction that the ILO can impose is to publish the violation in a report. *Id.* at 6.

¹⁰ Stephen I. Schlossberg, *United States' Participation in the ILO: Redefining the Role*, 11 COMP. LAB. L.J. 48, 58 (1989). After the passage of Recommendation 119, "legislation both in highly industrialized countries such as France, Sweden and the United Kingdom, and in developing countries such as Columbia, Cyprus, Mauritius, Panama, Tanzania, and Zaire reflect the provisions." *Id.* Similarly, Recommendation 119 influenced amendments to legislation throughout Latin America, notably in: Columbia, Chile, Venezuela, Panama, and Peru. Arturo S. Bronstein, *Protection Against Unjustified Dismissal in Latin America*, 129 INT'L LAB. REV. 593, 596 (1990).

with only minor reservations.¹¹ Similarly, Canadian representatives to the ILO General Counsel supported this recommendation as early as 1963.¹² Although the United States is a member of the ILO, it has not been influenced by any of the organization's initiatives on employment termination, and consequently, has refused to endorse these proposals.¹³ This position could be viewed as hypocritical given the United States' strong national policy of insisting that its trading partners adhere to certain basic worker rights.¹⁴

Through its proposal for just cause protection, the newly drafted Model Employment Termination Act of 1991 ("Model Act") seeks to move the United States into the international mainstream on employment termination law.¹⁵ Central to the Model Act is a tradeoff of interests: employees gain greater protection through just cause coverage, and employers gain limitations on the amount of damages that they potentially must pay in wrongful termination lawsuits.¹⁶ The Model Act also appears to be a response to the decline in unionization in the United States, which is especially pronounced in private sector manufacturing, and reflects a trend to-

¹¹ MALCOLM W.T. MEAD, UNFAIR DISMISSAL HANDBOOK 1-2 (3d ed. 1987). In recommending the establishment of a statute to provide employees protection against unfair dismissal, the Donovan Commission concluded that, "[i]n reality, people build much of their lives around their jobs, their incomes, and prospects for the future are inevitably founded in the expectation that their jobs will continue." *Id.* See also CLIVE JENKINS AND J.E. MORTIMER, THE KIND OF LAWS THE UNIONS OUGHT TO WANT 68-91 (1968) (arguing that Britain should pass legislation following the ILO recommendation to improve protection against arbitrary dismissal).

¹² M. NORMAN GROSSMAN, FEDERAL EMPLOYMENT LAW IN CANADA 88 (1990).

¹³ For example, the only votes in opposition to the 1982 Convention on Employment Termination came from Iraq, Saudi Arabia, Lebanon, Brazil, Chile, and the United States. CHARLES C. HECKSCHER, THE NEW UNIONISM 168 (1988).

¹⁴ Schlossberg, *supra* note 10, at 79. "Reports by both House and Senate committees on worker-rights clauses have expressly mentioned ILO standards." *Id.*

¹⁵ MODEL EMPLOYMENT TERMINATION ACT (Proposed Official Draft, August 1991) [hereinafter MODEL ACT]. For support in favor of just cause legislation, see also Clyde W. Summers, *Individual Protection against Unfair Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Joseph R. Grodin, *Past, Present, and Future in Wrongful Termination Law*, 6 THE LAB. LAW. 97, 103-106 (1990); Kevin Williams & David Lewis, *Legislating for Job Security: The British Experience with Reinstatement and Reengagement*, 8 EMPLOYEE REL. L.J. 482 (Winter 1982-83).

¹⁶ LESLIE, *supra* note 3, at 1-52. "The basic trade-off involves giving employees greater security against arbitrary firing than currently afforded but limiting employers' potential damage liability." *Id.*

ward greater awareness and concern for fairness and due process in the workplace.¹⁷ In addition, since each of the United States' major industrial competitors grants legal protection to their employees against wrongful discharge, the drafters of the Model Act argue that legislating a just cause standard would not put the United States at a competitive disadvantage in the global economy.¹⁸

Although the Model Act is the most far reaching proposal in this country to favor just cause legislation in the non-union sector, it is not unique in this respect. Even before the drafters began meeting, two jurisdictions in the United States already had implemented similar legislation. These jurisdictions, which represent the domestic perspective throughout this Comment, are the territory of Puerto Rico and the state of Montana. Puerto Rico's Act 80 has been in effect since 1976.¹⁹ Montana became the first state to legislate just cause protection for non-union workers when it passed the Wrongful Discharge From Employment Act in 1987.²⁰ While nine other states have proposed just cause legislation over the past decade, Puerto Rico and Montana remain the only two jurisdictions that have passed statutes.²¹

This Comment will focus primarily on the international approaches to wrongful discharge law in order to evaluate the desirability of the Model Act's proposals for reform in the United States. The second section of this Comment traces the bifurcation between just cause protection and employment at-will in U.S. wrongful discharge law. The third section describes the background of the Model Act, its basic proposals for reform, and the political calculus of the interest groups that will influence its adoption. The fourth section focuses on the international and domestic perspectives regarding the basic features of the Model Act: just cause, scope of coverage, dispute resolution procedures, and remedies. The international comparisons primarily focus on four specific

¹⁷ *Id.* at 409-10.

¹⁸ MODEL ACT PREFATORY NOTE, *supra* note 1, 540:26.

¹⁹ Roberto O. Maldonado, *Puerto Rico's Act 80 of 1976: An Experience in the Contract At Will/Wrongful Discharge Dilemma*, 57 REV. JURID. U.P.R. 217 (1988).

²⁰ Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 INDUS. & LAB. REL. REV. 644, 646-647 (1991).

²¹ *Id.* at 650.

wrongful discharge statutes: One that is in effect in Great Britain, one covering federal employees in Canada, and two that are operative in the Canadian provinces of Nova Scotia and Quebec. Other international experiences with wrongful discharge protection are also discussed. For example, the fourth section explores the requirement that employers give notice to employees several weeks or months prior to discharge. While this notice requirement is a common feature in international legislation, it is omitted from the Model Act's proposal. Section five summarizes the conclusions drawn from the study, and provides policymakers and practitioners with a framework for interpreting the merits of the Model Act, and its possibilities and challenges for wrongful discharge reform.

II. UNITED STATES: A BIFURCATED SYSTEM OF WRONGFUL DISCHARGE LAW

A. Just Cause

Traditionally, the determination of whether an employee could pursue a wrongful termination claim in the United States depended upon whether that employee worked in the union or non-union sector.²² One of the primary benefits of union membership is that a just cause provision is typically written into the collective bargaining agreement between labor and management in order to limit management's ability to discharge. This provision typically requires an employer to have cause for termination based on either worker conduct or economic exigencies of the business.²³ Disputes

²² Jack Steiber, *Termination of Employment in the United States*, 3 COMP. LAB. L.J. 327 (1984). See generally Terri A. Zall, Comment, *Unfair Dismissal in the United States and the United Kingdom: A Procedural Comparison of Remedies*, 9 COMP. LAB. L.J. 433, 437-39 (1987-88).

²³ FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 652 (4th ed. 1985). Ninety-six percent of all collective bargaining agreements (CBAs) contain provisions dealing with discipline and discharge. Steiber, *supra* note 22, at 330. Union arbitration typically has distinguished between major and minor offenses. For a major offense, such as theft or insubordination, an employee can be discharged immediately. For a minor offense, progressive discipline, such as a series of warnings, must be used prior to discharge. INTERNATIONAL & COMPARATIVE INDUSTRIAL RELATIONS: A STUDY OF DEVELOPED MARKET ECONOMIES 73 (Greg L. Barber & Russell D. Lansbury eds. (1987)) [*hereinafter COMPARATIVE INDUSTRIAL RELATIONS*]. According to one study, the most common offense alleged in discharge cases during the past forty years of union arbitration is excessive absenteeism. Steiber,

over what constitutes just cause usually are resolved through an internal grievance procedure with binding arbitration as the final step. If an employee is found to have been wrongfully discharged, the common remedy in the union context is to reinstate the employee with back pay.²⁴

In addition to the union sector, where just cause provisions are negotiated almost routinely through both public and private collective bargaining, the statutes in Puerto Rico and Montana guarantee non-union workers protection against unjust dismissal. Puerto Rico's Act 80 provides for redress of unfair dismissal in the courts. Prior to trial, the statute requires that the parties hold a pretrial conference to attempt to settle the dispute. If a case proceeds to court, the employer has the burden of proving that the dismissal was made with good cause. As a result of Puerto Rico's Spanish heritage, the statute adopts a civil law approach to the definition of good cause and endeavors to define it through the use of six guidelines.²⁵ A plaintiff who successfully proves a wrongful discharge case in Puerto Rico is entitled to an indemnity payment equal to one month's pay, plus one week of salary for every year of service to the employer.²⁶ In addition, if an employee is found to have been discharged for just cause but is a first offender, the statute does not favor discharge unless the employee's violation is of "such magnitude that it endangered good operation of [the] enterprise and security of other people working there."²⁷

When Montana passed its Wrongful Discharge From Employment Act in 1987, it became the first state to provide for just cause protection for non-union employees.²⁸ Although it was constitu-

supra note 22, at 331.

²⁴ *Id.* at 330; ELKOURI & ELKOURI, *supra* note 23, at 688. In contrast, in the case of permanent plant closure, about one-third of all collective bargaining agreements as of 1980 contained provisions for severance pay. The normal formula for determining severance pay is one week's pay per year of service. Steiber, *supra* note 22, at 328-330.

²⁵ Maldonado, *supra* note 19, at 223, 227.

²⁶ P.R. LAWS ANN. tit. 29, §§ 185a(a), (b) (1976) [hereinafter PUERTO Rico ACT]. For purposes of this calculation, the employer must use the highest rate of salary earned by the employee during the three years immediately preceding discharge. *Id.* § 185d.

²⁷ *Id.* See generally, Maldonado, *supra* note 19.

²⁸ Wrongful Discharge from Employment Act, Mont. Code Ann. §§ 39-2-901 to -914 (1987) [hereinafter Montana Act]. The fact that Montana is on the cutting edge of wrongful

tionally challenged, the validity of the statute has been upheld by the Montana Supreme Court.²⁹ Under this Act, both parties may voluntarily agree in writing to submit claims to binding arbitration under the rules of the Uniform Arbitration Act.³⁰ If the parties do not agree to arbitrate, the complainant may file a wrongful discharge action in court. The statute, however, adopts the English indemnity rule and thus, if the party rejecting the request to arbitrate loses the lawsuit, that party must pay the other side's attorney's fees. Similarly, if an employee prevails in arbitration, the employer must pay all costs associated with the proceeding.³¹ As a result, the statute attempts to encourage the use of arbitration as the primary means for resolving wrongful discharge cases. Under the Montana Act, the statutory remedy for wrongful discharge is severance pay. The maximum duration of payments an employee can receive is limited to four years of pay, plus interest, minus any mitigation during that period.³² The Montana Act also preempts all previous common law remedies available under contract or tort theory.³³ The passage of this Act can be attributed to the lobbying efforts of pro-employer groups that were seeking to curb both the uncertainty and magnitude of wrongful discharge awards.³⁴

B. Employment At-Will

In contrast to the employees that are covered by just cause provisions, the majority of the U.S. work force are employees at-will and receive no protection from arbitrary discharge. Under the em-

termination law should not be surprising since this state has "historically been a leader in labor law: it passed the nations' second compulsory workers' compensation law and was among the first states to pass a mandatory maternity leave law and sexual harassment prevention law." Krueger, *supra* note 20, at 646.

²⁹ Meech v. Hillhaven West, Inc., 776 P.2d 488 (Mont. 1989). See LeRoy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge From Employment Act: A New Order Begins*, 51 MONT. L. REV. 94, 112-15 (1990).

³⁰ Montana Act, *supra* note 28, § 9(6); see also Bernstein & Schiller, *supra* note 3, at 109.

³¹ Montana Act, *supra* note 28, § 39-2-914(4); Schramm, *supra* note 29, at 111, 118-21.

³² Montana Act, *supra* note 28, § 5 (1).

³³ *Id.* § 8. See generally Schramm, *supra* note 29.

³⁴ Krueger, *supra* note 20, at 647; Schramm, *supra* note 29, at 105 (citing the \$1.3 million punitive damages award in Flanigan v. Prudential Federal Savings, 720 P.2d 257 (Mont. 1986)).

ployment at-will doctrine, employers have the unfettered discretion to hire and fire for good cause or no cause at all. While the legal underpinning of this rule is somewhat questionable, the rule was adopted by courts and reinforced by notions of freedom of contract.³⁵ For example, the court in *Payne v. Western & A.R.R.* held that absent a fixed term employment contract, employers "may dismiss their employees at will . . . for good cause, for no cause or even for cause morally wrong."³⁶

State and federal statutes providing specific employee rights, however, place limitations on the at-will doctrine. For example, federal anti-discrimination laws and state fair employment practice legislation inhibit managerial prerogative in discharge. Under the Civil Rights Act of 1964, it is unlawful for an employer "to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin."³⁷ Likewise, the Pregnancy Discrimination Act (PDA) and the Age Discrimination in Employment Act (ADEA) serve to limit an employer's ability to discriminate against employees on the basis of pregnancy and age, respectively.³⁸

Over the past several decades, but particularly during the 1980s, there has been a marked and direct judicial erosion of the employment at-will doctrine. Through the application of various tort and contract theories, courts have carved out several exceptions in the common law in order to enable employees at-will to recover under a theory of wrongful discharge.³⁹ Although the specific nature of the exceptions vary by jurisdiction, there are primarily three theories that are articulated by the courts. First, the public policy exception (tort theory) prohibits termination when the public policy

³⁵ Maldonado, *supra* note 19, at 218-19.

³⁶ MODEL ACT PREFATORY NOTE, *supra* note 1, at 540:23 (citing *Payne v. Western & A.R.R.*, 81 Tenn. 507, 519-20 (1884)).

³⁷ Civil Rights Act of 1964, Title VII, 42 U.S.C.A. §2000e-2, §703(a)(1).

³⁸ Pregnancy Discrimination Act, amending Title VII, Public Law 95-555, 92 Stat. 2076 (1978); Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621-34 (1967). See generally William L. Mauk, *Model Employment Termination Act Is Flawed*, 27 TRIAL 28 (June 1991).

³⁹ Many articles have been written on the erosion of employment at-will which explore the issue in much greater detail. See generally William L. Mauk, *Wrongful discharge: The Erosion of 100 years of Employer Privilege*, 21 IDAHO L. Rev. 201 (1985).

for promoting an activity outweighs managerial discretion. Termination would violate public policy when an employee is fired for rejecting sexual advances, refusing to evade jury duty, filing worker's compensation claims, or refusing to perform illegal acts.⁴⁰ A second at-will exception is based upon the finding that an implied contract exists (contract theory).⁴¹ For example, statements made in an employee or personnel handbook may establish an implied contract. Third, a court may award damages based on the theory that the employer violated an implied covenant of "good faith and fair dealing."⁴² An employer would be held to have acted in bad faith for firing an employee in order to avoid paying sales commissions earned. The implied covenant of good faith and fair

⁴⁰ LESLIE, *supra* note 3, at 1-50; Fredrick Brown, *Limiting Your Risks in the New Russian Roulette—Discharging Employees*, 8 EMPLOYEE REL. L.J. 380, 382-88, 404-06 (1982-83); Maldonado, *supra* note 19, at 220; Steiber, *supra* note 22, at 338. To date, thirty-one states have adopted a public policy exception. Krueger, *supra* note 20, at 649. See, e.g., Savodnik v. Korvettes, Inc., 488 F Supp. 822 (E.D.N.Y. 1980) (holding that employer violates public policy when firing employee on the eve of his qualifying for pension benefits so that employer will not have to pay retirement benefits); Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980) (holding that employee discharged for refusing to participate in an illegal price fixing scheme is entitled to recovery from employer); Trombetta v. Detroit, 265 N.W.2d 385 (Mich. 1978) (granting recovery to employee discharged for refusing to falsify state pollution control reports); Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974) (allowing female employee recovery after being fired for refusing the sexual advances of her boss); Nees v. Hocks 536 P.2d 512 (Ore. 1975) (granting recovery to employee discharged for serving jury duty). In some jurisdictions, there is statutory protection for employees that serve on state court juries. In addition, under the Jury System Improvement Act of 1968, an employee's job is protected if that employee is called to serve on a federal jury.

⁴¹ Maldonado, *supra* note 19, at 221; LESLIE, *supra* note 3, at 1-50 to 1-51. To date, twenty-seven states have adopted an implied contract exception. Krueger, *supra* note 20, at 649. See, e.g., Foley v. Interactive Data, 765 P.2d 373 (Cal. 1988); Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880 (Mich. 1980) (discussing discharge on the basis of company policy and promises made during the interview process); Wooley v. Hoffman-LaRoche, 491 A.2d 1257 (N.J. 1985); Weiner v. McGraw Hill, Inc., 443 N.E.2d 441 (N.Y. 1982) (allowing discharged employee to recover on the basis that promises made in employee handbook constituted an implied contract).

⁴² Maldonado, *supra* note 19, at 222; LESLIE, *supra* note 3, at 1-51. To date, only eight states have adopted this exception to the at-will rule. Krueger, *supra* note 20, at 649; Plasencia, *supra* note 5, at 309 (citing Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974)). See, e.g., Cleary v. American Airlines, 111 Cal. App. 2d 443 (1980); Fortune v. National Cash Register, 364 N.E.2d 1251 (Mass. 1977). But see Murphy v. American Home Products, 448 N.E.2d 86 (N.Y. App. 1983). See generally Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 63-65 (1988).

dealing is arguably "the most troublesome for employers" because it may be covered by both tort and contract theory, which could permit employees a broad range of recoveries including punitive and compensatory damages.⁴³

According to the American Law Institute's Report of the Study Committee on Proposed Employment Termination Act, the number of wrongful discharge cases has increased tenfold each year for the last several years.⁴⁴ The reason for this trend in the United States is that over forty states have created one or more judicial exceptions to the at-will rule.⁴⁵ As the volume of cases has increased, so has the scope and application of the exceptions. In contrast to union labor arbitration, wrongful termination litigation features the use of jury trials, and some courts have permitted wrongfully discharged employees to recover large compensatory and punitive damage awards. Drafting of the Model Act can be attributed in part to the growing applicability of these exceptions which has led to an increase in wrongful discharge litigation and its associated costs. By attempting to bridge the gap that has traditionally existed in this bifurcated area of the law, the Model Act is the most far reaching proposal to date that rejects the employment

⁴³ Brown, *supra* note 40, at 383. This theory is arguably an extension of the accepted notion of "good faith" in contract law. For example, under the Uniform Commercial Code, "Every contract imposes an obligation of good faith in its performance or enforcement." U.C.C. §1-203 (1991). This obligation of good faith is also found under the common law. See, e.g., *Wood v. Lucy, Lady Duff-Gordon* 118 N.E. 214 (N.Y. 1919). "Even when at-will rights are contractually explicit and an employee is fired for just cause, the circumstances of that discharge can violate this covenant." JAMES N. DERTOUZOS ET AL., THE LEGAL & ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION vi (1988).

Not acting in good faith may permit the recovery of punitive damages under a theory of tortious interference of contractual relations. *See Cleary v. American Airlines*, 111 Cal. App. 2d 443 (1980) (holding that an employee can recover under both contract and tort theories). *But see Foley v. Interactive Data Corporation*, 765 P.2d 373 (Ca. 1988) (limiting recovery of punitive and compensatory damages).

⁴⁴ Leslie, *supra* note 3, at 1-49.

⁴⁵ Krueger, *supra* note 20, at 649; Paull, *supra* note 5, at 623. The seven states that have adopted none of the at-will exceptions are: Delaware, Florida, Georgia, Louisiana, Mississippi, Utah, and Wyoming. Krueger, *supra* note 20, at 649; Plasencia, *supra* note 5, at 309. This fact suggests that these states are pro-employer. Such a conclusion is also buttressed by the fact that these states, with the exception of Delaware, have right-to-work laws, Delaware, however, is known as a pro-employer state because of its favorable incorporation laws.

at-will doctrine.⁴⁶

III. MODEL EMPLOYMENT TERMINATION ACT

A. *Background*

After more than three years of drafting, the Model Employment Termination Act was adopted on August 8, 1991 by the National Conference of Commissioners on Uniform State Laws, a group of 300-state appointed commissioners.⁴⁷ The Commissioners who drafted the Model Act were charged with the task of codifying the common law and can be credited with gaining acceptance for the Uniform Commercial Code, the Uniform Partnership Act, and the Uniform Arbitration Act.⁴⁸ The widespread acceptance of these initiatives suggests that the Model Act could have a significant impact on the direction of employment law.

The Commissioners adopted the Act as a model by a 39-11 vote.⁴⁹ The Model Act did not, however, gain enough support to pass as uniform legislation similar to the Commissioners' other laws. The Commissioners voted 29-21 in favor of passing the Act as uniform legislation and therefore failed to garner the required two-thirds majority.⁵⁰ According to some commentators, it is beneficial that the Act was adopted as a model rather than as uniform legislation because states considering just cause legislation can look to it as a starting point while retaining the flexibility to adopt alternative provisions and amendments.⁵¹ In contrast, a uniform act

⁴⁶ Bernstein, *supra* note 3, at 109; Samborn, *supra* note 5, at 1.

⁴⁷ MODEL ACT PREFATORY NOTE, *supra* note 1, at 540:22-23; *Model Termination Act*, Individual Employment Rights Newsletter (BNA), Dec. 17, 1991, available in LEXIS, Labor Library, IER File; *Model Termination Act's Adoption Surprises Litigators*, Individual Employment Rights Newsletter (BNA), Aug. 27, 1991, available in LEXIS, Labor Library, IER File; Samborn, *supra* note 5, at 40.

⁴⁸ Mauk, *supra* note 38, at 28.

⁴⁹ Summary of Developments, LRR Analysis, News and Background Information (BNA), available in LEXIS, Labor Library, LRR file.

