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# Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism

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# COMPARATIVE WRONGFUL DISMISSAL LAW: REASSESSING AMERICAN EXCEPTIONALISM\*

SAMUEL ESTREICHER & JEFFREY M. HIRSCH\*\*

*Commentators have long debated the merits of the American “at-will” rule, which allows employers and employees to end the employment relationship without cause or notice, absent a constitutional, statutory, or public policy exception. One premise for both proponents and opponents of at-will employment is to stress the uniqueness of this default among other developed countries, which generally require “cause” for most dismissals.*

*Although other countries’ cause regimes differ significantly from the United States’ on paper, this Article addresses whether those differences in normative law also reflect differences in employees’ protection against wrongful termination in reality. The existing literature on dismissal law stops at a comparison of countries’ normative laws as they appear on the books. In comprehensively examining the dismissal regimes of numerous countries, this Article goes beyond the text of the relevant statutes and cases by using information from foreign employment law practitioners and available data—particularly claimants’ success*

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\*\* Respectively, Dwight D. Opperman Professor of Law, New York University School of Law, and Associate Dean for Academic Affairs and Geneva Yeargan Rand Distinguished Professor of Law, University of North Carolina School of Law. The authors owe a debt of gratitude to the wonderful librarians at their respective institutions and to distinguished practitioners and academics from abroad, including Luca Allevi, Gordon Anderson, Raffaela Betti, Susan Bison-Rapp, Anne Boileau, Erika Collins, Hugh Collins, Alexander Colvin, David Doorey, Bryan Dunne, Friederike Göbbels, Stephane Henry, Bob Hepple, John Howe, Daniel Hund, Pietro Ichino, Georgina Kabemba, Katrina Linos, François Longpré, Michael Lynch, Francesca Marinelli, Lisa Mayhew, Morton Mitchnick, Barbara Mok, Mariko Morita, Hiroya Nakakubo, Adam Salter, Deborah Sankowicz, Corinne Varga, and Michael Zimmer. This Article also benefited greatly from feedback generated during presentations at the Seventh Annual Comparative Law Works-in-Progress Workshop, Princeton University; Duke University School of Law Faculty Forum; and Seventh Annual Colloquium on Current Scholarship in Labor & Employment Law. The authors were very ably assisted by students Leslie Caia, Thomas Hodge, Casey Turner, and Gisela Valle-Garcia. This Article updates and expands upon an earlier effort by one of its co-authors, Samuel Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMP. L. 310 (1985), updated in GLOBAL ISSUES IN EMPLOYMENT LAW 74–85 (Samuel Estreicher & Miriam A. Cherry eds. 2008).

*rates and average remedies—in an attempt to observe how the laws actually operate. The authors find that, even on paper, the cause protection of the surveyed countries is far less robust than typically described. Moreover, the actual practice in these countries shows that challenges to dismissal can be difficult to pursue and generally result in modest remedies by U.S. standards. This suggests that the United States, with its at-will default and broader remedies, is actually part of a relatively narrow continuum of employment laws found in advanced countries.*

*This Article hopes to spur more in-depth descriptive work on the employment laws of other countries and to broaden the terms of the debate over the relative merits of the U.S. employment dismissal system and the dismissal systems of cause regimes.*

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## INTRODUCTION

Terminations from employment are among the most significant<sup>1</sup> and frequently litigated aspects of American employment law.<sup>2</sup> The

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1. See LOUIS JACOBSON, ROBERT LALONDE & DANIEL SULLIVAN, *THE COSTS OF WORKER DISLOCATION* 137, 144–45 (1993) (estimating lifetime loss of earnings caused by termination at approximately \$80,000 (\$129,034.74 in 2013 dollars) for an employee earning approximately \$24,000 (\$38,710.42 in 2013 dollars) per year); see also Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111, 147–50 (2006) (discussing costs of termination and clarifying Jacobson, LaLonde, and Sullivan’s estimate as discounted to present value).

2. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991) (noting the frequency of employment termination litigation and finding that there were six charges of discriminatory terminations in 1985 for every charge of discriminatory hiring). Overall, approximately 33,000 employment-related actions were filed in federal district courts from April 1, 2010, to March 31, 2011—comprising 11% of the federal trial court docket. See STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD

recent global economic crisis and its impact on unemployment levels have undoubtedly exacerbated this trend.

In the United States—absent a constitutional, statutory, or public-policy provision or ruling restricting the grounds for termination—nothing prevents the employer or employee from terminating the employment relationship without cause or notice.<sup>3</sup> This “at-will” default puts the United States in a singular position among most other developed countries, which usually require “cause”<sup>4</sup> for non-economic dismissals.<sup>5</sup> Cause protection can affect a

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STATISTICS: MARCH 31, 2011, at 46 tbl.C-2, *available at* <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C02Mar11.pdf> (referring to the 2011 “Federal Question” column and combining FLSA and ERISA cases from the “Labor Laws, Total” category with the “Employment,” “ADA—Employment” and “ADA—Other” cases from the “Civil Rights, Total” category). Concededly, the 33,000 figure may overstate the number of civil rights actions that were employment-related, but it does not include the number of employment-related contract and tort action cases falling under the federal diversity jurisdiction category.

3. See RESTATEMENT (THIRD) OF EMP’T LAW § 2.01 (Tentative Draft No. 2, 2009). The at-will default rule has a long history in the United States. It began to gain strength in the late 1800s and was adopted in nearly every state by the 1930s. See Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 700 (1994); see also Richard A. Bales, *Explaining the Spread of At-Will Employment as an Inter-Jurisdictional Race-to-the-Bottom of Employment Standards*, 75 TENN. L. REV. 453, 455 (2008) (arguing that the at-will default spread initially among underindustrialized states trying to attract capital); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 356 (2002) (discussing the origin of the at-will rule).

4. The definition of “cause” or “just cause” can vary depending on the jurisdiction or context. See *infra* Part I (discussing and comparing the employment laws of eleven foreign countries and the United States). One contract-based U.S. example is “a fair and honest cause or reason, regulated by good faith.” See *Pugh v. See’s Candies, Inc.*, 171 Cal. Rptr. 917, 927–28 (Ct. App. 1981) (quoting *R.J. Cardinal Co. v. Ritchie*, 32 Cal. Rptr. 545, 558 (Ct. App. 1963)) (internal quotation marks omitted) (using this definition to describe “just cause” as well as “good cause”); see also Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of “Just Cause” in Employee Discipline Cases*, 1985 DUKE L.J. 594, 594–95, 599–601 (noting the standards used in cases to determine whether an employer had a sufficiently “just” reason to terminate an employee). According to the *Restatement of Employment Law*, cause for early termination of a definite-term agreement for employment requires a showing that the employee engaged in “misconduct, other malfeasance, or other material breach of the agreement, such as persistent neglect of duties, gross negligence, or failure to perform the duties of the position due to a permanent disability.” RESTATEMENT (THIRD) OF EMP’T LAW § 2.04(a) (Tentative Draft No. 2, 2009). When an indefinite agreement requires cause for termination, such cause exists when, “in addition to the grounds stated in § 2.04(a), [there are] substantial legitimate business reasons, such as significant changes in the employer’s economic circumstances.” *Id.* § 2.04(b).

5. Not all terminations are based on the claimed performance of the employees; many are economic dismissals and layoffs. Unlike some European countries, as discussed *infra* Part I, the United States does not stipulate termination pay for economic dismissals as a matter of statutory right (as opposed to contract rights). See Rachel Arnov-Richman,

large number of individuals; although reliable data remain scarce, commentators have estimated that employers terminated 150,000 workers without cause in the United States as early as 1983.<sup>6</sup>

The contrast between the dismissal regimes of the United States and other countries has led many commentators to decry the exceptionalism of American employment law. The argument that frequently flows from this exceptionalism characterization posits that the United States should reconsider a rule—the at-will default—that differs so substantially from the approach taken by most other countries.<sup>7</sup> The counterargument suggests that the at-will rule permits

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*Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 25–26, 40–41 (2010) (arguing for a reasonable notice requirement for all terminations).