⁵⁰ Model Act Prefatory Note, *supra* note 1, at 540:21; *Draft Employment Termination Act Is Approved As Model State Law By National Commissioners*, LRR Analysis/News and Background Information (BNA), Aug. 26, 1991, available in LEXIS, Labor Library, LRR file.

⁵¹ *Model Termination Act's Adoption Surprises Litigators*, *supra* note 47.

would have discouraged legislatures from deviating from the language of the Act as it was drafted.⁵²

B. Objectives

In order to gain support for the Model Act, the drafters engaged in a compromise in an effort to appeal to the interests of employees and employers alike.⁵³ The Model Act grants affirmative just cause protection to employees in return for less costly legal battles for employers. In addition, by simplifying and streamlining the law, the Model Act imposes greater certainty into the employment relationship and therefore gives employees and employers a better understanding of their rights and obligations to each other.⁵⁴

One of the primary objectives of the Model Act is to increase due process in the workplace by providing a wider range of substantive rights to non-union employees against wrongful discharge through a just cause standard. Simultaneously, the Act seeks to broaden the scope of coverage for non-union employees, providing more protection than the common law at-will exceptions. One method is through relatively easy qualifying requirements. A second method removes wrongful discharge actions from the courts, providing instead for arbitration. The drafters of the Model Act estimate that the majority of the successful plaintiffs in wrongful discharge suits at common law are "middle- or upper-level management, professionals, or other highly paid personnel."⁵⁵ One reason for this fact may be that lower paid employees have difficulty finding lawyers to represent them since the damages they can recover are small relative to the costs of litigation.⁵⁶ By moving wrongful discharge out of the courts and into arbitration, the drafters intended to make affordable justice available to a broader group of employees that currently do not recover or even attempt to bring claims.

⁵² *Id.*

⁵³ MODEL ACT PREFATORY NOTE, *supra* note 1, at 540:24.

⁵⁴ *Id.* at 540:25.

⁵⁵ *Id.* at 540:23.

⁵⁶ Paull, *supra* note 5, at 625.

The Model Act's goal to control costs is accomplished through two mechanisms. The primary method is through the elimination of punitive and compensatory damages, which will make the cost of losing a case more manageable for American business. For example, in California, employees are winning approximately seventy percent of the wrongful discharge cases that go to trial, and are collecting awards which average \$400,000.⁵⁷ Between 1982 and 1986, the average total award nationwide was \$652,100.⁵⁸ In fact, throughout the country, single individuals have been awarded verdicts as high as \$20 million in wrongful discharge cases, and \$1 million dollar verdicts are not uncommon.⁵⁹ A possible explanation for these high damage awards, according to one commentator, is that "jurors feel a natural sympathy for wrongful termination plaintiffs [they] can easily identify with the worker who has received a pink slip."⁶⁰

As a result, a second way of reducing costs under the Act is by removing the cases from the courts and putting them into an arbitration system. In this respect, proponents of the Model Act argue, both employers and employees will benefit. The costs associated with going to court are reduced because arbitration is a less expensive process. Experts estimate that, on average, a plaintiff must pay \$40,000 in attorney's fees and costs in order to bring a wrongful discharge case, and it costs approximately \$80,000 in attorney's fees and expenses to defend one.⁶¹ In contrast, it is estimated that arbitration of a wrongful dismissal case would cost each party only \$15,000.⁶² The reason for this cost differential is that arbitration is

⁵⁷ MODEL ACT PREFATORY NOTE, *supra* note 1, at 540:23; Bernstein, *supra* note 3, at 109. In a study of 120 jury trials in California between 1980 and 1986, about forty percent of the amounts awarded were for punitive damages. DERTOUZOS, *supra* note 43, at vii. See *infra* text accompanying note 331.

⁵⁸ William B. Gould IV, *Stemming the Wrongful Discharge Tide: A Case For Arbitration*, 13 EMPLOYEE REL. L.J. 404, 405 (1987-88).

⁵⁹ MODEL ACT PREFATORY NOTE, *supra* note 1, 540:23. "Despite the visibility of million dollar jury awards, most plaintiffs receive less than \$30,000 after post-trial reductions and legal fees. This suggests that many terminated employees would have benefitted from a system, like the one in Great Britain or West Germany, that calls for modest but automatic remedies when an employee is discharged." DERTOUZOS, *supra* note 43, at ix.

⁶⁰ Gould, *supra* note 58, at 406-07.

⁶¹ *Id.*, Bernstein, *supra* note 3, at 109.

⁶² Bernstein, *supra* note 3, at 109.

usually shorter in length than a trial and there typically is only a narrow opportunity for appeal.

One of the most difficult goals the Model Act seeks to achieve is uniformity in wrongful discharge law.⁶³ By virtue of its design, however, the Model Act can achieve only a moderate level of success in this area because reform is being approached on a state, rather than on a federal level. Although federal wrongful discharge legislation would provide the uniformity and certainty in the law that the drafters want to achieve, current differences between and within employer and employee interests, when viewed nationwide, make it a politically unfeasible alternative at this time. This fact explains why the Model Act failed to pass as uniform legislation and required three separate drafts to strike a workable compromise between employer and employee interests. These conflicts are likely to make reform equally difficult on a state level and will probably result in a patchwork, rather than a uniform set of state laws. Commentators have suggested, therefore, that this area of the law needs federal legislation.⁶⁴

C. *Political Calculus*

The extension of employee rights, according to one commentator, depends upon two related factors: "the breadth and attractiveness of the specific proposals for change, and . . . the strength of the coalition that can be mobilized in their support."⁶⁵ Since the Model Act represents a compromise of a variety of interests, it is unclear what kind of support can be mobilized in its favor. In trying to accommodate each of these interests, the Model Act may not be attractive to any of them. One of the major problems with the

⁶³ MODEL ACT PREFATORY NOTE, *supra* note 1, at 540:25. The Model Act "should be proposed and supported to minimize diversity and improve the law." *Id.* at 540:26.

⁶⁴ See Jack Steiber and Michael Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. 319 (1983). According to one commentator, however, "Congress does not have exclusive jurisdiction over the subject matter, which has traditionally been treated as a matter solely of state concern." LESLIE, *supra* note 3, at 1-52. This argument is particularly weak, especially in light of the experience with employment discrimination legislation. Using Title VII of the Civil Rights Act of 1964 as a model, similar federal legislation could be passed for employment termination.

⁶⁵ Heckscher, *supra* note 13, at 176.

Model Act's compromise approach is that, within their respective groups, employers and employees have viewpoints and attitudes that are not always uniform.⁶⁶ For this reason, it is necessary to break down the political calculus by jurisdiction in order to analyze how different factions are likely to polarize on the issues.⁶⁷

Because of its compromise approach, the Model Act is not likely to affect jurisdictions that may properly be characterized as pro-employee or pro-employer. In pro-employee jurisdictions, which are characterized by their liberal exceptions to the at-will doctrine, little incentive exists for employees to seek protective legislation since they are already well protected at common law. This lack of incentive may help to explain, at least in part, why the just cause statutes that have previously been proposed in California, Connecticut, Michigan, New Jersey, Pennsylvania, Vermont, Washington, and Wisconsin were unsuccessful.⁶⁸ Likewise, in pro-employer states, such as Georgia, where the at-will doctrine is still strong and has not been eroded by exceptions, employers also have little incentive to advocate a statute.

In contrast, a statute may be more attractive to states where the balance of power is less decisive, where rights and obligations are ambiguous under the common law, and where the legislature is

⁶⁶ Williams & Lewis, *supra* note 15, at 491.

⁶⁷ Mixed into this political calculus are union interests, which at best can be characterized as neutral since "there is an uneasy coexistence between traditional labor relations and the set of new employee rights." Heckscher, *supra* note 13, at 163. Unions may publicly favor just cause legislation since it is their role to advocate employee rights. They may not be so enthusiastic to do so, however, because statutory just cause legislation would grant employees a right that typically is one of the most attractive features a union has to offer prospective members. A just cause statute will arguably have an adverse effect on union organizing efforts. "Such an approach simply replaces collective bargaining with government supervision. Thus, it is not surprising that unions have been, at best, ambivalent in many struggles over rights . . . because they see it as encroaching on their own function." *Id.* at 164. As a result of this conflict of interests, unions are unlikely to have a decisive impact on the outcome of wrongful discharge reform.

⁶⁸ Krueger, *supra* note 20, at 650. Proposals for just cause legislation were introduced before the following state legislatures, but failed: California (1984, 1985, 1986, 1988), Connecticut (1975), Michigan (1982), New Jersey (1980, 1984), Pennsylvania (1981, 1985), Vermont (1988), Washington (1987), and Wisconsin (1982). *Id.* In California, the interests have polarized, making it difficult for either employee or business interests to support balanced legislation. Similar polarization of interests has been noted in Michigan and Oregon. Heckscher, *supra* note 13, at 176.

amenable to modifying the Model Act's proposals to fit its particular needs. In these cases, it appears that pro-employer statutes are the most likely to be enacted because of the relative power that employer interests have over wrongful discharge reform. First, employers have greater control over legal reform because they are better organized as a lobbying group than non-union employees. For this reason, just cause statutes that employers perceive as lowering the total costs associated with discharge may succeed, as in Montana. As the dissenters in *Meech v. Hillhaven West* pointed out, the Montana Act enhanced employer rights by taking away gains made by employees under the common law.⁶⁹ In fact, a recent statistical study suggests that the erosion of employment at-will and the proposals for just cause legislation are correlated.⁷⁰

Second, to the extent that wrongful discharge has matured as a theory of recovery, employers may well benefit from opposing the Model Act's initiatives. In some jurisdictions, courts refuse to develop employee rights beyond the already established at-will exceptions. For example, the court in *Zolotar v. New York Life Insurance Co.* recently held that, despite the attack on the at-will rule by the Model Act, "[i]t is still settled law in New York that, absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will."⁷¹ Likewise, the California Supreme Court in *Foley v. Interactive Data Corp.* has limited the availability of punitive damages in wrongful discharge cases.⁷²

⁶⁹ *Meech v. Hillhaven West*, 776 P.2d 488 (Mont. 1989) (according to Justice Sheehy's dissent, "This is the blackest judicial day in the eleven years that I have sat on this Court

The decision today cleans the scalpel for the legislature to cut away unrestrainedly at the whole field of tort redress."); See also Schramm, *supra* note 29, at 115.

⁷⁰ Krueger, *supra* note 20, at 649, 651-59. If this evidence is correct, one might expect the introduction of just cause legislation in states where there are a significant number of exceptions to the at-will rule. For example, Montana adopted all three major exceptions to the at-will rule prior to passing its legislation. Currently, only three other states have adopted all three of the exceptions: California (since 1980), Connecticut (since 1986), and Nevada (since 1986). *Id.*

⁷¹ *Zolotar v. New York Life Insurance Co.*, 6 IER Cases (BNA) 1648 (A.D. 1st Dept. 1991). See discussion entitled "Limitations on Punitive and Compensatory Damages" *infra* text accompanying notes 314-32.

⁷² *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988). See also *infra* note 331 and accompanying text; *California Post-Foley*, 7 IER (BNA) 3 d9, Feb. 25, 1992, available in

Through their own actions, employers ultimately control the extent to which they are subject to wrongful discharge claims. By taking a series of preventative measures, such as treating employees fairly and consistently, employers can significantly limit their exposure to wrongful discharge liability.⁷³ As a result, an employer with limited exposure to wrongful discharge liability is less likely to advocate statutory reform.

IV INTERNATIONAL & DOMESTIC PERSPECTIVES

The study of industrial relations practices in other countries may have important implications for public policy and provides a sound basis for guiding the direction of wrongful discharge reform in the United States.⁷⁴ With this purpose in mind, the experiences in Great Britain and Canada provide valuable bases for comparison by which to evaluate the Model Act since these countries not only have comparable industrial relations systems to our own, but also have similar political and socio-economic cultures. First, as former British colonies, the United States and Canada have adopted various elements of British custom, practice, and law.⁷⁵ Second, these countries all have similar industrial relations institutions and comparable labor-management relations.⁷⁶ In addition,

LEXIS, BNA Library, IERNEW File.

⁷³ Other methods include: sanitizing employee handbooks; educating interviewers; not making any statements that could be construed as oral contracts; adopting reasonable work rules; conducting regular employee evaluations; establishing uniform discipline and counseling guidelines; giving special consideration to long-term employees; setting up internal grievance procedures, possibly with binding arbitration as the final step; and educating supervisors. Brown, *supra* note 40, at 390-402. See also, MARTIN EDWARDS, UNDERSTANDING DISMISSAL LAW 168-71 (1984).

⁷⁴ COMPARATIVE INDUSTRIAL RELATIONS, *supra* note 23, at 9.

⁷⁵ Roy L. Heenan & Thomas Brady, *Hiring, Termination and Regulation of Employees in the Canadian Workplace*, 16 Can. U.S. L.J. 183, 190 (1990); see also Roy J. Adams et al., *Discipline and Discharge in Canada and the United States*, 41 LAB. L.J. 596, 597 (1990); BORA LASKIN, THE BRITISH TRADITION IN CANADIAN LAW (1969) (discussing the British influence on Canadian law and the American influence on legislative initiatives).

⁷⁶ Estreicher, *supra* note 1, at 290; COMPARATIVE INDUSTRIAL RELATIONS, *supra* note 23, at 23. "Type I countries [i.e. U.S., Britain, Canada, and Australia] share a common inheritance of occupationally-based unionism, relatively weak central union and employer associations, a less consistent role played by governments in industrial relations (depending upon which political party holds office) and adversarial traditions of labour-management relations." *Id.* In contrast, Type II countries [i.e. Germany, Sweden, Norway, and Denmark]

the decline in union density, defined as the percentage of union members in the work force, in both Great Britain and Canada relative to other foreign industrialized countries, closely resembles the decline in the United States.⁷⁷ Furthermore, it is also relevant that each of these countries has an unemployment insurance system, since unemployment payments mitigate the damage of a wrongful discharge.⁷⁸

In Great Britain, the Conservative Government first announced the source of statutory protection against unjust dismissal in the Industrial Relations Act of 1971.⁷⁹ Until this Act was introduced, most employees had little or no protection against arbitrary discharge unless their employer breached an employment agreement.⁸⁰ In 1974, the Labour Government repealed the Industrial Relations Act of 1971. At the same time, the idea of providing employees with unjust dismissal protection was incorporated into the Trade Union and Labor Relations Act of 1974 and the Employment Protection Act of 1975.⁸¹ The relevant provisions of these Acts were consolidated in the Employment Protection (Consolidation) Act of 1978 (EPCA).⁸² This statute currently serves as the primary source of protection for British employees against wrongful discharge. Although the EPCA has been amended on several

"tend to have industry-wide unions (except for Denmark), strong central union and employer organizations, and generally a more consensual approach to industrial relations." *Id.*

⁷⁷ According to NLRB Member John Raudabaugh, union density in the United States is currently stable at 16.1 percent. *Glass, McCullough, Sherrill & Harrold: 1992 Employment Law Seminar* (Feb. 14, 1992). Similar to the United States, British union density has been in significant decline since 1979. JOHN MACINNES, THATCHERISM AT WORK 140 (1987). As of 1987, British union density was estimated at 50 percent, while Canadian union density was estimated at 38 percent. COMPARATIVE INDUSTRIAL RELATIONS, *supra* note 23, at 38, 257. In contrast, union density in Sweden reached ninety-four percent in 1983. *Id.* at 257.

⁷⁸ Rodriguez, *supra* note 1, at 246. Of the thirty-six ILO member countries studied, only half of them have unemployment insurance systems. *Id.* In many of these countries, severance payments awarded in wrongful discharge cases are made in lieu of unemployment insurance. See also David Lewis, *Termination of Employment in Britain*, 5 COMP. LAB. L. 248, 271-274 (1982).

⁷⁹ Streicher, *supra* note 1, at 288; see also Paul Lewis, *Ten Years of Unfair Dismissal Legislation in Great Britain*, 121 INT'L LAB. REV. 713 (1982).

⁸⁰ Mead, *supra* note 11, at 1.

⁸¹ *Id.* at 2.

⁸² *Id.*, Employment Protection (Consolidation) Act of 1978, c. 44 (Eng.) [hereinafter EPCA].

occasions, particularly with respect to trade union rights, the substantive law relating to "unfair dismissal" has seen only minimal changes.⁸³ The British law draws a distinction between "unfair" dismissal, which is dismissal without just cause, and "wrongful" dismissal, which is dismissal with or without cause but lacking the required length of notice prior to termination.⁸⁴ Under British law, the Advisory, Conciliation, and Arbitration Service (ACAS) attempts to encourage the early resolution of employee complaints.⁸⁵ Cases that cannot be settled are tried before government sponsored industrial tribunals, which provide a quick and inexpensive forum for adjudication of dismissal cases.⁸⁶ Parties that remain dissatisfied with the determination at the Tribunal stage may appeal to the Employment Appeal Tribunal (EAT).⁸⁷ The body of law developed under the Tribunal system bears many similarities to arbitration law in the United States.⁸⁸ Reinstatement, re-engagement, or compensation in the form of a severance payment are available to employees who prevail in wrongful discharge actions.⁸⁹

In Canada, both federal and provincial laws govern wrongful termination.⁹⁰ As in Great Britain, Canadian law distinguishes between wrongful dismissal, for failure to give notice, and unfair dismissal, for failure to provide a just cause reason for termination. All of the Canadian legislative jurisdictions have implemented provisions requiring an employer to give notice prior to termination, with the exception of the Northwest Territories.⁹¹ In contrast, only

⁸³ Estreicher, *supra* note 1, at 300 n.7. The Act was amended by the Employment Acts of 1980 and 1982, and the Sex Discrimination Act of 1986. Mead, *supra* note 11, at 2.

⁸⁴ See generally O'Laoire v. Jackel International Ltd., 1991 I.R.L.R. 170.

⁸⁵ EDWARDS, *supra* note 73, at 2.

⁸⁶ *Id.* at 1.

⁸⁷ *Id.* at 2.

⁸⁸ Summers, *supra* note 2, at 180.

⁸⁹ EPCA, *supra* note 82, § 68; Lewis, *supra* note 79, at 713. "Reinstatement" is defined as ordering the employer to treat the complainant in all respects as if she had not been dismissed. This award includes backpay, seniority and pension rights, and any other benefits that would have been conferred but for the unfair dismissal. In contrast, "re-engagement" refers to rehiring of the employee in a different, but comparable, position from the one from which she was dismissed. EPCA, *supra* note 82, § 69; Williams & Lewis, *supra* note 15, at 485-486.

⁹⁰ Estreicher, *supra* note 1, at 287.

⁹¹ PAUL L.S. SIMON, EMPLOYMENT LAW: THE NEW BASICS, para. 1206 (1988).

three statutes effective in Canada require an employer to provide a just cause reason for termination. Specifically, there is legislation covering federally employed workers and provincial legislation which has been passed in both Nova Scotia and Quebec, respectively.⁹² The most common grounds for just cause discharge in Canada include dishonesty, untrustworthiness, breach of a fiduciary duty by certain groups of senior employees, and incompetence.⁹³ In general, Canadian legislation at both federal and provincial levels provides two possible forums for wrongfully discharged non-union employees: courts and arbitration.⁹⁴ While the courts are inclined to award damages, the arbitrators are more likely to award reinstatement as a remedy⁹⁵

While the reform of wrongful discharge law in the United States might be made easier simply by adopting another country's system, experience demonstrates that this option is probably infeasible because of cultural differences. For example, although the British attempted to incorporate fundamental aspects of United States labor law into their Industrial Relations Act of 1971, they ultimately repealed the Act because it was a complete failure.⁹⁶ According to one commentator, "We cannot take for granted that rules or institutions are transplantable . . . Labor law is part of a system, and the consequences of change in one aspect of the system depends upon the relationship between all elements of the system."⁹⁷

⁹² *Id.* para. 1218; Adams et al., *supra* note 75, at 598; Innis Christie, *Termination of Employment: Trends and Overview*, in *TERMINATION OF EMPLOYMENT SYMPOSIUM: QUEEN'S UNIVERSITY AT KINGSTON* 6 (1981). Federal Canadian Labour Code, S.C., 26-27 Eliz. II ch.27 § 61.5 (1977-78), Canada Labour Code, R.S.C., ch. L-2, §§ 240-46 (1985) [hereinafter Canada Federal]; Nova Scotia Labour Standards Code, S.N.S., 21 Eliz. II, ch. 10 (1972) [hereinafter Nova Scotia (1972)]; An Act to Amend the Labour Standards Code, 24 Eliz. II ch. 50 (1975) [hereinafter Nova Scotia (1975)]; An Act to Amend Chapter 10 of the Acts of 1972, Labour Standards Code, R.S.N.S., 25 Eliz. II ch. 41 (1976) [hereinafter, Nova Scotia (1976)]; An Act Respecting Labour Standards, S.Q., ch. 45 (1979) [hereinafter Quebec (1979)]; An Act Respecting Labour Standards, R.S.Q., ch. 73 (1990) [hereinafter Quebec (1990)].

⁹³ Heenan & Brady, *supra* note 75, at 192-93.

⁹⁴ *Id.* at 190.

⁹⁵ *Id.* at 190-95.

⁹⁶ COMPARATIVE INDUSTRIAL RELATIONS, *supra* note 23, at 11; see generally A.W.J. THOMSON AND S.R. ENGLEMAN, THE INDUSTRIAL RELATIONS ACT: A REVIEW AND ANALYSIS (1975).

⁹⁷ COMPARATIVE INDUSTRIAL RELATIONS, *supra* note 23, at 11-12 (quoting O. Kahn-

To avoid unintended consequences, the United States should use comparative analysis as a guide to understanding domestic proposals for wrongful discharge reform. To facilitate this comparison, the following chart summarizes the salient features of the wrongful discharge statutes examined in this Comment. The accompanying text explores this comparison of the Model Act to the international and domestic perspectives in greater detail. Based on these comparisons, this Comment assesses the provisions of the Model Act as a basis for reform in the United States.