6. This estimate was extrapolated from the arguably inapposite labor arbitration experience under collective-bargaining agreements. See Jack Stieber, *Recent Developments in Employment-At-Will*, 36 LAB. L.J. 557, 558 (1985); see also Theodore J. St. Antoine, *The Model Employment Termination Act: A Threat to Management or a Long-Overdue Employee Right?*, in PROCEEDINGS OF NEW YORK UNIVERSITY 45TH ANNUAL NATIONAL CONFERENCE ON LABOR 269, 270 (Bruno Stein ed., 1993) (citing the Stieber estimate to argue that U.S. employers dismiss a significant number of employees without cause); Jack Stieber & Michael Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REFORM 319, 321 (1983) (stating that the current at-will regime leaves many workers unprotected). But see Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901, 1908–14 (1996) (criticizing the statistical value and reliability of Stieber and Murray's study). Given the size of the U.S. workforce, see News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, The Employment Situation—August 2013, summary tbl.A (Sept. 6, 2013), [http://www.bls.gov/news.release/archives/empstat\\_09062013.pdf](http://www.bls.gov/news.release/archives/empstat_09062013.pdf) (stating that there were approximately 144 million workers at the end of June 2013), and the number of termination decisions each year, see News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Job Openings and Labor Turnover—August 2013, tbl.5 (Oct. 24, 2013), <http://www.bls.gov/news.release/pdf/jolts.pdf> (stating that, in June 2013 alone, employers discharged or laid off approximately 1.6 million workers), the Stieber estimate may translate to a relatively low risk of wrongful dismissal per employee. See also Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1106 (1989) (estimating that at-will employees' annual probability of being dismissed in a manner that would violate a just-cause provision under collective bargaining agreement was 0.0154%, and the probability of being dismissed or disciplined in a manner that would likely be settled under a negotiated grievance procedure was 0.5769%).

7. Compare, e.g., Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 826 (2011) ("America is unique in its adherence to the at-will rule."), and Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 890–91 (1994) ("The United States stands alone among the world's major industrialized nations in failing to protect employees from wrongful discharge through federal legislation. . . . The time has come for us to join the community of nations in protecting employees from wrongful termination." (footnotes omitted)), and Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 68–69 (1988) ("The United States remains the last major industrial democracy that has not heeded the call for unjust dismissal legislation."), with Lawrence

greater labor-market flexibility and hence a more efficient, productive economy.<sup>8</sup> The dearth of literature on comparative unjust dismissal makes it difficult for the dispassionate observer to make a reasoned assessment of how the U.S. employment system compares with the arrangements in other countries. It is not enough, this Article argues, to compare the nominal provisions of the laws. Rather, it is key to provide an in-depth account of both the written termination laws of various countries and the manner in which those laws are actually enforced.<sup>9</sup> This Article, the authors believe, is the first work that undertakes this effort in a comprehensive fashion.

At the outset, this Article suggests that observers who emphasize the singularity of the American model must take account of the fact that the U.S. at-will default coexists with an ever-growing number of statutory and common-law exceptions. These federal, state, and local exceptions can provide significant restrictions on employer discretion and, as discussed below, expose employers to far larger monetary awards than those found in countries with wrongful dismissal legislation.<sup>10</sup> For instance, federal and state antidiscrimination laws provide a form of unjust dismissal protection by allowing employees to challenge terminations with indirect proof of discrimination, where liability often turns on the credibility of the employer's stated reason for termination.<sup>11</sup> Moreover, over twenty-five different federal

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E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1415 (1967) ("[J]udicial and quasi-judicial remedies are available to wrongfully discharged employees in a number of continental European countries.").