A. Just Cause

An employee seeking recovery for wrongful discharge under the Model Act must establish a *prima facie* case that he or she was not fired for "good cause."⁹⁸ To rebut this presumption and to avoid liability, an employer has the burden to "establish, by a preponderance of the evidence, that it would have terminated the employment."⁹⁹ The two-prong definition of good cause used in the Model Act reflects the compromise approach taken by the drafters.¹⁰⁰

The first prong of this definition requires an employer to demonstrate, "a *reasonable basis* related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise, job performance, and employment record."¹⁰¹ The Model Act permits the parties to execute an express written agreement specifying employee performance standards which, if not met, would provide an employer with a reasonable basis for termination.¹⁰² In recognition of the common law at-will exception for implied contracts, the Model Act provides that personnel policies or statements made in employee

Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 27 (1974)).

⁹⁸ MODEL ACT, *supra* note 15, § 6(e).

⁹⁹ *Id.* § 6(f).

¹⁰⁰ The Model Act defines a termination as being either a dismissal, layoff or suspension for greater than two months, or a quitting or early retirement by an employee that is wrongfully induced by an employer. *Id.* § 1(8).

¹⁰¹ *Id.* § 1(4)(i) (emphasis added).

¹⁰² *Id.* § 4(b).

handbooks may also grant rights and obligations governing the termination process.¹⁰³ In codifying this at-will exception, the Model Act does not go as far as Montana, which also incorporates the public policy exception into its statute.¹⁰⁴

The second prong of the good cause standard allows an employer to demonstrate that the termination was made in "the exercise of business judgment in good faith."¹⁰⁵ The Model Act defines business judgment as, "setting its economic or institutional goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force . . . and changing standards of performance for positions."¹⁰⁶ In addition, the Act defines "good faith" as consisting of "honesty in fact."¹⁰⁷ In choosing to use the phrase "good cause" instead of "just cause" throughout the statute, the drafters intended to underscore the fact that "an employer's business needs or external economic conditions may be legitimate grounds for termination, as well as the misconduct or incompetence of a particular employee."¹⁰⁸

In many respects, the Model Act's definition reflects the six guidelines that define just cause in the Puerto Rico Act.¹⁰⁹ The

¹⁰³ *Id.* § 4(e). See *supra*, note 41.

¹⁰⁴ Prior to passing its statute, Montana had adopted all three of the at-will exceptions: public policy (1980); implied contract (1983); and good faith and fair dealing (1983). Krueger, *supra* note 20, at 649. Under the Montana statute, "discharge is wrongful only if: (1) it was a retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; (2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or (3) the employer violated the express provisions of its own written personnel policy." Montana Act, *supra* note 28, § 39-2-904. By eliminating recovery under the common law, Section 8 of the Montana Act apparently eliminates recovery under the covenant of good faith and fair dealing exception. *Id.* at § 39-2-913. For a discussion of the common law at-will exceptions, see *supra* text accompanying notes 35-46.

¹⁰⁵ MODEL ACT, *supra* note 15, § 1(4)(ii).

¹⁰⁶ *Id.* § 1(4)(ii).

¹⁰⁷ *Id.* § 1(5).

¹⁰⁸ MODEL ACT PREFATORY NOTE, *supra* note 1, at 540:26. For the interpretation of a "legitimate business justification" under the Montana Act, see *Buck v. Billings Montana Chevrolet*, 811 P.2d 537 (Mont. 1991).

¹⁰⁹ PUERTO RICO ACT, *supra* note 26, § 185b(a)-(f).

WRONGFUL DISCHARGE STATUTES SUMMARIZED

Statute	Just Cause	Scope of Coverage	Dispute Resolution Procedures			Punitive/Compensatory Damages	Notice	Evaluation:
			Forum	ADR	Appellate Review			
Model Act (1991)	2 Prong Test: 1 "Reasonable Basis", 2 "Good Faith" Business Judgment	Broad 1 yr to qualify	*Arbitration or Administrative Alternative; Agency Courts	Pre Termination Determination	Limited in Arbitration Context • Unclear if Alt. A or B were exercised	1 Reinstatement or 2 Severance Pay (30 month max)	No	Compromise

INTERNATIONAL PERSPECTIVES

Britain Employment Protection (Consolidation) Act (EPPA) (1978)	Pro-Employer "Substantial Reason" Test (Subjective)	Broad 2 yrs to qualify	Publicly Funded Compulsory Arbitration	Post-Termination Conciliation (ACAS)	Review all Questions of Law (EAT)	1 Reinstatement 2 Re-engagement 3 Monetary Award • Basic • Compensation • Special	Available Under Common Law; Limitations on Monetary Awards	Yes Pro-Employer
Canada Federal Canada Labor Code (1978)	Pro-Employee "Generally Accepted Standards" Test	Broad Covers only Federal Employees 1 yr to qualify	Publicly Funded Compulsory Arbitration	Post-Termination Conciliation	Abuse of Discretion Standard	1 Reinstatement 2 Compensation 3 "Any other Equitable Remedy"	Available	Yes Pro-Employee
Nova Scotia Labor Standards Code (1975)	Defined through Arbitral Jurisprudence	Extremely Narrow 10 yrs to qualify	Publicly Funded Compulsory Arbitration	Post Termination Conciliation	Review all Questions of Law	1 Reinstatement 2 Compensation	Available	Yes Pro Employer

Quebec abor Standards Act (1980)	Defined through Arbitral Jurisprudence	Broader as per 1992 And 3 yrs to qualify	Privately Funded Compulsory Arbitration	Optional Mediation	Abuse of Direction Standard	1 Reinstatement 2 Any Remedy "Fair and Reasonable"	Available	Yes	Compromise

DOMESTIC PERSPECTIVES

Montana Wrongful Discharge from Employment Act (MDEA) (1987)	Codifies at-will exceptions	Extremely Broad Nonprobation employees quality	Privately Funded Voluntary Arbitration or Courts	Written Employer Internal Grievance Procedure	Review of Arbitration as per Uniform Arbitration Act	Severance Pay (4 yrs salary max)	Available only in Public Policy Based Discharges	No	Compromise
Puerto Rico Act 80 (1976)	6 Guidelines (Objective)	Extremely Broad	Courts	Post-Termination Conference	Unaffected by Statute	Severance Pay Formula = 1 mo salary + 1 wk salary/yr	Unaffected by Statute	No	Pro-Employee
Union Sector	Defined through Arbitral Jurisprudence	Limited to Employees covered under Collective Bargaining Agreement (CBA)	Privately Funded Voluntary Arbitration	Multi-Step Grievance Procedure	Limited review under Steelworker's Deferral Doctrine	Reinstatement with Backpay	Available independent of CBA	No	Compromise

first three of these guidelines closely resemble the first prong under the Model Act's definition, while the second three resemble the second prong of business justification.¹¹⁰ Similar to the Model Act, just cause in Puerto Rico must be substantiated by objective facts.¹¹¹ As a general statement of policy, Puerto Rico's Act requires that "[a] discharge made by mere whim or fancy of the employer or without cause related to the proper and normal operation of the establishment shall not be considered as a discharge for good cause."¹¹²

The British statute provides that every employee who qualifies for coverage, "shall have the right not to be unfairly dismissed by his employer."¹¹³ In contrast to the objective standard applied under the first prong of the Model Act's definition, the British statute applies a subjective standard requiring an employer to demonstrate to the tribunal that he acted reasonably and had a "sufficient reason" for dismissal.¹¹⁴ In this respect, the tribunal does not attempt to second guess the employer's decision to terminate, but rather defers to the decision.¹¹⁵

The statute provides four potentially fair reasons upon which an employer can specifically rely to justify a dismissal: the employee lacked the qualifications or was incapable of performing the assigned work; the conduct of the employee gave rise to discharge; the employee was made redundant (laid-off); or continued employ-

¹¹⁰ Some of the situations which are deemed just cause for termination include: Improper or disorderly conduct; repeated violations of rules; and inefficient, negligent, and sub-standard quality work. The second set of factors include: full, temporary, or partial business closure; downsizing due to technological or reorganization of the work place; and actual or anticipated slowdown in sales or profits. If just cause is motivated by this last set of factors, the employer has an obligation to recall employees from layoff based upon an established seniority system. *Id.* § 185c.

¹¹¹ Maldonado, *supra* note 19, at 231 (quoting *Wolf v. Neckwear*, 80 P.R.R. 519 (1958)).

¹¹² PUERTO RICO ACT, *supra* note 26, § 185b. Likewise, an employer is not acting with good cause if he induces or compels the employee to resign, by "imposing or trying to impose on him more onerous working conditions, reducing his salary, lowering his category or submitting him to derogatory criticisms or humiliations by deed or word." *Id.* § 185e.

¹¹³ EPCA, *supra* note 82, § 54(1).

¹¹⁴ *Id.* § 57(3). The precise inquiry is framed in terms of "whether the employer can satisfy the tribunal that in the circumstances he acted reasonably in treating it as a sufficient reason for dismissing the employee." *Id.*

¹¹⁵ See *infra* note 142.

ment of the individual would contravene a statutory duty or restriction.¹¹⁶ In addition, the statute permits an employer to assert "some other substantial reason" to justify termination.¹¹⁷ Amendments to the EPCA since 1980 make it even easier for an employer to satisfy the "other substantial reason" test because it permits a tribunal to take into account the size and resources of the employer when scrutinizing the decision to terminate.¹¹⁸ Furthermore, the statute specifically enumerates several reasons for dismissal that are automatically regarded as unfair, such as dismissing a woman for a reason relating to her pregnancy, or dismissing an employee "for trade union membership or activity."¹¹⁹

Relative to other countries that provide just cause protection, it is extremely easy for an employer to defend and to win unfair dismissal cases in Great Britain.¹²⁰ In applying the "substantial reason" test, most tribunals have held that once an employer demonstrates an honest belief to justify the adverse employment action, the tribunal will rarely inquire into the basis upon which that belief was formed.¹²¹ In the landmark decision of *British Home*

¹¹⁶ EPCA, *supra* note 82, § 57(2)(a)-(d). There are specific provisions in the Act that make it unfair in certain cases to dismiss an employee, i.e. for trade union membership (§ 58), for being pregnant (§ 60), or for engaging in a strike or other industrial action (§ 62). Employment legislation during the 1980s created exceptions to section fifty-eight and made it easier for employers to discharge employees for trade union related activities. Employment Act of 1980, c. 42, § 7 (Eng.); Employment Act of 1982, c. 46, §§ 2, 3 (Eng.). See generally Estreicher, *supra* note 1, at 289; Edwards, *supra* note 73, at 79.

¹¹⁷ EPCA, *supra* note 80, § 57(1)(b). The "other substantial reason" clause permits employers to have a wider latitude in lawfully discharging employees than under the ILO definitions. See John Bowers & Andrew Clark, *Unfair Dismissal Managerial Prerogative: A Study of "Other Substantial Reason"*, 10 IND. L.J. 34 (1981); Edwards, *supra* note 73, at 130-37.

¹¹⁸ Employment Act of 1980, *supra* note 116, § 6. As a result, a large employer with a substantial personnel department will have a more difficult time justifying a mishandled dismissal than a smaller employer. Edwards, *supra* note 73, at 82.

¹¹⁹ Edwards, *supra* note 73, at 78.

¹²⁰ Mead, *supra* note 11, at 2 (citing *Polkey v. Edmond Walker (Holdings) Ltd.* [1987] I.R.L.R. 13); In the approximately 11,828 cases decided by tribunals in 1978, seventy-two percent were won by employers. Stieber, *supra* note 1, at 234. See also Bowers & Clark, *supra* note 117, at 44 (arguing that because it is so easy for an employer to win unfair dismissal cases in Britain, the standard needs to be amended).

¹²¹ Estreicher, *supra* note 1, at 289; see generally MICHAEL RUBENSTEIN & YVONNE FROST, *UNFAIR DISMISSAL. A GUIDE TO RELEVANT CASE LAW* (1984) (providing case summaries on the meaning of just cause and the availability of remedies for unjust dismissal in

Stores v. Burchell, the court set out the principle that an employer must have a reasonable basis for the dismissal and must make due investigation and inquiry in order to gain sufficient information upon which to ground an "honest belief."¹²² Relying on the holding in *Burchell*, the Northern Ireland Court of Appeals in *Henderson v. Ulsterbus* held that the dismissal of an employee, a bus conductor who allegedly failed to issue tickets for the value of fares collected, was reasonable. The court reversed the lower tribunal's decision on the basis that it had wrongly substituted its own view for that of a reasonable employer.¹²³ Likewise, in *Parr v. Whitbread, Plc.*, the appeals tribunal held that the employer could blanketly dismiss the plaintiff and three other employees for theft when all four of the employees had access to the keys and safe combinations needed to commit the theft and, after reasonable investigation, it was impossible to identify any one individual as the guilty party.¹²⁴ In another case, "irreconcilable conflict of personalities" was held to be just cause for termination.¹²⁵

Although an employer has just cause when termination is motivated by the economic exigencies of the business, British law automatically requires the employer to make mandatory "redundancy payments."¹²⁶ This factor is the functional equivalent of the second prong to the just cause definition under the Model Act. In practice, many British employers argue one of the other three theories for

Britain).

¹²² *British Home Stores Ltd. v. Burchell* 1980 I.C.R. 303 (E.A.T.). See also Zall, *supra* note 22, at 442.

¹²³ *Ulsterbus Ltd. v. Henderson* 1989 I.R.L.R. 251 (C.A. N. Ireland); SWEET & MAXWELL'S ENCYCLOPEDIA OF EMPLOYMENT LAW (W Green ed.), formerly Encyclopedia of Labour Relations Law (B.A. Hepple ed.), Bull. No. 1/90, para. 90-013 (1990) [hereinafter ENCYCLOPEDIA] (citing *Ulsterbus Ltd. v. Henderson* 1989 I.R.L.R. 251 (C.A. N. Ireland)).

¹²⁴ ENCYCLOPEDIA, *supra* note 123, Bull. No. 5/90, para. 90-112 (1990) (citing *Parr v. Whitbread Plc.* (1990) I.R.L.R. 39 (E.A.T.); *Monie v. Coral Racing Ltd.* (1980) I.R.L.R. 464 (E.A.T.)).

¹²⁵ Estreicher, *supra* note 1, at 300 n.9. For other cases that explore reasonableness under § 57(3), see generally Alan C. Neal, *Unfair Dismissal II*, NEW L.J., Aug. 4, 1989, at 1088-93.

¹²⁶ The Redundancy Payments Act of 1965 contained the first of such legislation. Like unjust dismissal, it sets up a scheme whereby workers are entitled to severance payments, and recognizes that employees have a property interest in their jobs. Hugh Collins, *The Meaning of Job Security*, 20 IND. L.J. 227, 227-29 (1991). See generally Edwards, *supra* note 73, at 47-68.

just cause termination, even when their actual motive is economic, in an attempt to avoid making these statutory payments.¹²⁷ In order to recover the redundancy payment due, the discharged employee must demonstrate pretext.

Similarly, all three Canadian statutes provide for just cause protection against arbitrary discharge. None of these statutes, however, explain what it means. Nor do any of them explain what an employer must demonstrate to prove just cause. The Canadian federal legislation relies on the wisdom of arbitral jurisprudence to interpret the meaning of just cause.¹²⁸ The statute states that an adjudicator shall, "consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon."¹²⁹ In defining just cause, the court in *Duhamel v. Bank of Montreal* stated that the test is whether an employer acted in accordance with "generally accepted standards of good industrial practice."¹³⁰ Since the court looks to arbitral jurisprudence to help define "good industrial practice," arbitrators have a great deal of flexibility in deciding cases.

General categories that typically qualify as cause for dismissal in the federal sector include: incompetence, excessive absenteeism, severe and cumulating misconduct, insubordination, theft or dishonesty, and criminal conduct.¹³¹ In addition, the federal sector has also adopted the requirement of progressive discipline from arbitral jurisprudence in the union sector.¹³² With respect to the busi-

¹²⁷ Estreicher, *supra* note 1, at 300 n.8.

¹²⁸ G. England, *Unjust Dismissal in the Federal Jurisdiction: The First Three Years*, 12 MANITOBA L.J. 9, 21 (1982); C. Gordon Simmons, *The Experience of the Unjust Dismissal Section Under Section 61.5 in the Canada Labour Code, 1978-1981*, in TERMINATION OF EMPLOYMENT SYMPOSIUM: QUEEN'S UNIVERSITY AT KINGSTON 59, 62, (1981) (citing Campbell v. Reliance Moving and Storage Co. Ltd. (Aug. 16, 1979); Richard Huneault v. Central Mortgage and Housing Corp. (Aug. 27, 1979)).

¹²⁹ Grossman, *supra* note 12, at 156 (citing Canada Labour Code § 242(3)).

¹³⁰ *Id.* at 158; England, *supra* note 128, at 21 (citing *Duhamel v. Bank of Montreal* (Feb. 10, 1981)). In defining what constitutes "good industrial relations practice," the court looked to arbitral jurisprudence as a good indicator. *Id.*

¹³¹ See generally Grossman, *supra* note 12, at 159-79. For cases dealing with common law just cause in Canada, see DAVID HARRIS, *WRONGFUL DISMISSAL* 3-101 (1984).

¹³² Simmons, *supra* note 128, at 63 (citing *Walker v. Canadian Imperial Bank of Commerce* (Aug. 7, 1979)).

ness necessity prong of the Model Act's definition, the Canadian federal statute does not entertain claims from individuals "laid off because of lack of work or because of the discontinuance of a function."¹³³ For this reason, the Canadian Government does not have to justify work force reductions. In all cases, the employer carries the burden of proving just cause.¹³⁴

The meaning of just cause under the provincial legislation in Nova Scotia and Quebec is also interpreted through arbitral jurisprudence. The Nova Scotia statute, however, provides guidance to an arbitrator making this determination by stating that an employer can discharge, suspend, or lay off an employee that "has been guilty of willful misconduct or disobedience or neglect of duty that has not been condoned by the employer."¹³⁵ In addition, it has been held to be just cause for an employer to dismiss an employee when a company eliminates a cost-inefficient position by reorganizing jobs.¹³⁶

The Quebec statute draws a distinction between illegal and unfair dismissals, but provides similar procedures and remedies in both cases.¹³⁷ An illegal dismissal is similar to the public policy exception under the common law at-will doctrine. For example, it is an illegal dismissal for an employer to discharge an employee because she is pregnant.¹³⁸ In contrast, unfair dismissal would encompass dismissals not made for "good and sufficient cause."¹³⁹ In determining just cause, arbitrators look to arbitral jurisprudence developed in the union sector.¹⁴⁰

¹³³ Canada Federal, *supra* note 92, § 240(3)(a).

¹³⁴ Simmons, *supra* note 128, at 64 (citing, *inter alia*, *Wesley v. Worldways Airlines Ltd.* (Oct. 30, 1980)).

¹³⁵ Nova Scotia (1972), *supra* note 92, § 68(1).

¹³⁶ *Porter v. C.I.L. Inc.* 42 N.S.R.2d 624 (C.A. 1980).

¹³⁷ Quebec (1979), *supra* note 92, §§ 122-35.

¹³⁸ *Id.* § 122(4).

¹³⁹ *Id.* § 124.

¹⁴⁰ Jean Denis Gagnon, *Le Recours A L'Arbitrage dans les Cas de Congeidiement Injuste (English Summary) (Arbitration of Unjust Dismissal)*, in TERMINATION OF EMPLOYMENT SYMPOSIUM: QUEEN'S UNIVERSITY AT KINGSTON 79-81 (arguing that just cause in Quebec is interpreted through arbitral jurisprudence). For example, an employer was permitted to discharge a seasonal employee at the end of the season. *Deraiche v. J.P. Porter Co.* 1951 Que. S.C. 311. Furthermore, it was just cause to discharge an employee, a bursar at defend-

As a matter of policy, a just cause standard has the potential to promote industrial justice and create greater certainty in the employment relationship by identifying what constitutes acceptable behavior in the work place. Since the common law exceptions to the at-will rule have been in a state of flux, a properly drafted and implemented just cause standard could effectively put employees on notice as to when they can be disciplined, and for what offenses they can be discharged. Such a standard could also provide employers with greater guidance as to when discipline and discharge are legal, without unnecessarily trammeling their right to make and enforce reasonable work place rules.¹⁴¹

While it is clear that the burden should be placed on the employer to prove just cause, it remains ambiguous what standard of review should be established. International and domestic experiences are clearly mixed on this matter. The British standard of a subjective "substantial reason," focusing on whether an employer acted reasonably and in good faith, might provide the model for a just cause definition in a pro-employer jurisdiction because it eliminates the problem of having a fact finder "second-guess" termination decisions.¹⁴² In contrast, the Canadian federal standard of "generally accepted standards of good industrial practice," as defined through arbitral jurisprudence, might be used as the model in a pro-employee jurisdiction.

Since there is arguably no reason why behavior that is unacceptable in the union sector should be tolerated in the non-union sec-

ant's private school, for sexually harassing a secretary. *Himmelman v. King's-Edgehill School* (1985) 7 C.C.E.L. 16, 67 N.S.R.2d 358, 155 A.P.R. 358. *But see Bienvenu v. Zellers, Inc.* 5 C.C.E.L. 30 (1984), (holding that employer did not have just cause to dismiss an employee who failed to follow company policy on reduction in hours). In addition, internal business reorganization may be a pretextual argument for age discrimination, and therefore, was not just cause for dismissal. *Stock v. Best Form Brassiere Canada, Inc.* 15 C.C.E.L. 298 (Que. S.C. 1986).

¹⁴¹ Summers, *supra* note 2, at 162-63.

¹⁴² This deferential approach has been followed by some courts in the United States. *See Maietta v. United Parcel Service, Inc.*, 749 F. Supp. 1344, 1362 (D.N.J. 1990), *aff'd* 932 F.2d 960 (3d Cir. 1991) ("[an] employer need only make a good faith determination having credible support that good cause exists"); James A. Burns, Jr., *Proving Just Cause in Court*, 18 EMPLOYEE REL. L.J. 177-78 (1992) (citing *Simpson v. Western Graphics Corp.*, 643 P.2d 1276 (Ore. 1982)).

tor, one alternative would be to adapt the body of arbitration decisions on just cause in the union sector to the non-union sector.¹⁴³ While employees might favor this approach, employers are likely to reject it on the basis that labor arbitrators tend to impose an unrealistically rigorous standard of review.

Although greater certainty in the interpretation of a just cause standard could be achieved through the use of a more exacting definition, doing so runs the risk of under-inclusiveness. While Puerto Rico seems to avoid this problem under its just cause definition, it is a civil law jurisdiction. Political expediency, however, "might call for restricting statutory protection to an enumerated list of the most common abuses."¹⁴⁴

In light of these concerns, the Model Act's two-prong test for just cause seems to strike a reasonable balance between employee and employer interests. Uncertainty exists, however, as to the method by which arbitrators or juries would interpret the meaning of "reasonable basis" or "good faith business judgment." Ultimately, it is this ambiguity that makes both employer and employee interest groups skeptical about supporting just cause legislation.

B. Scope of Coverage

If fully implemented, it is estimated that the Model Act would grant just cause coverage to approximately sixty million employees. In addition, up to ten percent of the total number of workers that are fired each year would have valid claims under the Act.¹⁴⁵ The good cause standard would cover all non-union employees currently under the at-will doctrine with several notable exceptions. First, the Act specifically excludes independent contractors and all

¹⁴³ Although each case must be judged on its own merits, some examples of conduct that have constituted the just cause basis for discharge in labor union arbitration include: absenteeism, lateness, loafing, leaving work early, sleeping on the job, fighting, horseplay, insubordination, using profane or abusive language, falsifying employment application, theft, dishonesty, disloyalty, unsatisfactory job performance, possession or use of alcohol, gambling, and sexual harassment. ELKOURI & ELKOURI, *supra* note 23, at 691-707.

¹⁴⁴ St. Antoine, *supra* note 42, at 72.

¹⁴⁵ Bernstein, *supra* note 3, at 109.

individuals working for employers with fewer than five employees.¹⁴⁶ Second, it excludes part-time and probationary employees.¹⁴⁷ In addition, employees working under a fixed term contract or hired to complete an assignment within a specified period of time are not covered.¹⁴⁸ Employees not specifically excluded from coverage must work for the same employer for a minimum of one year in order to qualify under the Act.¹⁴⁹

The Model Act permits the parties to contractually waive the good cause requirement by agreement.¹⁵⁰ In cases of contractual waiver, employers are required to provide severance pay in an amount "equal to at least one month's pay for each full year of employment, up to a maximum total payment equal to thirty months pay at the employee's rate of pay in effect immediately before termination."¹⁵¹ Since the large majority of executives, managers, and professionals do not work under contract, they therefore would be covered under the Model Act. For this reason, employers operating in jurisdictions that adopt the Model Act may require these employees to sign waivers as a term and condition of employment.¹⁵²

The international experience is mixed on setting an appropriate qualifying period for protection against unfair dismissal. The British statute requires a two-year period of continuous employment for employees to qualify.¹⁵³ Similar to the Model Act, some classes

¹⁴⁶ MODEL ACT, *supra* note 15, § 1(1)-(2). With respect to public sector employees, the Act excludes, "a political subdivision, a municipal corporation, or any other governmental subdivision, agency, or instrumentality." *Id.* § 1(2).

¹⁴⁷ *Id.* § 3(b). "The good-cause protections [sic] apply only to an employee (i) who has been employed by the same employer for a total period of one year or more and (ii) who has worked for the employer for at least 520 hours during the 26 weeks preceding the termination." *Id.* § 3(b).

¹⁴⁸ *Id.* § 4(d).

¹⁴⁹ *Id.* § 3(b).

¹⁵⁰ *Id.* § 4.

¹⁵¹ *Id.* § 4(c).

¹⁵² According to a survey of two hundred of the largest companies in the United States, half retain at least one or more of their executives under contract. Usually, however, only the most senior executives have the security of these "golden parachutes." Robert Salwen, *Crafting Employment Contracts and Other Executive Agreements*, DIRECTORS AND BOARDS, Winter 1989, at 34-35.

¹⁵³ Employment Act of 1980, Ch. 42, (Eng.) § 64(1)(a); Lewis, *supra* note 79, at 713. In

of employees in Britain are specifically not covered. For example, independent contractors do not qualify under the statute.¹⁵⁴ In addition, employees working under a fixed term contract for less than one year, part-time employees working fewer than sixteen hours per week, and employees over the retirement age are specifically excluded.¹⁵⁵

The Nova Scotia statute provides the most stringent qualifying requirements. As a result, it is the most pro-employer of the statutes examined because it restricts coverage to a select group of employees that are employed by the same employer for ten years or longer.¹⁵⁶ In addition, it specifically excludes part-time employees and construction workers from coverage.¹⁵⁷ In the 1976 amendment, the legislature limited just cause protection by expanding the applicability of the exceptions previously listed to those employees with longer than ten years of service. This action was in response to the rule being interpreted to mean that any employee with ten years of service or longer with the same employer was entitled to protection.¹⁵⁸

In contrast, the Quebec statute is much broader in its scope and application. Upon passage of the statute, an employee was required to have five years of uninterrupted service. As recently amended in 1991, the five year qualifying period was reduced to four years. In

the British case of *Pinkney v. KCA Offshore Drilling Services*, the court clarified the meaning of "continuous employment" and "associated employer" by holding that an employee, having worked for three companies that were trading as a partnership, could aggregate his employment between 1980-87 and qualify under the Act because the partners were deemed "associated employers" within the meaning of § 153(4). *ENCYCLOPEDIA*, *supra* note 123, Bull. No. 2/90, para. 90-046 (Mar. 1990) (citing *Pinkney v. KCA Offshore Drilling Services, reu'g Pinkney v. Sandpiper Drilling*, 1989 I.C.R. 389 (E.A.T.)).

¹⁵⁴ Edwards, *supra* note 73, at 7-12.

¹⁵⁵ EPCA, *supra* note 82, § 64. In Britain, an employee loses the right to claim unfair dismissal once he or she reaches "normal retirement age" (NRA). The NRA is determined by ascertaining the reasonable expectations of employees holding the relevant "position" within the "undertaking." *ENCYCLOPEDIA*, *supra* note 123, Bull. No. 2/91 para. 91-017. See *Brooks v. British Telecommunications Plc.* (1991) I.R.L.R. 4 (citing *Waite v. Government Communications Headquarters* (1983) I.R.L.R. 341). See also *Estreicher*, *supra* note 1, at 288.

¹⁵⁶ Nova Scotia (1976), *supra* note 92, § 67A.

¹⁵⁷ *Id.* § 68(3)(a)-(h).

¹⁵⁸ *Id.* § 15(a).

1992, the qualification was again lowered to three years.¹⁵⁹ In addition, this amendment increased the statute of limitations on filing a claim from thirty days after discharge to forty-five days.¹⁶⁰ As a result, the scope of coverage in Quebec was expanded.

Pro-employee advocates in favor of greater coverage than provided under the Model Act may also advocate an even broader scope based upon the examples of the Canadian federal statute and Puerto Rico's Act 80. The Canadian statute extends its just cause protection to cover all federally employed workers in the public sector who have been employed for more than twelve months.¹⁶¹ Similarly, the statute in Puerto Rico covers, "[e]very employee in commerce, industry or any other business or place of employment . . . in which he works for compensation of any kind, under contract without a fixed time."¹⁶²

There are several policy reasons for following a compromise approach as set out in the Model Act with respect to the scope of just cause protection. One reason is to prevent a flood of litigation, which would reduce the speed in which claims are adjudicated.¹⁶³ With respect to the British statute, one commentator stated that qualifying periods were introduced strictly for administrative purposes, and were not intended as a matter of policy under which only the most senior employees should benefit from protection

¹⁵⁹ Quebec (1990), *supra* note 92, § 59(1)-(2). Previously, under the five year qualifying period, employers could, as under the Nova Scotia statute, find it efficient to discharge employees just prior to the vesting of their right to wrongful discharge protection since they would profit from having trained that employee without having liability for unfair dismissal. Gagnon, *supra* note 140, at 79. In contrast, there is a greater disincentive under the new three year qualifying period to discharge workers. In this respect, the Quebec statute is now more like the Canadian federal statute than the Nova Scotia statute.

¹⁶⁰ *Id.* § 59(4).

¹⁶¹ Canada Federal, *supra* note 92, § 240(1). See also Estreicher, *supra* note 1, at 287. Arbitral jurisprudence interprets the meaning of a qualified employee under the federal statute (i.e. managers and persons working for employers not engaged in a federal undertaking are excluded), whether the employee was dismissed (i.e. cases of constructive dismissal or non-renewal of a fixed contract), and whether the complainant completed twelve consecutive months of continuous work. GROSSMAN, *supra* note 12, at 92-136; Simmons, *supra* note 128, at 59-60.

¹⁶² PUERTO RICO ACT, *supra* note 26, § 185a.

¹⁶³ Summers, *supra* note 2, at 191.

against wrongful discharge.¹⁶⁴

In addition, a statute should permit certain exceptions. If all part-time, probationary, or short-term contract workers were covered under the Act, it would arguably place an unfair burden on employers. Conversely, restricting the statute's coverage to only long-term tenured employees is inequitable under the Model Act since one of its key premises is the *quid pro quo* of lower recoveries for greater coverage. With a growing trend towards part-time employment in the United States, as well as in Britain and Canada, greater numbers of workers are likely to be without just cause protection.

C. Dispute Resolution Procedures

Employees covered under the Act must follow specific procedures in order to pursue a claim for wrongful discharge. For example, the recommended statute of limitations requires an employee to file a complaint within six months after the effective date of termination.¹⁶⁵ In addition, the accused employer has an obligation within ten days after termination to send the employee a written statement of the reasons for termination.¹⁶⁶ With respect to other procedures, the Act is less clear. First, it does not stipulate with which commission, department, or service an employee must file his or her claim.¹⁶⁷ Second, although the Act requires payment of a filing fee along with the initial complaint, it does not specify how much is to be paid or by whom it should be paid—the employer, the employee, apportioned between the two parties, or publicly funded.¹⁶⁸ On these matters, the drafters intended for states to

¹⁶⁴ Neal, *supra* note 125, at 1011. Men over sixty-five and women over sixty are excluded. Estreicher, *supra* note 1, at 288.

¹⁶⁵ MODEL ACT, *supra* note 15, § 5(a).

¹⁶⁶ *Id.* § 5(b). The Act does not provide a remedy for an employee who requests a written statement but is not furnished with one. In this case, an employee may have to resort to the courts to force an employer to produce this document. Under an arbitration scheme, it is conceivable that this issue would be arbitrable.

¹⁶⁷ *Id.* § 5(a).

¹⁶⁸ *Id.* § 5(e). It is possible that if the initial filing fee for an employee to institute an action is greater than the court costs to file a complaint, it may help to weed out frivolous claims. Alternatively, if this fee is set too high, it may discourage meritorious claims.

adopt their own provisions.

Determining what procedure should be used, and who should bear the cost, are somewhat dependent upon each other. This relationship exists because some methods for cost allocation are more compatible with certain dispute resolution procedures than others. The Model Act offers three possibilities for adjudicating wrongful discharge claims: arbitration, administrative agencies, and the courts.¹⁶⁹ The Model Act exhibits a decided preference for arbitration. For this reason, the drafters described it in the main text while adding the alternative methods to the appendix. According to the drafting committee, "arbitration coincides with the historic method of resolving labor disputes, is more efficient and expeditious, and brings more skilled and objective fact finders to the adjudication process."¹⁷⁰

1. Arbitration

Proponents of an arbitration system argue that taking wrongful discharge out of the courts would provide greater access to justice for the majority of the work force, reduce costs, and accelerate the time to process each case. Under the Model Act, the arbitration system would include several distinctive features. The employee would have the initial burden of presenting a *prima facie* case by showing that termination was made without good cause. If the employee is successful, the burden would then shift to the employer.¹⁷¹ The use of limited discovery would be followed much like in the union sector, and an employer would be required to furnish an employee with a complete copy of his personnel file upon request.¹⁷²

The Model Act is unclear, however, about many factors that are crucial to the successful implementation of an arbitration system. For example, the Act fails to define the qualifications that arbitra-

¹⁶⁹ *Id.* § 6.

¹⁷⁰ Mauk, *supra* note 38, at 30. Many commentators take issue with the idea of arbitral expertise. Although arbitration has been traditionally utilized in the union sector, it has not been widely used in the non-union sector.

¹⁷¹ MODEL ACT, *supra* note 15, § 6(f).

¹⁷² *Id.* § 6(c).

tors must possess in order to hear cases, how they are to be selected and appointed, whether remuneration would be a flat fee or per diem, and who would bear the burden of paying these fees. Most importantly, the Model Act remains silent as to how an arbitration system should be implemented and funded. The Model Act's proposal for arbitration is ambiguous because it envisions the application of the Uniform Arbitration Act *as if* the parties had *voluntarily* agreed to its terms.¹⁷³ Therefore, although the arbitration process is compulsory, in all other respects the parties are treated as if they voluntarily submitted to arbitration.

An examination of the international and domestic perspectives suggests that there are four basic models that an arbitration statute could follow. First, under a voluntary, privately funded arbitration model, the parties would be required to agree voluntarily to use and to fund the process. Both union labor arbitration in the United States and the Montana Act follow this model.¹⁷⁴ The second arbitration model mandates participation and is funded with government revenues. This model, which functions like the administrative agency option proposed in the alternative by the Model Act, is followed by Great Britain, Nova Scotia, and the Canadian federal sector. From these two basic models two additional hybrid models are derived. First, the typical voluntary arbitration system could be funded with public money. None of the cases examined in this Comment follow this path. Alternatively, the compulsory arbitration model could require the parties to pay their own costs. This path is followed in Quebec.

The Department of Labor defines compulsory arbitration as a "process of settlement of employer-labor disputes by a government

¹⁷³ *Id.* § 6(a).

¹⁷⁴ A purely voluntary system operates under the Montana Act. There, claims can be submitted to arbitration if both parties voluntarily agree to it in writing. Bernstein, *supra* note 3, at 109. As in the Model Act, arbitration in Montana is also governed by the Uniform Arbitration Act. If the case goes to arbitration, the parties waive their right to litigate in court and submit to an arbitrator's final and binding decision. Montana Act, *supra* note 28, § 9(6). When both parties do not agree to arbitrate, the Model Act and Montana Act take different approaches. Under the Montana statute, the wrongful discharge case would proceed to court. Under the Model Act's proposed system, the parties would still be compelled to arbitrate.

agency (or other means provided by government) which has power to investigate and make an award which *must* be accepted by all parties concerned.”¹⁷⁵ In this case, enforcement of wrongful discharge would be delegated to a “new or existing administrative agency, staffed by civil service or other governmental personnel, operating under applicable state statutes.”¹⁷⁶ The character and identity of the administrative public agency is left entirely to the individual states to decide.¹⁷⁷ In evaluating this option, states should consider the evidence from abroad.

The case of the British industrial tribunal system suggests that the establishment of an administrative agency to perform wrongful discharge arbitration is a viable alternative. In Great Britain, the tribunal system was preferred to the courts for the same reasons that arbitration is used in the United States: speed, low cost, accessibility, and informality of procedures.¹⁷⁸ In essence, the tribunal system operates in the same manner that labor arbitration does in the union sector, with the exception that it is staffed by government employees in an administrative agency.

In Great Britain, if the dispute is not resolved at the conciliation stage, then a statutorily established industrial tribunal automatically reviews the case. Any employee qualifying under the EPCA may bring a complaint before the industrial tribunal for unfair dismissal.¹⁷⁹ These tribunals are typically tripartite, and are staffed by one member nominated by unions, one nominated by management, and one who is a legally qualified chairman.¹⁸⁰ All tribunal members are government appointed and paid. The “lay” members of the tribunal, those nominated by union and management, are paid on a per diem basis and are considered valuable members of the panel since they bring their practical experience to bear on the

¹⁷⁵ ELKOURI & ELKOURI, *supra* note 22, at 14, (emphasis in original) (quoting *Should the Federal Government Require Arbitration of Labor Disputes in All Basic Industries?* 26 CONG. DIG. 193, 195 (1947)).

¹⁷⁶ MODEL ACT, *supra* note 15, Alternative A.

¹⁷⁷ Mauk, *supra* note 38, at 33 n.10.

¹⁷⁸ Lewis, *supra* note 79, at 716.

¹⁷⁹ EPCA, *supra* note 82, § 67(1).

¹⁸⁰ Lewis, *supra* note 79, at 714.

cases which they hear.¹⁸¹ In contrast, most chairmen are full-time salaried employees of the tribunal service, and are trained in the statutory and judicial framework of the employment tribunal.¹⁸² As a result, the chairman provides legal experience in the handling of the cases, while the lay members bring their experience from industry.¹⁸³ While the British tribunals have jurisdiction to hear other cases, such as equal pay and redundancy pay claims, wrongful discharge claims make up the bulk of their case load. In addition, judicial review is available to the claimant through the Employment Appeals Tribunal (EAT).¹⁸⁴ Most claimants do not pursue the process beyond this stage.¹⁸⁵

Parties in Great Britain can avoid this procedure by entering into a "dismissal procedures agreement."¹⁸⁶ Such an agreement permits the parties to submit the dismissal to private arbitration "by an independent referee."¹⁸⁷ Any of the parties may waive back into the statute, however, by applying to the Secretary of State to revoke the dismissal procedures agreement. Private arbitration is, therefore, a completely voluntary process in Great Britain.¹⁸⁸

Under the Canadian federal statute, if a claim cannot be settled by an inspector at the investigative stage, the complainant can request that the matter be referred to an adjudicator by the Minister of Labour.¹⁸⁹ Upon appointment of the adjudicator, both parties are notified in writing.¹⁹⁰ The adjudicator then contacts the parties

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Patrick Elias, *Fairness in Unfair Dismissal: Trends and Tensions*, 10 INDUS. L.J. 201, 202 (1981).

¹⁸⁴ See Sir John Wood, *The Employment Appeal Tribunal as it Enters the 1990s*, 19 INDUS. L.J. 133 (1990).

¹⁸⁵ Lewis, *supra* note 78, at 715. Discharged employees may appeal decisions through the Employment Appeals Tribunal (EAT), and then through the courts. *Id.*

¹⁸⁶ EPCA, *supra* note 82, § 65. Such an agreement must not discriminate within groups of employees that it purports to cover, and its remedies must be "as beneficial (but not necessarily identical with) those provided" in the statute. *Id.*, § 65(2)(d).

¹⁸⁷ *Id.* § 65(2)(e).

¹⁸⁸ *Id.* § 66.

¹⁸⁹ Canada Federal, *supra* note 92, §§ 241(3), 242(1); GROSSMAN, *supra* note 12, at 136, 141.

¹⁹⁰ GROSSMAN, *supra* note 12, at 143.

to set up a hearing on the first mutually convenient date.¹⁹¹ At the hearing, the adjudicator is required by the statute to give both parties an opportunity to present evidence relating to the claim.¹⁹² In rendering a decision, since the adjudicator is to give the benefit of the doubt to the employee, unfair dismissal complaints are generally uphill battles for Canadian federal sector employers.

Both of the Canadian provinces also favor compulsory arbitration. In Nova Scotia, a statute sets up an administrative agency which performs public arbitration. Under the 1972 Act, a Labour Standards Tribunal was established in order to adjudicate claims.¹⁹³ Similar to the British labor tribunal, three members are required to sit on each case. Unique to this progressive province is the requirement of at least one female member on the panel.¹⁹⁴ An employee who suspects that he was wrongfully discharged, can voice a complaint. At that point, the Director will investigate the complaint, attempting to forge a settlement, and if the Director rejects the claim, the employee has a right to appeal.¹⁹⁵ If the claim is permitted to go forward, members of the tribunal are to be paid a remuneration set by the Governor in Council covering their actual and reasonable expenses incurred in hearing the case.¹⁹⁶

In Quebec, if mediation efforts fail, the moving party can file again with the commissioner within thirty days to have the case referred to arbitration. This process resembles the one in Nova Scotia.¹⁹⁷ In Quebec, however, the statute specifically requires that the expenses of arbitration be split between the employer and the employee.¹⁹⁸ In the 1990 amendments, the term "labor commissioner" replaced the term "arbitrator."¹⁹⁹

Following the British and Canadian examples, the United States could pursue the compulsory arbitration path via an administra-

¹⁹¹ *Id.*

¹⁹² *Id.*, Canada Federal, *supra* note 92, § 242(2)(b).

¹⁹³ Nova Scotia (1972), *supra* note 92, § 15.

¹⁹⁴ *Id.* § 15(1) (§§ 19-29 set up the administration of the tribunal).

¹⁹⁵ *Id.* § 19(2), (6).

¹⁹⁶ Nova Scotia (1972), *supra* note 92 § 16.

¹⁹⁷ Heenan & Brady, *supra* note 75, at 195.

¹⁹⁸ Quebec (1979), *supra* note 92, § 135.

¹⁹⁹ Quebec (1990), *supra* note 92, §§ 61-64.

tive agency model. According to one commentator, “[i]n the long run, if we are to have a first-class public justice system, available freely to all, then we must find the necessary public funds to pay for it.”²⁰⁰ This goal could be accomplished by establishing a new administrative agency to staff tribunals. When Michigan, New Jersey, New York, and Pennsylvania introduced unfair dismissal legislation, each featured state-run review boards to hear disputes over terminations.²⁰¹ Alternatively, the jurisdiction of the government agencies that already handle wrongful discharge cases could be expanded. On the state level, these functions could be added to existing mediation and arbitration agencies.²⁰² On the federal level, the role of the Federal Mediation and Conciliation Service (FMCS) or the National Mediation Board (NMB) could be expanded to accommodate wrongful discharge claims. Making such radical changes in existing state or federal agencies, however, may have unintended and undesirable consequences.