8. See, e.g., Walter E. Williams, *European Nations Actually in Stagnation and Decline*, DESERET NEWS (Nov. 23, 2005, 12:00 AM), <http://www.deseretnews.com/article/635163298/European-nations-actually-in-stagnation-and-decline.html?pg=all> (arguing that in Europe, "[h]igh minimum wages and employment protection regulations make it nearly impossible to fire people, thereby making it costly to hire them"); cf. J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 895–96 (arguing that just-cause protection decreases flexibility for firms and contributes to poor national economic performance). See generally Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) (arguing that an at-will rule is more efficient than a just-cause rule as the default for employment agreements).

9. See generally, e.g., ROGER BLANPAIN ET AL., THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW (2d ed. 2012) (providing an overview of a broad range of labor and employment laws in several of the countries in this survey).

10. See *infra* Part II.D.5.

11. See, e.g., Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147–48 (2000) (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)); *Tex. Dep't of Cnty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("[I]f the plaintiff succeeds in proving the prima facie [discrimination] case, the burden shifts to the defendant 'to articulate some

statutes, and a much larger number of state statutes and common-law rules, govern terminations.<sup>12</sup> Protection is even greater in the public and unionized sectors, where a substantial number of employees are protected against unfair termination by constitutional provisions, civil-service laws, and collective-bargaining agreements.<sup>13</sup>

The authors know that cause regimes differ from U.S. employment laws in their premises. This Article addresses how different those laws are in practice. Even on paper, the cause protection of the surveyed countries is often far less robust than typically described. Moreover, the actual practice in these countries frequently results in less protection on the ground than is afforded to U.S. workers because challenges to terminations can be difficult to pursue, and remedies may be quite modest by U.S. standards.<sup>14</sup> This

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legitimate, nondiscriminatory reason for the employee's rejection.' " (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)); *see also* Alfred W. Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII*, 2 INDUS. REL. L.J. 519, 527 (1978) ("The employer may then advance a legitimate non-discriminatory reason for the allegedly discriminatory action; the claimant may then respond that the reason is a pretext."). This Article does not survey antidiscrimination limits on termination outside the United States because in other countries, unjust dismissal statutes typically provide the primary remedy for discrimination claims. *See infra* Part I. One slight exception is the United Kingdom, which caps remedies for unjust dismissal claims but not for discrimination claims; however, the number of successful discrimination claims in the United Kingdom is far lower than the number of successful unjust dismissal claims, and both have comparable median awards. *See* MIN. OF JUSTICE, EMPLOYMENT TRIBUNALS AND EAT STATISTICS, 2011–12, tbls.2, 5–11 (2012), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/218497/employment-trib-stats-april-march-2011-12.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218497/employment-trib-stats-april-march-2011-12.pdf) (noting 3,900 successful employment tribunal unjust dismissal claims in 2011–2012—2,309 with financial award—and 742 successful discrimination tribunal claims—345 with financial award; median financial award for unjust dismissal claims was £4,560 (US\$7,192), race discrimination was £5,256 (US\$8,289), and sex discrimination was £6,746 (US\$10,639)). All currency conversions have been calculated to represent the particular amount's value in 2013 U.S. dollars. *See infra* note 14.

12. *See, e.g.*, HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE §§ 1.07, 2.10, 3.06 (5th ed. Supp. 2011) (providing "state-by-state" summary of termination laws); *id.* §§ 302–05, 307–20 (listing federal statutes); *cf.* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012) (surveying different statutory and common-law protections for employee speech against retaliation).

13. See BUREAU OF NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 7 (14th ed. 1995) (studying collective-bargaining agreements and finding that "'[c]ause' or 'just cause' is stated as a reason for discharge in 92 percent of agreements"); Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the CPS*, UNIONSTATS.COM (2013), <http://www.unionstats.com/> (noting that in 2010, 13.1% of all workers, public and private, were covered by a collective-bargaining agreement; coverage was 7.7% in the private sector and 40% in the public sector).

14. This Article provides conversions of all foreign monetary data to 2013 U.S. dollars (the conversion appears in parentheses following every notation of foreign currency). The

Article aims to shift the terms of the debate—to place U.S. employment law along a relatively narrow continuum with the employment laws of other advanced countries and to require scholars and practitioners in those countries to provide a rendering of their employment laws that takes full account of the barriers to enforcement and the range of available remedies.

This Article also aims to alter the U.S. academic debate on reform of the American at-will rule. Presently, the debate between defenders of the at-will rule and proponents of a cause regime often describes a world in which there are only two options: a strong at-will default rule (as currently exists in the United States) or a strong cause protection that offers the access to courts and remedies typical of U.S. employment laws.<sup>15</sup> However, the view from abroad reveals a wider range of tradeoffs involving the employment law on the books and the accessibility and efficacy of the remedial scheme on the ground.

This Article first surveys the unjust dismissal regimes of eleven foreign countries, as well as the United States.<sup>16</sup> As part of that survey, it describes each country's laws on individual unjust dismissals, economic dismissals and layoffs, unemployment assistance, and means for enforcement. Where possible, the Article supplements these descriptions with feedback from practitioners in those countries. Moreover, when examining the enforcement of these laws, the Article cites available data on maximum and minimum limits on damage awards, average awards, and the frequency of certain types of remedies, such as reinstatement. Next, the Article synthesizes the country-specific information to show how the eleven foreign countries compare with each other, as well as how they compare with the U.S. system of termination law. Finally, the Article argues that previous comparisons of the U.S. system and those around the world ignore much of the complexity present in these systems and suggests that future considerations of unjust dismissal regulation should take these complexities into account.

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authors used the conversion tools available at either (1) <http://www.usinflationcalculator.com> or (2) <http://www.oanda.com/currency/converter/>, depending on the type of conversion necessary. Some calculations required the use of both calculation tools. For historical rates, the authors used July 2 as the mid-point of a given year, unless the source provided a more specific date.

15. See generally Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89 (2008) (offering a broad description of this debate).

16. In addition to the United States, this Article surveys the following countries *infra* Part I: Australia, Brazil, Canada, China, France, Germany, Ireland, Italy, Japan, Mexico, and the United Kingdom.

## I. AN INTERNATIONAL SURVEY OF UNJUST DISMISSAL PROTECTION

Over the last couple of decades, there has been a partial convergence of employment protections among most countries—mainly due to a pullback from stricter protections in certain jurisdictions.<sup>17</sup> However, there still remain significant differences among countries. For instance, Canada and the United Kingdom (along with the United States) tend to have the less formidable formal restrictions on an employer's ability to dismiss workers.<sup>18</sup> In contrast, other countries—such as France and Mexico—make terminations substantially more difficult, at least on paper.<sup>19</sup> What follows is a study of the dismissal laws of eleven foreign countries, as well as a brief study of the dismissal laws of the United States, and an attempt to assess how such laws are enforced in practice.<sup>20</sup>

This Article will examine three general aspects of each country's unjust dismissal regime: (1) the provisions of unjust dismissal legislation, where applicable, as well as related procedural requirements; (2) the rules mandating certain actions or payments for no-fault layoffs, such as redundancy pay, collective-dismissal requirements, and unemployment benefits; and (3) the enforcement scheme, including the manner of adjudication and, where data are available, the probability of success and average awards.

This study begins by examining the actual provisions of each country's unjust dismissal legislation or, where applicable, judge-made rules. Virtually all of the surveyed jurisdictions prohibit unjust dismissals, and in each jurisdiction an unjust dismissal triggers a notice, or payment in lieu of notice, requirement. The concept behind this latter requirement is that notice periods can help employees transition out of a job and, in some cases, can serve as a type of

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17. ORG. FOR ECON. CO-OPERATION & DEV., OECD EMPLOYMENT OUTLOOK 2004, at 71–75 (2004) [hereinafter OECD, EMPLOYMENT OUTLOOK], *available at* <http://www.oecd.org/employment/emp/34846856.pdf> (noting that much of the pullback occurred with regard to regulation of temporary employment).