In setting up an arbitration system, the non-union sector may follow the path already paved by voluntary union labor arbitration in the United States. When the Canadian federal statute was passed, its drafters used the U.S. union labor arbitration system as the model. “The persons named as adjudicators are invariably ones who have served as arbitrators under collective agreements and the case law which has developed under these provisions has been very strongly marked by concepts imported from grievance arbitration in a unionized workplace.”²⁰³ The apparent success of this statute in Canada suggests that the United States might be able to follow suit and adapt its union arbitration system to the non-union

²⁰⁰ Frank E.A. Sander, *Paying for ADR*, A.B.A.J., Feb. 1992, at 105.

²⁰¹ Warshaw, *supra* note 2, at 75.

²⁰² Summers, *supra* note 2, at 191.

²⁰³ Heenan & Brady, *supra* note 75, at 195. The labor arbitration system in Canada is different from the system in the United States union sector in several respects. Unions and management in the United States write an arbitration clause into the collective bargaining agreement and the procedure is both private and voluntary. In Canada, the arbitration process is quasi-public and mandatory. Adams et al., *supra* note 75, at 599. Either party may apply to the Labour Ministry for a state-appointed arbitrator to quickly settle disputes. *Id.* at 599. “Arbitral jurisprudence in the two countries is very similar in cases involving: insubordination, theft, collective action, fighting, off-duty conduct, attendance, performance, loyalty, conflicts of interest, and intoxication.” *Id.* at 600.

sector.

Despite the vast possibilities for an arbitration or administrative agency model for resolving wrongful discharge disputes, there appears to be only lukewarm interest on the part of employer and employee advocates. Employers are skeptical of arbitration primarily because of the uncertainty as to how arbitrators will interpret the just cause standard.²⁰⁴ In contrast, plaintiffs' lawyers want to keep wrongful discharge in the courts because their clients are likely to collect larger damage awards under the current system, and they are likely to receive higher legal fees as a result since most plaintiffs' attorneys' work under a contingency fee arrangement.²⁰⁵

2. Alternative Dispute Resolution (ADR)

One of the major problems with the use of an arbitration system as set out in the Model Act is that every case filed automatically proceeds to arbitration. In the unionized sector, however, the union must take a case through several steps of a grievance procedure before it ultimately reaches the arbitration stage. In fact, an overwhelming majority of these disputes are settled prior to union arbitration. For example, in a typical year, 200,000 grievances are filed under a United Auto Workers-General Motors collective bargaining agreement. In reality, only one thousand of those grievances are scheduled for arbitration, and of those scheduled, less than fifty are actually arbitrated.²⁰⁶ While arbitration is arguably less

²⁰⁴ Jane S. Pollack, *Model Termination Act Puts 'At Will' at Risk*, 130 N.J.L.J. 1348, 1373 (Apr. 27, 1992). Under the Model Act, "the path is clear for an arbitrator to second-guess management's decision. The Model ETA should not present any mechanism by which an arbitrator might invade a decision-making process that belongs strictly in the boardroom and executive offices. Given the broad discretion exercisable by arbitrators, employers are likely to be uncomfortable with the arbitral process contemplated under the Model ETA." *Id.* In addition, "[c]onsidering employees' general view that governmental agencies exhibit a strong pro-employee bias, the prospect of agency-operated arbitration is sure to be [an] anathema to management." *Id.*

²⁰⁵ Those individuals most likely to recover substantial awards under the common law exceptions include older workers, those individuals that are seriously wronged and could effectively appeal to the sympathies of a jury, and other highly paid workers who could afford to go to court. Samborn, *supra* note 5, at 40.

²⁰⁶ LESLIE, *supra* note 3, at 6-2.

expensive than the courts, there are still more economical and perhaps more beneficial ways to resolve wrongful discharge cases.²⁰⁷

The Montana Act addresses this problem by granting enhanced legal status to employer internal grievance procedures. The Act requires a discharged employee to first exhaust internal grievance procedures before being allowed to file a claim.²⁰⁸ In order to trigger this procedure, employers must adopt a written procedure, and notify discharged employees of the steps involved within seven days of the discharge.²⁰⁹ The benefits to this requirement are that employers can gather more information on the termination and perhaps reverse a decision if it is unwarranted without legal expense, or at least reduce the uncertainty about whether the discharge will result in subsequent litigation.²¹⁰

While the Model Act permits the use of ADR procedures when an employer and employee expressly authorize it in a written document, it does not state what types of ADR should be used nor when ADR is applicable.²¹¹ In addition, although an employer may establish an internal grievance procedure to settle claims, an employee does not have an obligation to exhaust this process prior to seeking relief under the Model Act.²¹²

The Model Act does, however, provide employers with a mechanism to weed out claims prior to the arbitration process since it permits them to seek a preliminary determination as to whether discharge is justified before the employee is terminated.²¹³ One problem with this approach is that if an employer's decision to terminate is ratified, this pre-termination decision might preclude the employee from bringing a wrongful discharge case. If the decision to terminate is not ratified, the evidential value of the pre-termination hearing decision in the subsequent wrongful discharge case re-

²⁰⁷ See James N. Adler, *Settling Wrongful Termination Actions: A Practical Approach*, 11 INDUS. REL. L.J. 18 (1989) (suggesting a consulting arrangement, mediation, and settlement).

²⁰⁸ Montana Act, *supra* note 28, § 39-2-911; Schramm, *supra* note 29, at 117.

²⁰⁹ Schram, *supra* note 29, at 117.

²¹⁰ *Id.* at 118.

²¹¹ MODEL ACT, *supra* note 15, § 4(h)-(i).

²¹² *Id.* § 5(a).

²¹³ *Id.* § 5 (c)-(d).

mains unclear.

Similar pre-termination procedures already operate in the United States. For example, pre-termination hearings for public employees became a requirement under the Supreme Court's decision in *Cleveland Board of Education v. Loudermill*.²¹⁴ In addition, a state mediation system to handle grievances currently exists in South Carolina.²¹⁵

In addition to the use of pre-termination ADR, the international experience permits the use of post-termination mediation and conciliation to resolve disputes. In Great Britain, all complaints are referred to the Advisory, Conciliation and Arbitration Service (ACAS), a government sponsored agency, whereby conciliation is attempted.²¹⁶ ACAS is governed by a tripartite council composed of members nominated by employers, unions, and government selected academics.²¹⁷ ACAS officials offer publicly funded conciliation.²¹⁸ Studies suggest that approximately one-third of all complaints are resolved at this stage.²¹⁹ Although reinstatement is used infrequently, in Great Britain, it is still twice as likely to occur at the conciliation stage than at the hearing stage. In addition, this alternative is cost effective. Forty-two percent of the British employers who settled stated that they did so because it cost less than arbitration.²²⁰

The results are even more pronounced under the federal Canadian legislation, which mandates the conciliation of all claims. The statute states that, "an inspector shall endeavour to assist the parties to the complaint to settle the complaint or cause another in-

²¹⁴ *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); LEX K. LARSON & PHILLIP BOROWSKY, 2 UNJUST DISMISSAL 11-9 to 11-10 (1992).

²¹⁵ COMPARATIVE INDUSTRIAL RELATIONS, *supra* note 23, at 74.

²¹⁶ *Id.* at 46.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Of the 28,624 wrongful discharge claims filed in Great Britain in 1980: 9,081 were withdrawn (31.7 %), 9,506 were settled through conciliation (33.2 %), and 10,037 were decided by a tribunal (35.1 %). Lewis, *supra* note 79, at 716.

²²⁰ The less expensive it is to pay out severance, the less likely employers are to settle, reinstate, or reengage. Linda Dickens, et. al. *Re-employment of Unfairly Dismissed Workers: The Lost Remedy*, 10 INDUS. L.J. 160, 171 (1981).

spector to do so.”²²¹ Although the statute uses the term “shall,” thereby implying that the procedure is voluntary, it has not been interpreted in that manner nor has the validity of mandatory conciliation been challenged.²²²

The conciliation process under the Canadian federal statute begins with the labor inspector sending a copy of the complaint to the employer, and giving the employer fifteen days to respond in writing, detailing the reasons for the dismissal.²²³ It is imperative that the employer undertake a thorough investigation at this stage in order to establish all of the reasons for the dismissal because the employer may be limited to those reasons listed in the written response if the case proceeds to hearing.²²⁴ In addition, the inspector possesses broad powers under the statute to assist in the resolution of the complaint, which include the right to inspect the employer’s books and records.²²⁵ In the event that the parties cannot reconcile their differences at this stage, which typically lasts about three months, the complainant can request in writing that the claim be referred to an adjudicator.²²⁶ According to a study conducted during the two-year period following passage of the Canadian federal legislation, forty-six percent of the total number of complaints were settled at the conciliation stage.²²⁷

Similarly, in Nova Scotia, the Director of Labour Standards, or a designated officer of the Department of Labour, shall attempt to settle the complaint.²²⁸ If, however, the parties fail to reach a settlement, the Director may refer the matter to the Labour Standards Tribunal for arbitration.²²⁹

In contrast, mediation is discretionary in Quebec. Upon receipt of an employee’s complaint, the Commissioner may appoint a me-

²²¹ Canada Federal, *supra* note 92, § 241(2) (emphasis added).

²²² G. England, *Unjust Dismissal in the Federal Jurisdiction: The First Three Years*, 12 MANITOBA L.J. 9, 20-21 (1982).

²²³ GROSSMAN, *supra* note 12, at 137.

²²⁴ *Id.* at 138-39.

²²⁵ *Id.* at 140.

²²⁶ Canada Federal, *supra* note 92, § 241(3); GROSSMAN, *supra* note 12, at 141.

²²⁷ England, *supra* note 222, at 20.

²²⁸ Nova Scotia, *supra* note 92, § 19(1).

²²⁹ *Id.* § 19(4).

diator to settle the dispute.²³⁰ For this purpose, the employer may be compelled to provide a written explanation of the employee's discharge.²³¹ If the conflict is mediated but not settled, an employee retains the right to request arbitration.²³²

The experience in Great Britain and Canada, as well as in other European countries, suggests that ADR techniques, such as mediation and conciliation, should be used in conjunction with an arbitration system. Alternative dispute resolutions that have been incorporated into foreign statutes have been successfully used to resolve cases prior to arbitration. In addition, the evidence suggests that the remedy of reinstatement may be more effective when the parties reconcile their differences earlier in the process.

3. Appellate Review

If the arbitration path for dispute resolution is followed, the extent to which courts should have the power to review arbitration decisions remains unclear. Although the Model Act specifically limits judicial review in the arbitration context, it is silent on this issue with respect to administrative agencies. As a result, judicial review under the Model Act could be more expansive under a public compulsory arbitration system.²³³

With respect to U.S. labor arbitration, judicial review is subject to the deferral doctrine. This long-standing rule, which initially was formulated in a series of cases that have come to be known as the *Steelworker's Trilogy*, states that courts generally defer to the findings of an arbitrator unless it is clear that the arbitrator has exceeded his authority.²³⁴ Although the precise grounds upon which an arbitrator's award will be set aside are not clearly defined, situations where it has been include: When the arbitrator is

²³⁰ Quebec (1979), *supra* note 92, § 125.

²³¹ *Id.*

²³² Gagnon, *supra* note 140, at 80.

²³³ MODEL ACT, *supra* note 15, § 8. Alternative A and B both delete the § 8 restriction (Alternative A, § 5; Alternative B, Introductory paragraph).

²³⁴ Steelworkers Trilogy: *United Steelworkers v. Enterprise Wheel & Car Corp.*, 80 S.Ct. 1358 (1960); *United Steelworkers v. American Mfg. Co.*, 80 S.Ct. 1343 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 80 S.Ct. 1347 (1960).

found to have been partial to one party; when the arbitrator made a manifestly incorrect factual error that influenced the award; and when the arbitrator acted in a purely arbitrary and capricious manner. Courts will not, however, overrule an arbitrator's decision simply because they wish to substitute their own interpretation of the case.²³⁵

The standard applied in the Canadian legislation is similar to the deferral doctrine in U.S. labor arbitration. Under the Canadian federal statute, "[e]very order of an adjudicator is final and shall not be questioned or reviewed in any court."²³⁶ The federal Court of Appeals, however, held in *Pioneer Grain Co. Ltd. v. Kraus* that the Federal Court Act overrides this provision, permitting a limited right of appeal from an adjudicator's decision.²³⁷

In interpreting the extent to which courts should have judicial review over arbitration decisions made pursuant to the Quebec statute, the Supreme Court of Canada in *Blanchard v. Control Data Canada Ltd.* stated that only "an abuse of authority amounting to fraud and of such a nature as to cause a flagrant injustice would divest [the arbitrator] of his jurisdiction and be a basis for judicial review."²³⁸ In this case, the court upheld the arbitrator's four month suspension of an employee who acted contrary to professional ethics and the company's policies despite the fact that the Court of Appeals sought to overturn the decision and uphold the employer's decision to terminate. While the Supreme Court admits that it would have decided the case in favor of dismissal, it refused to impose its view since the arbitrator did not abuse his discretion in arriving at an opposite, but reasonable, interpretation of the case.²³⁹

²³⁵ ELKOURI & ELKOURI, *supra* note 23, at 29-32. (citing *United Steelworkers v. Enterprise Wheel & Car Corp.*, 80 S.Ct. 1358 (1960), *United Steelworkers v. American Mfg. Co.*, 80 S.Ct. 1343 (1960), *United Steelworkers v. Warrior & Gulf Navigation Co.*, 80 S.Ct. 1347 (1960); *W.R. Grace & Co. v. Rubber Workers Local 759*, 103 S.Ct. 2177 (1983)). See generally Theodore St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137 (1977).

²³⁶ Canada Federal, *supra* note 92, § 243(1).

²³⁷ GROSSMAN, *supra* note 12, at 197-199 (citing Federal Court Act, R.S.C. 1985, c.F-7 § 28); Simmons, *supra* note 128, at 66-67 (citing *Pioneer Grain Co. Ltd. v. Kraus* (1981)).

²³⁸ *Blanchard v. Control Data Canada Ltd.*, 5 I.L.L.R. 262, 264 (1984).

²³⁹ *Id.*

In Nova Scotia, the Labour Tribunal's decisions are generally final and not open to review.²⁴⁰ Any party affected by the decision, however, may appeal to the Appeal Division of the Supreme Court on a question of law, or of jurisdiction, within 30 days of the decision.²⁴¹ The Appeal Division must then resolve the question and remand the case back to the Tribunal.²⁴²

The experience in Great Britain demonstrates that appeals can be conducted within an administrative or arbitration system, using judicial review as a last resort. The successful role of the Employment Appeals Tribunal (EAT) suggests that appellate review of industrial tribunal decisions is a desirable feature in the resolution of unfair dismissal claims. In line with the deferral doctrine, however, the EAT has jurisdiction limited only to the review of questions of law, and does not extend to the factual findings of the industrial tribunal unless the tribunal "misdirects," "misunderstands," or "misapplies" the law.²⁴³

If the arbitration path proposed in the Model Act is followed, limited judicial review could be permitted based upon the international examples and that of the union sector in the United States. This result could be achieved without disrupting the deferral doctrine as it is applied to both public and private sector union arbitration. A major premise, however, upon which the *Steelworker's Trilogy* established the deferral doctrine is that because the parties to arbitration voluntarily agreed to utilize the process, the decision should be final and binding.²⁴⁴ In the case of compulsory public

²⁴⁰ Nova Scotia (1972), *supra* note 92, § 18(1)..

²⁴¹ *Id.* § 18(2).

²⁴² *Id.* § 18(5).

²⁴³ Wood, *supra* note 184, at 136 (advocating the important role of the EAT, and suggesting that the EAT should assert appellate jurisdiction only on points of law and not fact). The court in *British Telecommunications Plc., v. Sheridan* held that for an appeal against an industrial tribunal to succeed, "[t]he Appellant must show either that the tribunal misdirected itself in law or misunderstood or misapplied the law, or secondly, that the decision was perverse, i.e., that there was no evidence to justify the conclusion which was reached." *ENCYCLOPEDIA*, *supra* note 123, Bull. No. 5/90, para. 90-113 (citing *British Telecommunications Plc. v. Sheridan* 1990 I.R.L.R. 27 (Eng. C.A.).

²⁴⁴ Steelworker's arguments would not have a binding effect on the Model Act if it were enacted by state legislatures since state law would govern. *ELKOURI & ELKOURI*, *supra* note 23, at 40.

arbitration under the Model Act, since the parties are compelled to arbitrate, they should have greater access to an appeals process. The Montana Act avoids this problem by encouraging voluntary arbitration. In this respect, the integrity of the arbitration process must be balanced against the due process concerns of the participants. Although the British and Canadian statutes utilize compulsory arbitration processes, they still follow the basic premise of the deferral doctrine. In addition, the British example suggests that the appeals process could be conducted within the context of an administrative agency framework. By using the courts as a forum of last resort and restricting the flow of cases through an internal appeals process, the United States could help alleviate the problem of an already overburdened judicial system.

As arbitrators become more entrusted with deciding issues of external law, courts arguably should play a greater role in the review of their decisions.²⁴⁵ For example, in private labor arbitration in Canada, the courts reserve the right to correct errors made by arbitrators on "collateral questions of law."²⁴⁶

If the recent decision *Gilmer v. Interstate/Johnson Lane Corp.* is indicative of a current trend, it is unlikely that appellate review will be permitted in private arbitration.²⁴⁷ In *Gilmer*, an age discrimination claim was subjected to compulsory arbitration. The Court held that the arbitrator's decision precluded the plaintiff's ability to seek additional recovery under the Age Discrimination in Employment Act (ADEA).²⁴⁸ Although some commentators argue that this decision is not dispositive because it applied to the special circumstances of private arbitration in the securities brokerage industry, the recent decision in *Mago v. Shearson Lehman Hutton* suggests an expansion of *Gilmer* to other kinds of employee disputes.²⁴⁹

²⁴⁵ See generally David E. Feller, *The Impact of External Law Upon Labor Arbitration*, in *THE FUTURE OF LABOR ARBITRATION IN AMERICA* 83 (1976).

²⁴⁶ Benjamin Aaron, *The Impact of Public Employment Grievance Settlement on the Labor Arbitration Process*, in *THE FUTURE OF LABOR ARBITRATION IN AMERICA* 47 (1976).

²⁴⁷ *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991).

²⁴⁸ *Id.*

²⁴⁹ *Mago v. Shearson Lehman Hutton*, 956 F.2d 932, (9th Cir. 1992); *Arbitration OK'd For Title VII Claim*, NAT'L. L.J., Mar. 2, 1992, at 21 (citing *Mago v. Shearson Lehman*

Although the breadth of the Court's holding in *Gilmer* has yet to be determined, it is likely to have important implications for the reform of wrongful termination.²⁵⁰ Employers may be able to insert private arbitration clauses in employment contracts to effectively waive the coverage of the Model Act or statutes based upon the Model Act. By doing so, employers may be able to foreclose an employee's opportunity to litigate issues related to termination. In addition, the use of private arbitration offers confidentiality not afforded by public arbitration or litigation.²⁵¹ With such a powerful tool at their disposal, employers may not see a need to support the passage of the Model Act or other just cause legislation. They may be able to gain the benefits of arbitration without surrendering statutory just cause protection.

D. Remedies for the Wrongfully Discharged Employee

According to one commentator, three factors should be considered when assessing the appropriateness of a remedy²⁵² First, from the standpoint of efficiency and fairness, does the statute in question deter wrongful terminations? Second, from a fairness perspective, does the statutory remedy cover all of the actual damages suf-

Hutton Inc., 90-55926 (Wallace, 9th Cir. 1992)). In this case, the plaintiff pursued Title VII claims for sexual harassment and gender bias though an arbitration clause that was written into her employment contract. Expanding on *Gilmer*, the case suggests that employers with a preference for arbitration can write private arbitration clauses into their employment contracts in order to effectively take wrongful termination out of the courts. As a matter of fact, the clause written into the contract in *Mago* specifically covered employment termination, along with all other compensation and employment claims. *Id.* See also *Dancu v. Coopers & Lybrand*, 778 F.Supp. 832, (E.D. Pa. 1991).

²⁵⁰ It is unclear whether *Alexander v. Gardner-Denver*, 45 U.S. 36 (1974), has been overruled by *Gilmer* (permitting a de novo review of a Title VII claim after the discrimination issue already was decided in arbitration). It does not seem equitable for a unionized employee (not covered by the Model Act) to be able to seek de novo review of a Title VII claim, applying *Alexander v. Gardner-Denver*, while a similarly situated non-union employee would be precluded from doing so. This issue will have to be addressed by the courts.

²⁵¹ James F. Henry, *Down with Litigation, Up with ADR*, DIRECTORS & BOARDS, Summer 1988, at 37. In addition, one study suggests that industry-backed arbitration systems are just as fair as independent arbitration. Customers in securities arbitration cases win approximately fifty-eight percent of the time in cases brought under Self-Regulating Organizations (SROs) and the American Arbitration Association (AAA). Don J. Benedictis, *Arbitration Fair to Stock Buyers*, ABA JOURNAL, Feb. 1992, at 25.

²⁵² Maldonado, *supra* note 19, at 232.

ferred by a wrongfully terminated employee? Third, from a quality and efficiency perspective, is the statutory remedy so rigid that it would lock employers and employees into involuntary and inefficient relationships?²⁵³ This set of criteria is used below to evaluate the Model Act's proposed remedies of reinstatement and severance pay.

1. *Reinstatement*

Reinstatement is the preferred remedy in wrongful discharge cases under the Model Act.²⁵⁴ Similarly, under British law, compensation cannot be considered as a remedy until the reinstatement option has been investigated and rejected.²⁵⁵ One reason for this rule is that the tribunal is required under the statute to take into account both the employee's wishes along with the "practicability" of reinstatement from the employer's perspective.²⁵⁶ The British tribunal possesses the authority to grant reinstatement in cases where it deems it to be an appropriate remedy.²⁵⁷ In determining whether to exercise this discretion, the tribunal also may consider whether it is fair to issue such an order, and whether it is practical for an employer to comply with it.²⁵⁸ If the reinstatement option is rejected as being impractical, the tribunal then should

²⁵³ *Id.* The challenge for establishing an effective remedy lies in the fact that a weak remedy will not deter wrongful discharge behavior, but too strong a remedy may guarantee an employee more job security than is desirable to the extent that it causes the "employee to become more laid back and less efficient and effective" on the job. *Id.* at 243.

²⁵⁴ MODEL ACT, *supra* note 15, § 7(b).

²⁵⁵ Williams & Lewis, *supra* note 15, at 483.

²⁵⁶ Estreicher, *supra* note 1, at 289. In defining "practicability," see London Underground Ltd. v. Dean, EAT/325/87 (transcript) (1987) available in LEXIS, English General Library, Cases File; Williams & Lewis, *supra* note 15, at 483, 502 nn.8, 9 (citing Coleman v. Magnet Joinery Ltd. 1975 I.C.R. 46).

²⁵⁷ EPCA, *supra* note 82, §§ 68(1), 69(5)(a); Bob Hepple, *A Right to Work?*, 10 IND. L.J. 65, 76 (1981).

²⁵⁸ See generally Arab British Chamber of Commerce v. Saleh (E.A.T. transcript 1988) available in LEXIS, English General Library, Cases File. According to the court, "[t]here was not a scintilla of evidence before this Tribunal that it would not be 'practicable' for the respondents to re-instate the applicant. The evidence really is all the other way. The applicant was well liked both by those with whom she worked and by her supervisors and Managers. There is a marked lack of evidence from any of the respondents' immediate Managers who might if they were going to say it was impracticable have come along and given such evidence." *Id.*

consider whether an order for re-engagement is feasible.²⁵⁹ Re-engagement is the British term referring to reinstatement to another job that is comparable to the one previously held. Although the Model Act does not specifically refer to re-engagement, it follows the British rule in this regard.²⁶⁰

Reinstatement is largely a voluntary and self-elected remedy in Great Britain. Tribunals are unlikely to order reinstatement as a remedy when either an employee fears victimization or an employer is hostile to the idea.²⁶¹ Industrial tribunals in 1979 awarded reinstatement in only eight percent of the cases. In general, reinstatement is awarded in fewer than five percent of all cases.²⁶² Empirical evidence in Great Britain also shows that most of the employees that are reinstated do not remain on the job for long.²⁶³ One study estimates the average length of an employee's stay after reinstatement at 13.7 months. While most of these employees voluntarily quit their jobs, a majority of those surveyed stated that their motivation for doing so was "unfair treatment."²⁶⁴ The concern that reinstatement will likely lead to a second discharge causes many employees to prefer compensation over reinstatement as a remedy.²⁶⁵

A major flaw with the British system of reinstatement is that employees who choose this option lack the enforcement mechanisms necessary to make it an effective remedy. For example, a reinstated employee lacks the support of possible contempt of court sanctions against an employer who chooses to violate a tribunal order of reinstatement.²⁶⁶ A study of reinstatement decisions approximated that during the first five years that the British unfair dismissal legislation was in effect, twenty-five percent of em-

²⁵⁹ EPCA, *supra* note 82, § 69(6).

²⁶⁰ MODEL ACT, *supra* note 15, § 7(b)(1).

²⁶¹ Williams & Lewis, *supra* note 15, at 484, 490.

²⁶² *Id.* at 484. This pattern in Britain is not unique. In Italy as well, only a very small percentage of employees discharged actually are reinstated. Hepple, *supra* note 257, at 77.

²⁶³ Estreicher, *supra* note 1, at 289-290, 300 n.13.

²⁶⁴ Williams & Lewis, *supra* note 15, at 487-88.

²⁶⁵ Estreicher, *supra* note 1, at 289.

²⁶⁶ Williams & Lewis, *supra* note 15, at 502 n.11.

ployers failed to implement reinstatement orders.²⁶⁷ This noncompliance occurred particularly among smaller employers with fewer than one hundred employees. While the difficulty of reinstatement seems to increase as company size decreases, it is important to consider each situation on a case-by-case basis, taking into account the type of job and individuals involved, as well as the nature of the employer's business.²⁶⁸ For the most part, an employee that is victimized after reinstatement lacks an appropriate remedy.

In cases of highly compensated executives, employers in Britain have a strong disincentive to comply with reinstatement orders and to challenge them under the recent holding by the Court of Appeals in *O'Laoire v. Jackel International Ltd.* In such cases, it is often more cost-effective for an employer to refuse to reinstate the executive and to pay the maximum damage penalty under the statute rather than to reinstate and to pay actual damages.²⁶⁹ Ac-

²⁶⁷ *Id.* at 485.

²⁶⁸ *Id.* at 485, 498-99. Although re-employment might damage supervisory relationships or generate more friction in smaller companies, it does not necessarily have the same effect in larger companies. As a matter of policy, therefore, reinstatement may be a better remedy for these larger companies. *Id.* at 497. Work-group size may be more important, however, than the overall size of the company because employees who return to a relatively large work-group find it is easier to avoid being the focus of attention, even in a small company. *Id.* at 499.

²⁶⁹ *O'Laoire v. Jackel International Ltd.*, 1990 I.C.R. 197, 1990 I.R.L.R. 70 (Eng. C.A.); *ENCYCLOPEDIA*, *supra* note 123, Bull. No. 5/90, para. 90-115 (1990), Bull. No. 3/90, para. 90-058 (1990). *O'Laoire* overruled *Conoco (UK) Ltd. v. Neal*, 1989 I.R.L.R. 51, which held that a highly compensated employee could seek enforcement of a compensation award granted under a reinstatement order in County Court when the amount of the award exceeds the maximum amount that could be granted under the British statute. In *Conoco*, *Neal* was an executive who was unfairly discharged by his employer. The tribunal ordered reinstatement and a payment of £17,000 under EPCA § 69. The employer refused to comply with the reinstatement order. Without recourse to enforce the reinstatement part of the order, *Neal* went to County Court to enforce the £17,000 award, since the remedy of a "special award" was limited under § 75, as amended, to a maximum of £15,000. The Court held for *Neal* and stated that it is "inequitable that an employer should be enabled to avoid the true loss suffered by an applicant." *Id.*, *Neal*, *supra* note 123, at 1015.

The *O'Laoire* court overruled this decision, however, and stated that a reinstatement monetary award was only enforceable pursuant to EPCA § 71, because it specifically states that "[an industrial] tribunal shall make an award of compensation" when an employer fails to comply with a reinstatement order. As a result, the court rejects the argument by the plaintiff citing *Conoco v. Neal* that it was up to the employee alone to decide whether to pursue this § 71 remedies or seek enforcement of his award under § 69 in County Court. *O'Laoire*, 1990 I.C.R. 197, 1990 I.R.L.R. 70 (Eng. C.A.). Under the facts in *O'Laoire*, if the

cording to Lord Donaldson MR in that case, "The current maximum can positively discourage employers from complying with a reinstatement order, contrary to the interests of Parliament, and in addition causes injustice to higher paid employees."²⁷⁰

In Great Britain, most of the successful cases of reinstatement have occurred in unionized settings. According to one study on British reinstatement:

- reemployment failed to materialize in half the cases where there was no recognized union. It seems reasonably clear, therefore, that a relatively strong trade union presence contributed to an atmosphere that was conducive to a successful return to work. Similarly, reemployment tended to work out more successfully for trade unionists than non-unionists, both in terms of lower rates of non-return and length of stay. This may be because a tribunal order in favor of a union member encourages the union to ensure that the remedy is put into effect satisfactorily and 'policed,' even if the union did not represent the employee at the hearing or otherwise support his or her complaint.²⁷¹

The British experience with reinstatement generally suggests that it is a poor remedy to apply in the non-union sector. Without a union on the premises, courts and administrative agencies are too far removed to oversee the carrying out of a reinstatement order.²⁷²

Reinstatement has been used as a remedy in Canada more regularly than in Britain. Under the Canadian federal statute, an adjudicator may award unjustly dismissed employees backpay, reinstatement, or "any other like thing that it is equitable to require the employer to do in order to remedy or counteract any conse-

holding in Neal had applied and the plaintiff had been able to enforce the reinstatement order in County Court, then O'Laoire would have been entitled to £27,833. Because he was limited by the court to his § 71 remedy, however, he was only entitled to £12,185. This holding creates a strong incentive for employers to avoid following reinstatement orders. ENCYCLOPEDIA, *supra* note 123, Bull. No. 5/90, para. 90-115 (1990), Bull. No. 3/90, para. 90-058 (1990); Hugh Collins, *Recent Cases*, 19 IND. L.J. 193 (1971).

²⁷⁰ O'Laoire v. Jackel International Ltd., 1990 I.C.R. 197, 1990 I.R.L.R. 70 (Eng. C.A.).

²⁷¹ Williams & Lewis, *supra* note 15, at 500.

²⁷² HECKSCHER, *supra* note 13, at 165.

quence of the dismissal.”²⁷³ Although the arbitrators have used their broad remedial powers to award reinstatement almost routinely under this statute in the past,²⁷⁴ it appears that reinstatement has become a less popular remedy in recent years.²⁷⁵ In several cases, Canadian arbitrators seem overly willing to “exalt the employee’s interest in his job over any other considerations,” thus making discharge extremely difficult.²⁷⁶ Reinstatement is generally denied, however, when the adjudicator observes an antagonistic relationship between the parties indicating that their relationship in the future would be unduly strained.²⁷⁷

Similar remedies are available to employees in the Canadian provinces, although reinstatement has not been used as extensively as in the federal sector. For example, in Quebec, the same three remedies are available to workers as in the federal sector. First, the arbitrator may issue an order to reinstate the employee.²⁷⁸ In addition, the employee may be awarded backpay that would have been paid but for the discharge, plus any other remedy that is deemed “fair and reasonable.”²⁷⁹ In *Consoltex Canada Inc. v. Taran*, an arbitrator in Quebec held that it was appropriate to reinstate the president of a company who was discharged following a change in control of the corporation.²⁸⁰ Similarly, in *Sobeys Stores Ltd. v. Yeomans et. al.*, the Supreme Court of Canada upheld the tribunal’s decision to grant reinstatement with backpay under the Nova Scotia statute.²⁸¹ The Quebec case of *Moore v. Montreal Trust*,

²⁷³ Canada Federal, *supra* note 92, § 242(4)(b)-(c). “Pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person.” *Id.* § 242(4)(a)

²⁷⁴ Estreicher, *supra* note 1, at 288; Heenan & Brady, *supra* note 75, at 195. Reinstatement was awarded in 44.4 percent of the federal claims that were adjudicated on the merits. *Id.* at 195.

²⁷⁵ GROSSMAN, *supra* note 12, at 180. “Since 1984, roughly fifteen percent of unjust dismissal decisions have ordered the employee reinstated.” *Id.* Even at this level, Grossman concludes that reinstatement is overused under the Canadian federal statute. *Id.* at 181.

²⁷⁶ Heenan & Brady, *supra* note 75, at 200, 202-203. GROSSMAN, *supra* note 12, at 181-182 (citing Banca Nationale del Lavoro of Canada and Lee-Shanok, *Re* (1987)).

²⁷⁷ GROSSMAN, *supra* note 12, at 182-83.

²⁷⁸ Quebec (1979), *supra* note 92, § 128(1).

²⁷⁹ *Id.* § 128(2)-(3).

²⁸⁰ Estreicher, *supra* note 1, at 196 n.62 (citing *Consoltex Canada Inc. v. Taran* (1984)).

²⁸¹ CANADIAN MASTER LABOUR GUIDE, 220 (1992) (citing *Sobeys Stores Ltd. v. Yeomans*

however, illustrates the problems associated with reinstatement as a remedy.²⁸²

It is argued that reinstatement is a better remedy for employees than severance pay because it promotes a policy favoring job security and low unemployment.²⁸³ It may only be an effective remedy, however, if both parties seek to preserve their personal relationships despite obvious differences in their opinions regarding the dismissal.²⁸⁴ The goal should be to help workers "overcome the psychological resistance of . . . returning to employment after the unpleasant rupture of a dismissal which they consider to be unfair."²⁸⁵ In this regard, requiring pre- or post-termination mediation or conciliation might go a long way toward making reinstatement a more viable remedy.

2. *Severance Pay*

Under the Model Act, severance pay should be available to employees if reinstatement is impractical. If such payments are made,

et al.).

²⁸² William Marsden, *Montreal Trust Ordered to Pay \$437,000 Over Firing*, GAZETTE (Montreal), Oct. 17, 1991, at A1 (Appeal pending). In this case, the plaintiff, Mark Moore, was an employee in the real estate department at Montreal Trust. In 1982, he was fired from his job because of a dispute with his employer. In 1988, the Quebec Court of Appeals reinstated Moore to his job. Beginning with his first day back at work, Moore was followed by a private detective. In addition, after testifying against his employer on an unrelated matter, Moore was fired again, this time for disloyalty. In a second lawsuit against his employer which was resolved in 1990, Moore was awarded \$437,000. Despite the nine years of litigation and large damage recovery, he still wanted to be reinstated to his job. Moore was quoted as saying, "I went back the first time, I'll go back again. Wild horses couldn't keep me out." *Id.* The problems encountered in this case seem to be typical of most reinstatement cases. It is unclear, however, why Moore still sought reinstatement after he was discharged a second time. One explanation is that, because Moore was a professional employee, he was extremely attached to his job.

To determine the practicality of reinstatement, a fact finder should inquire into how it will influence personal relationships at the workplace, especially within the reinstated employee's immediate work group. For example, a person who performs independent work, and who has little interaction with other workers, may be a better candidate for reinstatement. Likewise, workers in large businesses may also be better candidates than those in smaller firms.

²⁸³ See generally Hepple, *supra* note 257.

²⁸⁴ Dickens, *supra* note 220, at 174.

²⁸⁵ Hepple, *supra* note 257, at 77-78.

the Act limits them to a maximum of thirty-six months (three years) of salary, less mitigation during the time of the proceedings.²⁸⁶ In addition, “[i]n making a monetary award under this section, the arbitrator shall reduce the award by the amount of any monetary award to the employee in another forum for the same conduct of the employer.”²⁸⁷

Setting an appropriate level of severance pay is somewhat problematic because it is determined prospectively at the outset of the discharge when it is unclear how to measure the extent of the actual damage caused to the employee.²⁸⁸ For example, in a tight labor market, the discharged employee may be able to find suitable alternative employment faster, making at least part of the severance payment a windfall. On the other hand, in a loose labor market, the payment may not be enough to cover reasonable expenses incurred during a long period of unemployment. For this reason, a good severance pay package accounts for the circumstances of the discharge, the number of dependents the discharged supports, and the nature of the labor market and likelihood of finding suitable alternative employment. The lump-sum payment scheme under the Model Act recognizes these problems and is sensitive to them in that it considers both the reasons for the termination and the employee’s length of service with the employer.²⁸⁹

In Great Britain, if neither reinstatement nor re-engagement is

²⁸⁶ MODEL ACT, *supra* note 15, § 7(b)(3).

²⁸⁷ *Id.* § 7(d). Wrongful discharge recovery under the Act is intended to supplement recovery in other related proceedings. For example, if an employee is discharged because of discrimination, recovery under Title VII would offset any wrongful discharge recovery under the Model Act. If the Title VII claim is unsuccessful, any case under the Model Act would be subject to “issue, fact, and judgment preclusion” from the case that was previously litigated and determined. Since the Act extinguishes all common law actions for wrongful discharge, there would not be any recovery possible under the at-will exceptions.

²⁸⁸ Maldonado, *supra* note 19, at 234-35. In examining severance pay under Puerto Rico’s Act 80, one commentator concluded that it was insufficient to deter employers from engaging in capricious or arbitrary discharge because the severance pay formula hinged on length of service. As a result, employers are only deterred from engaging in arbitrary behavior, other things being equal, when dealing with more senior employees. “Act 80 does not seem to take into account the full spectrum of employees that can be subject to unfair dismissals and the full spectrum of problems that these employees can be subject to confront as a result of the termination.” *Id.* at 235.

²⁸⁹ MODEL ACT, *supra* note 15, § 7(b)(3).

deemed to be a viable option, the tribunal is required to formulate a monetary award.²⁹⁰ There are potentially three components to this severance package. First, a "basic award" is calculated based upon a combination of the employee's age, earnings, and length of employment.²⁹¹ Second, a compensatory award may be granted, less mitigation from other earnings and unemployment insurance received.²⁹² Third, if the monetary award is made after an employer's failure to comply with a reinstatement award, a "special award" of thirteen to twenty-six weeks of former pay may also be granted.²⁹³ Under the EPCA of 1978, the second and third types of compensatory awards were not to exceed £5,200 (\$9,800) for each award.²⁹⁴ Under a reformulation of the "special award" in the Employment Act of 1982, a plaintiff could receive as much as £20,000 (\$38,000).²⁹⁵ The tribunal also retains the right to reduce the monetary award when the conduct of the complainant is deemed to have contributed in part to the discharge.

Under both the British and Canadian statutes, the average amounts of recovery by wrongfully discharged employees were low relative to American standards. As amended in April 1991, Great Britain declared £198 (\$376) as the maximum weekly salary used for computing basic and additional awards for unfair dismissal.²⁹⁶ In addition, Great Britain raised the maximum basic award for unfair dismissal to £5,940 (\$11,286), while it set the maximum com-

²⁹⁰ EPCA, *supra* note 82, § 68(2).

²⁹¹ *Id.* § 73(2); Lewis, *supra* note 78, at 714; Estreicher, *supra* note 1, at 290. As part of the basic award, an unfairly dismissed employee shall receive one and one-half weeks of pay for each year of service for which the employee is over 41 years of age, one week of pay for each year of service when the employee was between the ages of 22 and 41, and one-half week of pay for each year served between the ages of 18 and 22. EPCA, *supra* note 82, § 73(3); Employment Act of 1980, *supra* note 116, § 9(3).

²⁹² EPCA, *supra* note 82, § 74. Compensation shall be made for any expenses reasonably incurred by the complainant as a consequence of the dismissal, as well as any benefits that would have been received but for the dismissal. *Id.* § 74(2).

²⁹³ *Id.* § 71; Estreicher, *supra* note 1, at 290. The same is true in Italy, where employers who do not comply with a reinstatement order must pay additional compensation of between 13 and 26 weeks pay. Hepple, *supra* note 257, at 77.

²⁹⁴ For purposes of comparison, this Comment approximates the exchange rate at £1 British = \$1.90 U.S.

²⁹⁵ Employment Act of 1982, *supra* note 116, § 5(3).

²⁹⁶ ENCYCLOPEDIA, *supra* note 123, Bull. No. 2/91, para. 91-009 (1991).

pensatory award at £10,000 (\$19,000).²⁹⁷ Furthermore, failure to comply with a reinstatement or re-engagement order can result in an additional award set at a minimum of £2,574 (\$4,890) and a maximum of £5,148 (\$9,781). These amounts are doubled when dismissal is the result of race or sex discrimination.²⁹⁸ Finally, Great Britain established a "special award" for employees terminated because of trade union membership or activities, with a minimum award of £13,180 (\$25,042) and a maximum award of £26,290 (\$49,951).²⁹⁹ The statute is usually updated annually in order to keep the amounts current with inflation.³⁰⁰

Roughly one-third of the plaintiffs that successfully bring unfair dismissal claims in Great Britain receive awards that are much lower than the statutory maximums.³⁰¹ For example, in 1978, the median award was approximately five weeks pay or £375 (\$638), and three-fourths of the awards were for less than £750 (\$1,275).³⁰² More recently, the median award for successful applicants in 1986-87 was £1,676 (\$2,849), and £1,865 (\$3,171) in 1988-89.³⁰³

The Canadian federal government, as well as the provinces of Nova Scotia and Quebec, will award compensation to employees if reinstatement is impractical.³⁰⁴ Canada defines the term "severance pay" as "a lump-sum payment by an employer to a worker whose employment is permanently ended, usually for causes beyond the worker's control."³⁰⁵ Under this definition, the federal government and Ontario are the only two jurisdictions that provide specifically for "severance payments" to employees.³⁰⁶ In contrast,

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ The increases when accounting for inflation are *de minimis*. For example, the maximum weekly pay set in April 1990 was £184 while the maximum basic award was £5,520. *Id.*, Bull. No. 5/90, para. 90-105(i)-(iii) (1990).

³⁰¹ *Id.* In 1987, 24,916 unfair dismissal cases were filed. Seventy percent of these cases were either settled, conciliated or dropped. Approximately one-third of the remaining cases, or 10% of the total initial cases, resulted in a finding of unfair dismissal by a tribunal. *Id.*

³⁰² Estreicher, *supra* note 1, at 290.

³⁰³ Neal, *supra* note 125, at 1012.

³⁰⁴ See *supra* text accompanying note 282.

³⁰⁵ CANADIAN MASTER LABOUR GUIDE, *supra* note 281, at 250.

³⁰⁶ *Id.* In Ontario, where there is no just cause protection, employees with five or more

the Canadian statutes opt for the terminology of "monetary compensation" to describe a monetary award to an unjustly dismissed employee.³⁰⁷

Under the Canadian federal statute, adjudications take a "make whole" approach and award back pay plus any additional amount necessary to compensate for the dismissal.³⁰⁸ The first component of this award is easy to quantify. Because the court exercises its equitable discretion in formulating the second component, however, this part of the award may be open to challenge.³⁰⁹ Discharged employees also have a duty to mitigate damages.³¹⁰

Western European law and practice also provide a model for the recovery of compensation in the form of severance pay.³¹¹ For example, while Italy encourages reinstatement more frequently than other European states, it still is rarely used as a remedy.³¹² Even when it is, employees who are reinstated also are granted an indemnity award of a minimum of five months' salary. Furthermore, while Italian executives are never entitled to reinstatement, they are permitted to sue for up to twenty months of salary in severance pay.³¹³

Based on both the international and domestic perspectives, severance payments are more likely to deter employers from engaging in wrongful discharge than reinstatement. Since reinstatement is essentially "cost-free" to the employer, there is little deterrent value to it. The frequency of awards under the third element of the severance pay formula in Great Britain, penalizing employers for defying reinstatement orders, supports this conclusion. In addition, severance pay permits the parties to part after the discharge,

years of continuous employment still may receive up to 26 weeks of pay during lay-off or in the event of permanent plant closure. *Id.*

³⁰⁷ GROSSMAN, *supra* note 12, at 184.