18. *Id.* at 71 (noting that countries differ in their protections for permanent and temporary employees).

19. *Id.*

20. The European Union ("E.U.") has been relatively silent with regard to unjust dismissal. See *Dismissals*, EUROFOUND, <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/dismissal.htm> (last updated May 5, 2011) (noting that the E.U. has not regulated dismissals aside from some rules on collective dismissals and other ancillary issues).

severance payment reflecting prior service.<sup>21</sup> In addition, some countries mandate that an employer provide an explanation for termination of an employee, which might also be thought to improve employer decision-making and thus reduce the incidence of unjust dismissal.<sup>22</sup>

Beyond direct protection for unfair dismissals, most of the countries surveyed regulate in some fashion the layoff or dismissal of workers for economic reasons. In contrast to cases in which the reason for dismissal is related to a particular employee—such as misconduct or work quality issues—these layoffs generally involve cases in which financial pressure or operational needs prompt the employer to dismiss one or more employees for reasons unrelated to their conduct or performance. Because of their no-fault nature, special rules apply to these dismissals. Indeed, even the United States provides some limited protection for economically dismissed employees through its unemployment system<sup>23</sup> and the advance notice requirements for plant closings and mass layoffs under the federal Worker Adjustment and Retraining Notification Act (“WARN Act”)<sup>24</sup> and state analogues.<sup>25</sup>

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21. See Arnow-Richman, *supra* note 5, at 45, 59–60 (citing evidence that advance notice can reduce the length of an individual’s unemployment and, in some cases, prevent unemployment altogether); St. Antoine, *supra* note 7, at 67 (describing the psychological and physical costs associated with mass layoffs).

22. Abrams & Nolan, *supra* note 4, at 599–601, 610 (“[I]t is in the employer’s interest to give employees adequate notice of their obligations.”); Ellen Dannin, *Why At-Will Employment Is Bad for Employers and Just Cause Is Good for Them*, 58 LAB. L.J. 5, 11–12 (2007) (arguing that just-cause protection would increase employers’ willingness to inform employees about work problems prior to termination); Robert L. Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 79 (1976) (arguing that an explanation requirement is a “core safeguard against arbitrariness”). An explanation might also reduce discrimination and other types of dismissal claims. See Arnow-Richman, *supra* note 5, at 62–63 (arguing that a predictable notice requirement would reduce the number of employment discrimination and unjust dismissal claims); Richard Michael Fischl, ‘A domain into which the King’s writ does not seek to run’: *Workplace Justice in the Shadow of Employment-at-Will*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION* 253, 262 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002) (“[I]t is frequently the unfairness of the discharge itself that leads the employee to suspect a racial or gender aspect . . . ”).

23. See *infra* notes 697–702 and accompanying text.

24. Pub. L. No. 100-379, 102 Stat. 890 (codified as amended at 29 U.S.C. §§ 2101–2109 (2012)).

25. See JEFFREY M. HIRSCH, PAUL M. SECUNDA & RICHARD A. BALES, *UNDERSTANDING EMPLOYMENT LAW* 183–89 (2d ed. 2007) (providing a summary of the WARN Act); see also *infra* notes 694–96 and accompanying text (discussing the WARN Act).

Providing a precise definition of all types of economic dismissal protections proves difficult because of countries' varying use of terms, but four classifications are common: (1) redundancy, (2) severance, (3) unemployment benefits, and (4) group or collective dismissals.