³⁰⁸ *Id.* at 185.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 186.

³¹¹ Herbert L. Sherman, Jr., *Reinstatement as a Remedy for Unfair Dismissal in Common Market Countries*, 29 AM. J. COMP. LAB. 467, 510-11 (1981) (focusing on the law in Belgium, Ireland, Italy, and the United Kingdom).

³¹² *Id.* at 491.

³¹³ Estreicher, *supra* note 1, at 292.

rather than locking them into either involuntary or inefficient relationships. When statutes provide for higher basic payments and for punitive and compensatory damages, they arguably allow for more adequate severance packages and deter employers from wrongfully discharging workers.

3. *Limitations on Punitive & Compensatory Damages*

The trend in employment law is to impose restrictions on damages.³¹⁴ Probably the most controversial aspect of the Model Act, and the most favorable for employers, is the prohibition against any individual recovering compensatory or punitive damages.³¹⁵ Opponents of damage limitations argue that employers simply will reduce wrongful termination down to a cost of doing business. They argue that, as a result, employers will be less careful when discharging employees, and therefore will expose a greater number of workers to the possibility of unfair and arbitrary dismissal.³¹⁶

By restricting recovery to only those remedies available under the statute, the exclusivity provision of the Model Act precludes the recovery of both punitive and compensatory damages. According to the drafters, in no event may an arbitrator, administrative agency, or court, "award damages for pain and suffering, emotional distress, defamation, fraud, or other injury under the common law; punitive damages; compensatory damages; or any other monetary award."³¹⁷ This idea of no-fault, limited liability for employers closely parallels the system used in state workers' compensation

³¹⁴ The Civil Rights Act of 1991 features the use of punitive damage caps varying between \$50,000 and \$300,000 depending upon the size of the employer's business. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(b)(3) (1991).

³¹⁵ MODEL ACT, *supra* note 15, § 7(d).

³¹⁶ "[T]o enact an arbitrary cap is to tie a court's hands in the name of fairness and predictability, thereby decreasing the likelihood of complete deterrence and undermining the very system of property rights punitive damages were intended to preserve. A punitive damage rule that recognizes the role of the profit motive in a potential tortfeasor's decision-making process allows the courts to fashion efficient solutions to the problems they face and, at the same time, teaches the prospective wrongdoer that 'tort does not pay'" Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 340 (1991).

³¹⁷ MODEL ACT, *supra* note 15, § 7(d), Alt. A § 6(c), Alt. B § 5(c).

laws.³¹⁸ Under workers' compensation, however, plaintiffs typically are permitted to sue in tort for punitive and compensatory damages outside the statute if they can prove that their employer committed an intentional or willful violation.

States desiring to follow the example of state workers' compensation in this regard should look to the Montana Act for guidance because it allows workers to recover punitive damages in public-policy-based discharges. To do so, an employee must establish, "by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge."³¹⁹ In all other cases, the Montana statute prohibits the recovery of damages for pain and suffering, and for emotional distress.³²⁰ In *Meech v. Hillhaven West*, the Montana Supreme Court held that the State's limitations on damages for wrongful discharge did not violate an individual's right to "full legal redress" and therefore were constitutional.³²¹

While the claims in the Canadian provinces typically are disposed of through arbitration workers may have recourse to the

³¹⁸ Krueger, *supra* note 20, at 645. "The legislative history of state workers' compensation laws—which were enacted with the support of both the American Federation of Labor and the National Association of Manufacturers at the beginning of the twentieth century—closely parallels the recent developments in unjust-dismissal laws. The idea that no-fault, limited liability legislation is a response to ad hoc changes in the common law may have broad applications." *Id.* The workers' compensation program was designed to overcome some of the deficiencies of the common law approach, such as the general lack of recovery by employees, the occasional substantial award against employers, and the delays and costs of excessive litigation. JOHN F BURTON, JR., *AN INTRODUCTION TO WORKERS' COMPENSATION* 3 (1990). Like wrongful termination, common law remedies were available through the courts in the form of compensatory and punitive damages. While few employees were successful in proving negligence, the few that could won substantial recoveries. *Id.* at 1. By rejecting common law suits through the courts which provided compensatory and punitive damage, the same *quid pro quo* applies, in that employees gain greater coverage and certainty in recovery for their loss, while employers gain the certainty through the restriction in the award they must pay out if they lose. *Id.* at 4.

This proposal is a workable compromise because the common law at-will exceptions will still exist, and could apply to all employees not covered under the Act. In this respect, the courts could have a continued, albeit limited, role in the administration of wrongful discharge claims. This alternative would be similar to the compromise struck in the Canadian statute.

³¹⁹ Montana Act, *supra* note 28, § 5(2).

³²⁰ Schramm, *supra* note 29, at 110-11.

³²¹ *Meech v. Hillhaven West, Inc.*, 776 P.2d 488 (Mont. 1989).

courts in a limited number of cases. Canadian workers are permitted to assert a cause of action for emotional distress if they can demonstrate that an act other than the mere fact of the dismissal caused the distress, that it was "sufficiently serious to be an independently actionable wrong," and that it was the proximate cause of the employer's wrongful act.³²² To be awarded punitive damages, the claimant must also show that the employer "acted in a harsh, vindictive, reprehensible and malicious manner."³²³ Punitive damages are awarded in Quebec under an abuse of rights theory when employers act wantonly or recklessly in discharging an employee.³²⁴ A situation in which an emotional distress claim might be actionable under Canadian law is when an employer breaches the implied contract to provide workers with reasonable notice prior to termination.³²⁵

Based on the Canadian experience, a compromise position would limit an employee to recovery under the Model Act, but permit redress under the at-will exceptions in cases where an employer has committed an intentional and willful violation. In Canada, statutory wrongful discharge recovery does not completely preclude an employee from recovering under the common law. For example, under the Canadian federal statute, alternative remedies are preserved and thus, "[n]o civil remedy of an employee against his employer is suspended or affected by this section."³²⁶ The Quebec statute also limits an employee's ability to pursue a claim, "where a remedial procedure, other than a recourse in damages, is provided elsewhere."³²⁷

The British statute, as previously discussed with respect to severance pay, sets maximum recovery amounts.³²⁸ The statute, how-

³²² Heenan & Brady, *supra* note 75, at 192. (citing *Vorvis v. Ins. Co. of B.C.*, 1 S.C.R. 1085 (1989)).

³²³ *Id.* at 192. See generally R.W NAPIER, COMPARATIVE DISMISSAL LAW (1982); G. England, *Recent Developments in Wrongful Dismissal Laws and Some Pointers for Reform*, 16 ALTA. L. REV. 470 (1978).

³²⁴ Heenan & Brady, *supra* note 75, at 192.

³²⁵ *Id.* at 191.

³²⁶ Canada Federal, *supra* note 92, § 246(1).

³²⁷ Quebec (1979), *supra* note 92, § 124.

³²⁸ See *supra* text accompanying notes 290-303.

ever, provides that the monetary limit may be lifted by the Secretary of State if each House of Parliament approves.³²⁹ Although the statute raises the monetary limit to keep the proscribed maximums in pace with inflation, this power permits employees to recover punitive damages for certain types of dismissals. The benefit of allowing these awards, even on a limited basis, is that they deter employers from unfairly dismissing individuals.³³⁰

Limiting punitive and compensatory damages in the United States may be achieved under the common law without the need for statutory limitations. For example, the trend in California is to restrict the availability of damages. In *Foley v. Interactive Data Corp.*, the Supreme Court of California held that the implied covenant of good faith and fair dealing exception to the at-will rule was grounded in contract law, rather than tort law, and therefore, punitive and compensatory damages were unavailable to the plaintiff under this theory.³³¹ In addition, although the United States Supreme Court recently upheld the broad discretion of juries to impose punitive damage awards, Justice Blackmun's majority opinion in *Pacific Mutual Life Insurance Co. v. Haslip* left the door open for limitations on other, more excessive, awards.³³² To the extent that the common law can effectively limit the availability of damages, employers will have less of an incentive to advocate statutory reform. This attitude results from the fact that the costs associated with wrongful discharge can be sufficiently managed without having to trade just cause protection to do so.

E. Notice of Discharge

Although the Model Act does not have a provision requiring an employer to provide an employee with notice prior to discharge,

³²⁹ EPCA, *supra* note 82, § 75.

³³⁰ Collins, *supra* note 126, at 238.

³³¹ *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988) *See also Newman v. Emerson Radio Corp.*, 772 P.2d 1059 (Cal. 1989) (holding that Foley applies retroactively); *Welch v. Metro-Goldwyn-Mayer*, 769 P.2d 932 (Cal. 1989).

³³² Daniel A. Farber, *Punitive Damages*, 27 TRIAL 62, 64 (June 1991). See *Pac. Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991); *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257 (1989).

the statutes in most industrialized nations, including Great Britain and Canada, suggest that such a requirement is preferable. Employers in Great Britain must provide employees with a minimum period of notice and a written statement explaining the reasons for dismissal.³³³ Any employer who fails to provide a discharged worker with the requisite amount of notice provided under the EPCA is liable for breach of contract.³³⁴ In general, the greater an employee's seniority or the more specialized his or her skills, the greater the length of notice the statute requires.³³⁵ In Great Britain, any worker continuously employed between four weeks and two years is entitled to not less than one week of notice prior to being discharged.³³⁶ For employees with two to twelve years of service, an employer must provide a minimum of one week of notice for each year of service. The British Act also requires employers to give a twelve-week warning to all workers with more than twelve years of service.³³⁷ While parties to an employment contract may specify the length of time for notification, it must be at least equal to the minimum periods established under the Act.³³⁸ An employee that does not receive adequate notice can sue for damages under a theory of wrongful dismissal.³³⁹

The right to reasonable notice also represents an important feature in Canadian legislation. A common type of wrongful discharge suit in Canada is one that is brought by an employee who is dissatisfied with the length of notice he received prior to termination.³⁴⁰ An employer can dismiss a worker so long as reasonable notice is provided. The question as to whether the discharge was for just

³³³ EPCA, *supra* note 82, § 53(1)-(2). Employees who are continuously employed for greater than twenty-six weeks are entitled to a written statement containing the reasons for discharge. These written statements are admissible as evidence in any proceeding. *Id.* § 53(3). An employee can complain to an industrial tribunal if an employer unreasonably refuses to provide a written statement. *Id.* § 53(4).

³³⁴ *Id.* § 51.

³³⁵ Mead, *supra* note 11, at 4.

³³⁶ EPCA, *supra* note 82, § 49(1)(a).

³³⁷ *Id.* § 49(1)(c). In order for an advance warning to constitute notice of dismissal, an employer must specify the date or make statements "from which that date is positively ascertainable." *Morton Sundour Fabrics Ltd. v. Shaw*, 1967 2 I.T.R. 84.

³³⁸ Mead, *supra* note 11, at 3; Edwards, *supra* note 82, at 37.

³³⁹ Edwards, *supra* note 73, at 41.

³⁴⁰ Adams et al., *supra* note 75, at 597.

cause becomes an independent and separate inquiry in addition to the notice requirement. In defining reasonable notice in Canada, courts have looked at the employee's age, the nature of the job, the length of service, and the availability of finding comparable employment based on the employee's experience, training, and qualifications.³⁴¹ One study concluded that the length of notice in Canada ranged from an average of 4.3 months, for relatively junior clerical and technical employees to an average of 20.9 months for senior executives who had been with the company for longer periods of time.³⁴² In determining an appropriate level of damages, the courts usually consider the position that the employee held, the age of the employee, and the length of service with the employer.³⁴³

An employee who receives inadequate notice under the Nova Scotia and Quebec statutes can seek special remedies based on the length of service. An employer in Nova Scotia must pay an employee discharged with inadequate notice an amount "equal to all pay to which he would be entitled . . . for the period of notice."³⁴⁴ An employee employed for three months to two years is entitled to one week notice and pay; for two to five years of service, two weeks notice and pay; for five to ten years, four weeks notice and pay; and for employees with greater than ten years of service, eight weeks notice and pay.³⁴⁵ In Quebec, employers must give reasonable notice or pay damages when inadequate notice is given.³⁴⁶ The requirements in Quebec and Nova Scotia are identical, except that employees in Quebec with between one and five years of service are entitled to two weeks notice.³⁴⁷

The notice requirement may also be a two-way street, giving employers a reciprocal right to notice from employees that wish to

³⁴¹ Harris, *supra* note 131, § 4-12 to -13 (quoting *Bardal v. Globe & Mail Ltd.*, 1960 O.W.N. 253, 255).

³⁴² Adams et al., *supra* note 75, at 597 n.4 (citing B. Fisher & L. Goodfield, *A Computerized Analysis of Notice Periods in Wrongful Dismissal Actions in Leading Edge Issues in CANADA BAR ASSOCIATION, EMPLOYMENT LAW AND WRONGFUL DISMISSAL* (1988)).

³⁴³ Harris, *supra* note 131 at 4-12 to -13.

³⁴⁴ Nova Scotia (1972), *supra* note 92, § 68(4).

³⁴⁵ CANADIAN MASTER LABOUR GUIDE, *supra* note 281, para. 11,105, at 208 (1992).

³⁴⁶ Heenan & Brady, *supra* note 75, at 190-91. See generally *Bordeleau v. Union Carbide of Canada Ltd.* 6 C.C.E.L. 88 (Que. S.C. 1984).

³⁴⁷ CANADIAN MASTER LABOUR GUIDE, *supra* note 281, at 209.

quit their jobs. The reciprocal right, however, is usually not completely equitable because it does not work on the same sliding scale as is required for employers.³⁴⁸ In Great Britain, employees continuously employed for longer than four weeks must give their employers at least one week notice prior to quitting.³⁴⁹ Seven of the Canadian provinces, including Nova Scotia and Quebec, are reciprocal jurisdictions.³⁵⁰ In Nova Scotia, employees with three months to two years of service must give their employers one week notice, while employees with two or more years of service must give their employers two weeks notice.³⁵¹ In Quebec, domestics, servants, laborers and journeymen must give varying degrees of notice to their employers depending upon whether they are hired by the week, month, or year.³⁵² While the Canadian federal sector requires an employer to give an employee two weeks notice, employees are not required to give any notice prior to leaving.³⁵³

Notice requirements are not unique to the laws of Great Britain and Canada, but are afforded to the majority of European workers. For example, in France, one month advance notice is required for employers with six months to two years of service, and two months notice is required for employees with at least two years of service.³⁵⁴ In the Netherlands, notice must be given at least one week in advance of termination for each year of service, up to a maximum of thirteen weeks. Workers over the age of forty-five, however, can be awarded six months notice, while older workers may be entitled to more.³⁵⁵ In Germany, a blue-collar worker may re-

³⁴⁸ *Id.* at 208-09. Although the Canadian provinces of Newfoundland, Prince Edward Island, and the Yukon Territory all require employees to give the same amount of notice to their employers as the employers are required to give to them, the notice requirement is only one to two weeks. *Id.*

³⁴⁹ EPCA, *supra* note 82, § 49(2).

³⁵⁰ CANADIAN MASTER LABOUR GUIDE, *supra* note 281, at 207. British Columbia, New Brunswick, Ontario, and Saskatchewan are not reciprocal jurisdictions. *Id.* at 208-09.

³⁵¹ *Id.* at 209, 219.

³⁵² *Id.* For example, in *Grenier v. Radiodiffusion Mutuelle Canada Ltd.* 18 C.C.E.L. 756 (Que. S.C. 1987), an employer was awarded \$10,000 in damages since the employee that quit gave insufficient notice. *Id.*

³⁵³ *Id.* at 207.

³⁵⁴ Matthew C. Vita, *Labor Laws Shield European Workers*, ATLANTA JOURNAL, Jan. 19, 1992, at A12.

³⁵⁵ *Id.*

ceive anywhere from two to three months notice, depending upon the length of service, while white-collar workers are entitled to a minimum of six weeks and a maximum of six months notice.³⁵⁶ In Italy, long term employees may be entitled to as much as one year's notice.³⁵⁷

If incorporated into the Model Act, a notice provision would be analogous to the requirements of the Worker Adjustment and Retraining Notification Act (WARN) of 1988, which requires employers to give sixty days notice to employees prior to plant closure.³⁵⁸ The international experience suggests that there is arguably no reason why the law with respect to notice should distinguish between individual and group terminations.³⁵⁹

V CONCLUSIONS

Just cause legislation does not intend to limit the right of employers to discharge when reasonable grounds exist for doing so, but aims to prevent the abuse of managerial discretion. As a result, the notion that workers should have statutory protection against unfair dismissal is an intuitively appealing concept. For an employer, firing a worker for an arbitrary reason is simply inefficient economic behavior.³⁶⁰ For an employee, wrongful discharge can bring great personal anguish and financial strain, particularly in a recessionary economy when it is difficult to find substantially similar employment. From a governmental perspective, wrongful dis-

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ Worker Adjustment and Retraining Notification Act, 29 U.S.C.A. §2101 (1988). Employers that fail to give notice for plant closure may be fined and/or held liable for back pay and benefits to employees. See generally Hotel Employees v. Elsinore Shore Assoc., 5 I.E.R. Cases (BNA) 958 (D.N.J. 1989); Karl A. Hofstetter and Richard A. Klubeck, *Accommodating Labor and Community Interests in Mass Dismissals: A Transnational Approach*, 9 IND. REL. L.J. 451 (1987).

³⁵⁹ For an example in the Canadian federal sector see GROSSMAN, *supra* note 12, at 82-86.

³⁶⁰ "From the employer's standpoint there may be losses as a result of the new costs incurred in hiring and training of a replacement, claims that the employer may have to pay as a result of the discharge, the impact that the discharge may produce in the rest of the employees, and the effect that the discharge may have on employee morale, motivation, and productivity." Maldonado, *supra* note 19, at 246.

charge inflates the ranks of the unemployed, negatively impacts the economy, and adds undue strain to the unemployment insurance system. In total, all of the above reasons explain why the concept of employment at-will has been significantly eroded under the common law and by federal anti-discrimination and state fair employment practice laws.

The Model Act is premised on the fact that the next logical step in the evolution of the law of wrongful discharge should be guided through legislative action, and directly challenges the notion that state court judges should be allowed to continue setting law in a piecemeal fashion. To the extent that legislative action is the favored solution, as it is in Montana and throughout much of the international community, the perspectives examined in this Comment are useful for evaluating the feasibility of the proposals contained in the Model Act.

The international and domestic examples demonstrate that a just cause standard can grant varying degrees of employment protection depending upon how it is drafted and interpreted. For example, the experience in Great Britain suggests that management could effectively roll back the gains made in employee substantive rights under the at-will exceptions by advocating a just cause statute that uses broad interpretive standards for the definition of just cause. Likewise, the example of Nova Scotia suggests that the implementation of longer qualifying periods could be used to limit the scope of the protection to only the most senior employees. In contrast, to the extent that just cause imposes an unrealistically rigorous standard of review, applied liberally to most employees through relatively short qualifying periods, as in the Canadian Federal sector, the statutory right could arguably translate into an institutionalization of mediocre performance.³⁶¹

While the international and domestic experience is mixed on defining just cause, an equitable definition and interpretation would permit employees to have substantive rights, but not make it extremely difficult for an employer to fire incompetent or otherwise

³⁶¹ Pollack, *supra* note 204, at 1373.

problematic employees.³⁶² As the court stated in *Monge v. Beebe Rubber Co.*, “[t]he employer’s interest in running his business as he sees fit should be balanced against the interest of the employee in maintaining his employment.”³⁶³ Although such a balancing approach may be attractive in theory, the difficulties encountered in the proper drafting and interpretation of a just cause standard is extremely problematic in practice.³⁶⁴ If properly drafted and applied, however, it appears that the use of an objective test for evaluating just cause could strike a reasonable balance between employer and employee interests. For example, one court has required an employer to show that its action was objectively reasonable without being required to prove that it was necessarily correct.³⁶⁵ Regardless of what standard is adopted, it is clear that courts or arbitrators should put less emphasis on procedural criteria, such as the need for management to provide documentation to justify dismissal, and focus their analysis more on the substance and fairness of the discharge decision.³⁶⁶

Notwithstanding the difficulty in defining and interpreting the meaning of just cause, an overwhelming consensus exists in the international experience that arbitration is the best forum for resolving wrongful discharge disputes. As a benefit to both employers and employees, the arbitration process is prospectively less expensive, less time consuming, and a more efficient process than litigation. It is unclear, however, whether arbitration should be a voluntary or compulsory process, and whether it should be publicly or privately administered and funded. Both the British and Canadian

³⁶² Edwards, *supra* note 73, at 2.

³⁶³ *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).

³⁶⁴ See generally Wendy J. Delmendo, Note, *Determining Just Cause: An Equitable Solution for the Workplace*, 66 WASH. L. REV. 831 (1991).

³⁶⁵ Rosemary Alito, *Employment Law*, 131 N.J.L.J. 1572, 1574 (Supp. Sept. 7, 1992). According to the court in *Greenwood v. State Police Training Ctr.*, 606 A.2d 336 (N.J. 1992), “[a]n employer does not have good cause to terminate a public employee on the basis of physical limitation unless there is substantial evidence that limitation either prevents the employee from adequately performing the job or creates a substantial risk of serious injury to the employee or others.” *Id.* at 342. Justices Clifford and Pollock, however, dissented on the basis that the court improperly “substitutes its judgment for the considered determination of the people on whom the legislature has conferred responsibility.” *Id.* at 344.

³⁶⁶ See generally Elias, *supra* note 183.

systems advocate the use of publicly funded compulsory arbitration, with the exception of Quebec, where compulsory arbitration is privately funded. If the publicly funded compulsory arbitration path is followed, it would make sense to establish an administrative agency to handle wrongful discharge cases. On the other hand, the Montana statute provides the proper model for evaluating the effectiveness of voluntary and privately funded arbitration.

The decision in *Gilmer v. Interstate/Johnson Lane* and its progeny raises the possibility that an employer could achieve the benefits of arbitration without advocating a statute. For example, if employment contracts included provisions stating that wrongful discharge, and perhaps other employment related disputes, would be resolved in arbitration, courts might uphold the provision and enforce the arbitrator's decision. It remains to be seen whether this option is a viable alternative.

It is also clear from the international and domestic experience that severance pay should be favored over reinstatement as a remedy. Although preferred by the Model Act as a means for promoting employment security, reinstatement appears to be a viable remedy only when the parties take measures to preserve personal relationships. Requiring a pre-termination hearing and/or post-termination mediation and conciliation could make reinstatement a more feasible remedy. In addition, the success of reinstatement in the union sector in both Britain and the United States suggests that it is a more viable remedy when there is an independent third party (e.g. union) at the work place to police and enforce it. It is unclear what types of enforcement mechanisms, if any, could be used to protect non-union employees once they are reinstated to their jobs. For these reasons it is argued that reinstatement should be used only in exceptional situations.

What constitutes an equitable amount of severance pay may be debatable, but it is clear that a rule completely eliminating punitive and compensatory damages is too rigid. Following international examples and state workers' compensation law, a more equitable rule would permit employees to seek punitive and compensatory damages in the most egregious cases of employer misconduct. Allowing some degree of damage recovery, even on a

limited availability basis, would promote greater deterrence against wrongful discharge than contemplated under the Model Act. In addition, by following the spirit of federal plant closure law in the United States, a statute could also require employers to give a reasonable amount of notice to employees prior to discharge. Using the international experience as a model, the length of notice could be determined by looking at the nature of the employee's job and length of service. In fairness to employers, this right could be made reciprocal by requiring employees to give an equal amount of notice prior to quitting.

In conclusion, it is clear that the compromise approach used in the Model Act may only be applicable in a limited number of jurisdictions. For this reason, the Model Act is likely to be utilized as a starting point, rather than as an end to achieve, by states that are interested in drafting legislation. In order to evaluate the viability of these alternatives, an understanding of the international and domestic experience is worthy of consideration. In this respect, pro-employer interests should consider the statutes in Great Britain, Nova Scotia, and Montana to help in their drafting efforts, while pro-employee interests should look to the Canadian federal statute, Quebec, Puerto Rico, and the union sector. Since no state is compelled to adopt any of its provisions, the Model Act is likely to have little impact on the reform of wrongful discharge law in the United States.

APPENDIX I: MODEL EMPLOYMENT TERMINATION ACT

As adopted on August 8, 1991 by the National Conference of Commissioners on Uniform State Laws.

SECTION 1: DEFINITIONS

- (1) "Employee" means an individual who works for hire, including an individual employed in a supervisory, managerial, or confidential position, but not including an independent contractor.
- (2) "Employer" means a person [, excluding this State, a political subdivision, a municipal corporation, or any other governmental subdivision, agency, or instrumentality,] that employs [five] or more employees for each working day in each of 20 or more calendar weeks in the combined current and

next preceding calendar years, excluding any individual who is the parent, spouse, child, or other member of the employer's immediate family or of the immediate family of an individual having a controlling interest in the employer.

(3) "Fringe benefit" means vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, pension benefit plan, or other benefit of economic value, to the extent the leave, plan, or benefit is paid for by the employer.

(4) "Good cause" means

(i) a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct (on the job or otherwise), job performance, and employment record, or

(ii) the exercise of business judgment in good faith by the employer, including setting its economic or institutional goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force and the nature of the positions filled by its work force, and determining and changing standards of performance for positions.

(5) "Good faith" means honest in fact.

(6) "Pay" means hourly wages or periodic salary, including tips, regularly paid and nondiscretionary commissions and bonuses, and regularly paid overtime, but not fringe benefits.

(7) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial entity [, excluding government or a government subdivision, agency, or instrumentality].

(8) "Termination" means:

(i) a dismissal, including that resulting from the elimination of a position, of an employee by an

employer;

(ii) a layoff or suspension of an employee by an employer for more than two consecutive months; or

(iii) a quitting of employment or a retirement by an employee induced by an act or omission of the employer, after notice to the employer of the act or omission without appropriate relief by the employer, so intolerable that under the circumstances a reasonable individual would quit or retire.

SECTION 2: SCOPE

(a) This [Act] applies only to a termination that occurs after the effective date of this [Act].

(b) Except as provided in subsection (d), this [Act] displaces and extinguishes all common-law rights and claims of a terminated employee against the employer, its officers, directors, and employees, which are based on the termination or on acts taken or statements made that are reasonably necessary to initiate or effect the termination if the employee's termination

(i) requires good cause under Section 3(a),

(ii) is subject to an agreement for severance pay under Section 4(c), or

(iii) is permitted by the expiration of a specified-duration agreement under Section 4(d).

(c) An employee whose termination is not subject to Section 3(a) and who is not a party to an agreement under Section 4(c) or (d) retains all common-law rights and claims.

(d) This [Act] does not displace or extinguish rights or claims of a terminated employee against an employer arising under

(i) state of [sic] federal statutes or administrative regulations having the force of law [or local ordinances valid under state law],

(ii) a collective-bargaining agreement between an

employer and a labor organization, or

(iii) provisions of an express oral or written agreement relating to employment that do not violate this [Act].

Those rights and claims may not be asserted under this [Act], except as otherwise provided in this [Act]. The existence or adjudication of those rights or claims does not limit the employee's rights or claims under this [Act], except under the rules of preclusion in Section 7(d).

SECTION 3: PROHIBITED TERMINATIONS

(a) Except as provided in subsection (b), in an agreement for severance pay under Section 4(c), or in an agreement for a specified duration under Section 4(d), an employer may not terminate the employment of an employee without good cause.

(b) The good-cause protections of subsection (a) apply only to an employee

(i) who has been employed by the same employer for a total period of one year or more and

(ii) who has worked for the employer for a [sic] least 520 hours during the 26 weeks next preceding the termination. A layoff or other break in service is not counted in determining whether an employee's period of employment totals one year, but the employee is considered to be employed during paid vacations and other authorized leaves. If an employee is rehired after a break in service exceeding one year, not counting absences due to labor disputes or authorized leaves, the employee is considered to be newly hired. The 26-week period for purposes of this subsection does not include any week during which the employee was absent because of layoffs of one year or less, paid vacations, authorized leaves, or labor disputes.

SECTION 4: AGREEMENTS BETWEEN EMPLOYER AND EMPLOYEE

(a) A right of an employee under this [Act] may not be waived by agreement except as provided in this section.

(b) By express written agreement, an employer and an employee may provide that the employee's failure to meet specified business-related standards of performance or the employee's commission or omission of specified business-related acts will constitute good cause for termination in proceedings under this [Act]. Those standards or prohibitions are effective only if

(i) they have been consistently enforced and

(ii) they have not been applied to a particular employee in a disparate manner without justification.

If the agreement authorizes changes by the employer in the standards or prohibitions, any changes must be clearly communicated to the employee.

(c) By express written agreement, an employer and an employee may mutually waive the requirement of good cause for termination, if the employer agrees that upon the termination of the employee for any reason other than the willful misconduct of the employee, the employer will provide severance pay in an amount equal to at least one month's pay for each full year of employment, up to a maximum total payment equal to 30 months' pay at the employee's rate of pay in effect immediately before the termination. The employer may make a lump-sum payment or series of monthly installment payments, none of which may be less than one month's pay plus interest on the principal balance. The lump-sum payment must be made or the monthly payments must begin within 30 days after the employee's termination. A [sic] agreement under this subsection constitutes a waiver by the employer and the employee of the right to civil trial, including jury trial, concerning disputes over the nature of the termination and the employee's entitlement to severance pay, and constitutes a stipulation by the parties that those disputes will be subject to the procedures and remedies of this

[Act].

(d) The good-cause protections of Section 3(a) do not apply to the termination of an employee at the expiration of an express oral or written agreement of employment for a specified duration related to the completion of a specified task, project, undertaking, or assignment. If the employment continues after the expiration of the agreement, Section 3 applies to its termination unless the parties enter into a new express oral or written agreement under this subsection. The period of employment under an agreement described in this subsection counts toward the minimum periods of employment required by Section 3(b).

(e) An employer may provide substantive and procedural rights in addition to those provided by this [Act], either to one or more specific employees by express oral or written agreement, or to employees generally by a written personnel policy or statement, and may provide that those rights are enforceable under the procedures of this [Act].

(f) An employing person and an employee not otherwise subject to this [Act] may, by express written agreement, become subject to its provisions in whole or in part.

(g) Every agreement between an employer and an employee subject to this [Act] imposes a duty of good faith in its formation, performance, and enforcement.

(h) By express written agreement, an employer and employee may

(i) settle any claim arising under this [Act];

(ii) before or after a dispute or claim arises under this [Act], agree to private arbitration or other alternate dispute resolution procedure for resolving the dispute or claim; or

(iii) after a dispute or claim arises under this [Act], agree to court resolution of the dispute or claim. The substantive provisions of this [Act] apply under any agreement authorized by clause (ii) or (iii).

SECTION 5: PROCEDURE AND LIMITATIONS

(a) An employee whose employment is terminated may file a complaint and demand for arbitration under this [Act] with the [Commission; Department; Service] not more than 180 days after the effective date of the termination, or the date of the breach of an agreement for severance pay under Section 4(c), or the date the employee learns or should have learned of the facts forming the basis of the claim, whichever is later. The time for filing is suspended while the employee is pursuing the employer's internal remedies and has not been notified in writing by the employer that the internal procedures have been concluded, but resort to an employer's internal procedures is not a condition for filing a complaint under this [Act].

(b) Except when an employee quits, an employer, within 10 business days after a termination, shall mail or deliver to the terminated employee a written statement of the reasons for the termination and a copy of this [Act] or a summary approved by the [Commission; Department; Service].

(c) An employer may file a complaint and demand for arbitration under this [Act] with the [Commission; Department; Service] to determine whether there is good cause for the termination of a named employee. At least 15 business days before filing, the employer shall mail or deliver to the employee a written statement of the employer's intention to file and the factors alleged to constitute good cause for a termination.

(d) The [Commission; Department; Service] shall promptly mail or deliver to the respondent a copy of the complaint and demand for arbitration. Within 21 days after receipt of a complaint, the respondent must file an answer with the [Commission; Department; Service] and mail a copy of the answer to the complainant. The answer of a respondent employer must include a copy of the statement of the reasons for the termination furnished the employee.

[(e) When a complaint is filed, a complainant employee or employer shall pay a filing fee to the [Commission; Department; Service] in [the amount of \$____] [an amount not ex-

ceeding the maximum filing fee for a civil action in the courts of general jurisdiction of this State]. The [Commission; Department; Service] may waive or defer payment of the filing fee upon a showing of the complainant employee's indigency.]

SECTION 6: ARBITRATION; SELECTION AND POWERS OF ARBITRATORS; HEARINGS; BURDEN OF PROOF

(a) Except as otherwise provided in this [Act], the [Uniform Arbitration Act] [—— arbitration act of this State] applies to proceedings under this [Act] as if the parties had agreed to arbitrate under that statute. The [Commission; Department; Service] shall adopt rules to regulate arbitration proceedings under this [Act.] The [Administrative Procedure Act and other] statutes of this State applicable to the procedures of state agencies do not apply to arbitration proceedings under this [Act].

(b) The [Commission; Department; Service] shall adopt rules specifying the qualifications, method of selection, and appointment of arbitrators. An arbitrator serving under this [Act] exercises the authority of the state.

(c) Subject to rules adopted by the [Commission; Department; Service], all forms of discovery [provided by applicable state statute or regulations] are available in the discretion of the arbitrator, who shall ensure there is no undue delay, expense, or inconvenience. Upon request, the employer shall provide the complainant or respondent employee a complete copy of the employee's personnel file.

(d) A party may be represented in arbitration by an attorney or other person authorized under the laws of this State to represent an individual in arbitration.

(e) A complainant employee has the burden of proof that a termination was without good cause or that an employer breached an agreement for severance pay under Section 4(c). A complainant employer has the burden of proof that there is good cause for a termination. In all arbitrations, the employer presents its case first unless the employee alleges that a quitting or retirement was a termination within the meaning of Section 1(8)(iii).

(f) If an employee establishes that a termination was motivated, in part, by impermissible grounds, the employer, to avoid liability, must establish, by a preponderance of the evidence, that it would have terminated the employment even in the absence of the impermissible grounds.

SECTION 7: AWARDS

(a) Within 30 days after the close of an arbitration hearing or at any later time on which the parties may agree, the arbitrator shall mail or deliver to the parties a written award sustaining or dismissing the complaint, in whole or in part, and specifying the appropriate remedies, if any.

(b) An arbitrator may make one or more of the following awards for a termination in violation of this [Act]:

(1) reinstatement to the position of employment the employee held when employment was terminated or, if that is impractical, to a comparable position;

(2) full or partial backpay and reimbursement for lost fringe benefits, with interest, reduced by interim earnings from employment elsewhere, benefits received, and amounts that could have been received with reasonable diligence;

(3) if reinstatement is not awarded, a lump-sum severance payment at the employee's rate of pay in effect before the termination, for a period not exceeding [36 months] after the date of the award, together with the value of fringe benefits lost during that period, reduced by likely earnings and benefits from employment elsewhere, and taking into account such equitable considerations as the employee's length of service with the employer and the reasons for the termination; and

(4) reasonable attorney's fees and costs

(c) An arbitrator may make either or both of the following awards for a violation of an agreement for severance pay under Section 4(c):

(1) enforcement of the severance pay and other applicable provisions of the agreement, with interest; and

(2) reasonable attorney's fees and costs.

(d) An arbitrator may not make any award except as provided in subsections (b) and (c). In no event may the arbitrator award damages for pain and suffering, emotional distress, defamation, fraud, or other injury under the common law, punitive damages, compensatory damages, or any other monetary award. In making a monetary award under this [Act], the arbitrator shall reduce the award by the amount of any monetary award to the employee in another forum for the same conduct of the employer. In making any award, the arbitrator is subject to the rules of issue, fact, and judgment preclusion, which apply in the courts of record in this State.

(e) If an arbitrator dismisses an employee's complaint and finds it frivolous, unreasonable, or without foundation, the arbitrator may award reasonable attorney's fees and costs to the prevailing employer.

(f) An arbitrator may sustain an employer's complaint and make an award declaring that there is good cause for the termination of a named employee. If the arbitrator dismisses the employer's complaint, the arbitrator may award reasonable attorney's fees and costs to the prevailing employee.

SECTION 8: JUDICIAL REVIEW AND ENFORCEMENT

(a) Either party to an arbitration may seek vacation, modification, or enforcement of the arbitrator's award in the [court of general jurisdiction] for the [county] in which the termination occurred or in which the employee resides.

(b) An application for vacation or modification must be filed within [90] days after the issuance of the arbitrator's award. An application for enforcement may be filed at any time after the issuance of the arbitrator's award.

(c) The court may vacate or modify an arbitrator's award only if the court finds that:

- (1) the award was procured by corruption, fraud, or other improper means;
 - (2) there was evident partiality by the arbitrator or misconduct prejudicing the rights of a party;
 - (3) the arbitrator exceeded the powers of an arbitrator;
 - (4) the arbitrator committed a prejudicial error of law; or
 - (5) another ground exists for vacating the award under the [Uniform Arbitration Act] [—— arbitration act of this State].
- (d) In an application for vacation, modification, or enforcement of the arbitrator's award, the court may award a prevailing employee reasonable attorney's fees and costs. In an application by an employee for vacation of the arbitrator's award, the court may award a prevailing employer reasonable attorney's fees and costs if the court finds the employee's application is frivolous, unreasonable, or without foundation.

SECTION 9: POSTING

An employer shall post a copy of this [Act] or a summary approved by the [Commission; Department; Service] in a prominent place in the work area. An employer who violates this section is subject to a civil penalty not exceeding [\$—]. The [Attorney General] is authorized to bring a civil action, on behalf of this State, to impose and collect any civil penalty arising under this section.

SECTION 10: RETALIATION PROHIBITED AND CIVIL ACTION CREATED

An employer or other employing person may not directly or indirectly take adverse action in retaliation against an individual for filing a complaint, giving testimony, or otherwise lawfully participating in proceedings under this [Act], whether or not the individual is an employee given rights under this [Act]. An employer or other employing person who violates this section is liable to the individual subjected to the

adverse action in retaliation for actual damage caused by the action, punitive damages when appropriate, and reasonable attorney's fees. A separate civil action may be brought to enforce this liability and the employer is also subject to the procedures and remedies provided by Sections 5 through 8 where they also apply.

SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 12: SHORT TITLE

This [Act] may be cited as the [Model] Employment Termination Act.

SECTION 13: SEVERABILITY CLAUSE

If any provision of this [Act] or its application to any person or circumstance is held invalid; the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 14: EFFECTIVE DATE

This [Act] takes effect -----

SECTION 15: REPEALS

The following acts and parts of acts are repealed

- (1).
- (2).
- (3).

(a) This [Act] does not apply to a termination at the expi-

ration of an express oral or written agreement of employment for a specified duration, which was valid, subsisting, and in effect on the [effective] date of this [Act].

(b) This [Act] does not apply to the termination of an employee within six months after the effective date of this [Act] based upon the employee's refusal to enter into an agreement meeting the minimum standards of Section 4(c), which the employer, in the exercise of good faith business judgment, may impose as a condition of continued employment.

APPENDIX

Note: Instead of the arbitration system provided by Sections 5 through 8 of the preceding text, states may select the following Alternative A or Alternative B as the means for enforcement.

ALTERNATIVE A

SECTION 5: ADMINISTRATIVE PROCEEDINGS.

[Insert provisions consigning enforcement of the [Act] to a new or existing administrative agency, staffed by civil service or other governmental personnel, operating under applicable state statutes. Delete Sections 5 through 8 of the preceding text and renumber the remaining section and any cross references according.]

SECTION 6: REMEDIES

(a) The [Commission; Department; Service] may provide one or more of the following remedies for a termination in violation of this [Act]:

(1) reinstatement to the position of employment the employee held when employment was terminated or, if that is impractical, to a comparable position;

(2) full or partial backpay and reimbursement for lost fringe benefits, with interest, reduced by interim earnings from employment elsewhere, benefits received, and amounts that could have been received with reasonable diligence;

(3) if reinstatement is not awarded, a lump-sum

severance payment at the employee's rate of pay in effect before the termination, for a period not exceeding [36 months] from the date of the order, together with the value of fringe benefits lost during that period, reduced by likely earnings and benefits from employment elsewhere, and taking into account such equitable considerations as the employee's length of service with the employer and the reasons for the termination; and

(4) Reasonable attorney's fees and costs

(b) The [Commission; Department; Service] may grant either or both of the following remedies for a violation of an agreement for severance pay under Section 4(c):

(1) enforcement of the severance pay and other applicable provisions of the agreement, with interest; and

(2) reasonable attorney's fees and costs.

(c) The [Commission; Department; Service] may not make any award except as provided in subsections (a) and (b). In no event may the [Commission; Department; Service] award damages for pain and suffering, emotional distress, defamation, fraud, or other injury under the common law, punitive damages, compensatory damages, or any other monetary award under this [Act]. In making a monetary award under this section, the [Commission; Department; Service] shall reduce the award by the amount of any monetary award to the employee in another forum for the same conduct of the employer. In making any award, the [Commission; Department; Service] is subject to the rules of issue, fact, and judgment preclusion, which apply in the courts of record in this State.

(d) If the [Commission; Department; Service] dismisses an employee's complaint and finds it frivolous, unreasonable, or without foundation, the [Commission; Department; Service] may award reasonable attorney's fees and costs to the prevailing employer.

(e) Upon the complaint of an employer, the [Commission; Department; Service] may issue an order declaring whether

there is good cause for the termination of a named employee. If the [Commission; Department; Service] dismisses the employer's complaint, the [Commission; Department; Service] may award reasonable attorney's fees and costs to the prevailing employee.]

ALTERNATIVE B

[Alternative B would leave the enforcement of the statute to the civil courts. Delete Sections 5 through 8 of the preceding text and renumber the remaining sections and any cross references accordingly]

SECTION 5: JUDICIAL REMEDIES

(a) The court may grant one or more of the following awards for a termination in violation of this [Act]:

(1) reinstatement to the position of employment the employee held when employment was terminated or, if that is impractical, to a comparable position;

(2) full or partial backpay and reimbursement for lost fringe benefits, with interest, reduced by interim earnings and benefits received, or amounts that could have been received with reasonable diligence;

(3) if reinstatement is not awarded, a lump-sum severance payment at the employee's rate of pay in effect before the termination, for a period not exceeding [36 months] from the date of the award, together with the value of fringe benefits lost during that period, reduced by likely earnings and benefits from employment elsewhere, and taking into account such equitable considerations as the employee's length of service with the employer and the reasons for the termination; and

(4) Reasonable attorney's fees and costs.

(b) The court may make either or both of the following awards for a violation of an agreement for severance pay under Section 4(c):

(1) enforcement of the severance pay and other applicable provisions of the agreement, with interest; and

(2) reasonable attorney's fees and costs.

(c) The court may not make any award except as provided in subsections (a) and (b). In no event may the court award damages for pain and suffering, emotional distress, defamation, fraud, or other injury under the common law, punitive damages, compensatory damages, or any other monetary award under this [Act]. In making a monetary award under this section, the court shall reduce the award by the amount of any monetary award to the employee in another forum for the same conduct of the employer. In making any award, the court is subject to the rules of issue, fact, and judgment preclusion, which apply in the courts of record in this State.

(d) If the court dismisses an employee's complaint and finds it frivolous, unreasonable, or without foundation, the court may award reasonable attorney's fees and costs to the prevailing employer.

(e) Upon the complaint of an employer, the court may enter a judgment declaring whether there is good cause for the termination of a named employee. If the court dismisses the employer's complaint, the arbitrator may award reasonable attorney's fees and costs to the prevailing employee.]