The first two types, "redundancy" and "severance," are quite similar and are often used interchangeably. However, they can encompass two different situations. Redundancy pay typically applies to a dismissal that occurs when an employee's services are no longer required, usually due to changes in the employer's finances or operations.<sup>26</sup> Either by contract or by legislation, the employer may make redundancy payments to employees who lose their jobs for this reason.

In some jurisdictions, the term "severance" may be used to describe redundancy payments, but the term may also be used more broadly to describe payments to terminated employees that are keyed to length of service. Although both severance and redundancy can be triggered by an economic dismissal in which the employee is not at fault, severance extends to additional situations—even, in some countries, when the employee is at fault.<sup>27</sup> Most countries in this survey provide some sort of payment to economically dismissed employees and call it either redundancy or severance, often without much concern for whether the term they use is technically accurate.<sup>28</sup> The United States does not require employers to pay benefits to dismissed employees, although in both union and non-union settings, contractual severance payments for terminations unrelated to employee misconduct are not uncommon.<sup>29</sup>

Third, in addition to severance and redundancy benefits, many countries, including the United States, maintain an unemployment

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26. See, e.g., *Genuine Redundancy or Unfair Dismissal*, FAIR WORK OMBUDSMAN, <http://www.fairwork.gov.au/termination/redundancy/pages/genuine-redundancy-or-unfair-dismissal.aspx> (last updated Mar. 3, 2011).

27. See *infra* Part I.H.2 (providing Italy as an example).

28. But see CODE DU TRAVAIL [C. TRAV.] arts. L1233-58, L1234-9 (Fr.) (providing distinct awards for severance and redundancy); *infra* Part I.E.2.

29. See Donald O. Parsons, *Mandated Severance Pay and Firing Cost Distortions: A Critical Review of the Evidence* 1-2 (Inst. for the Study of Labor (IZA), Discussion Paper No. 5,776, 2011), available at <http://ftp.iza.org/dp5776.pdf>; see also Donald O. Parsons, Benefit Generosity in Voluntary Severance Plans: The U.S. Experience 1, 3 (Dec. 2005) (on file with the George Washington University Center for Economic Research), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=877903](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=877903) (citing data showing that approximately one-quarter of all employees work under such plans—a fraction that approaches two-thirds in certain sectors—and listing reasons for why employers voluntarily offer benefits, including worker morale, increased productivity, and the ability to profit from providing such insurance).

insurance system. Unemployment benefits, although similar to redundancy or severance pay, have a different policy goal: enhancing dismissed employees' ability to find suitable employment by giving them financial assistance while they are looking for work.<sup>30</sup> Generally, this policy is implemented in part by requiring that employees not be at fault for their dismissal and that the unemployment benefits cease once the employee-claimants accept new employment or abandon their job search.<sup>31</sup> This contrasts with severance and redundancy benefits, which are intended to compensate employees for their job losses and are generally not dependent on dismissed employees' job searches.

A fourth category of economic dismissal protection applies only to group or collective dismissals. For instance, under the federal WARN Act, large employers must give notice before a plant closing or others types of mass layoffs.<sup>32</sup> In addition to WARN-like notice requirements, some countries also require negotiations with plant-level works councils or other employee representatives to limit the effect of the layoffs on employees and possibly to obtain additional payment from the employer.

Finally, after discussing each country's unjust dismissal protection and layoff requirements, this Article moves beyond the prior literature, which merely describes the formal requirements of an unjust dismissal regime without examining how the law operates in practice. Comparative law is too often satisfied with a comparison of only the nominal provisions of laws.<sup>33</sup> Such a limited perspective imparts little information on how the law actually operates. If, for example, nominally employee-generous laws are difficult to enforce in practice or violations result in modest payments, the actual cost to employers of a termination decision may be lower than the cost in an at-will regime where laws that are less employee-generous on their face are, in practice, more amenable to lawsuits and risk of damages. To capture more of the realistic implementation of these laws, this

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30. See Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 340–43 (2001).

31. See HIRSCH ET AL., *supra* note 25, at 180–81.

32. See *infra* notes 694–96 and accompanying text.

33. See generally, e.g., Katharine G. Abraham & Susan N. Houseman, *Does Employment Protection Inhibit Labor Market Flexibility? Lessons from Germany, France, and Belgium*, in SOCIAL PROTECTION VERSUS ECONOMIC FLEXIBILITY: IS THERE A TRADE-OFF? 59 (Rebecca M. Blank ed., 1994) (examining the impact of changes in countries' job security laws—as written, rather than as implemented—on labor market flexibility).

Article relies on input from practitioners in the studied countries and data on these laws' enforcement, such as average damages awards.

Proponents of the U.S. exceptionalism view assume that the United States favors employers most of the time, while other countries overwhelmingly favor employees most of the time.<sup>34</sup> The truth may be more complicated. In the United States, the exceptions to the at-will default rule can result in high-stakes litigation that yields significant monetary recoveries for successful claimants. Highly compensated employees, in particular, enjoy considerable bargaining leverage to wrest generous severances in exchange for giving up the right to sue in court.<sup>35</sup> However, employees with median incomes will find it difficult to obtain competent counsel and sue their employers in court.<sup>36</sup> This is true even though in many respects access to the U.S. civil courts is considerably less daunting than in other countries—partially due to the availability of class actions, the recovery of emotional and punitive damages, and the absence of a “loser pays” rule for attorney’s fees.<sup>37</sup> It is difficult to win employment claims in the United States,<sup>38</sup> but when employees are successful, they receive awards that are much greater on average than what employees typically receive in other countries.<sup>39</sup>

The foreign countries in this study have very different enforcement schemes than the United States. They typically use administrative labor courts or industrial tribunals to provide a less costly forum for adjudication of employment disputes than the civil courts. Employee claims brought to these specialized tribunals are more likely to be successful, but typically result in far smaller awards than successful employment claims in the United States.

This Article does not conclude that the U.S. approach to employment protection is superior to that of the other countries under study, or vice versa. Rather, the Article argues that a comparison of the nominal provisions of the laws does not tell the entire story. For every country, a more complete account is required to show how the law is experienced through the particular

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34. See *supra* note 7 and accompanying text.

35. See Befort, *supra* note 3, at 402–03.

36. Cf. *id.* (“Many of those workers who may have a legitimate claim are unable to pursue it because of the high entry cost of our justice system.”).

37. See *id.* at 402 (“[E]mployers have a strong incentive to settle employment claims in order to avoid the costs associated with litigation.”); *infra* notes 747–52 and accompanying text (discussing limits on recovery).

38. See *infra* Part II.D.4.

39. See *infra* notes 789–92 and accompanying text.

institutional arrangements, enforcement provisions, and legal culture. As the following study demonstrates, there is more variance in countries' regulation of dismissals than previous research has acknowledged.<sup>40</sup>

This disparity in enforcement also undermines the exceptionalism argument that simply importing an unjust dismissal statute into the United States will make its employment system more similar to that of other countries. This argument both ignores the differences in countries' unjust dismissal rules and fails to account for essential differences in enforcement mechanisms and legal culture.

Below, the Article summarizes the employment law systems of Australia, Brazil, Canada, China, France, Germany, Ireland, Italy, Japan, Mexico, the United Kingdom, and the United States. The authors picked these countries to provide a mix of common-law and civil law systems, countries that are members of the European Union ("E.U."), countries outside of the E.U., and two Latin American economies. All of these countries are also important trading partners of the United States.<sup>41</sup>

#### A. Australia

In recent years, Australian termination law has become more employee-friendly, covering a wider range of employees and placing the burden on employers to defend dismissals. In addition, Australian termination law provides victims of redundancy dismissals with special benefits, so long as they worked at a large enough company, and requires a specific process for collective dismissals of fifteen or more employees. Australia also provides a unique unemployment assistance program intended to help low-income families with unemployed individuals. Notably, the large majority of employees in Australia are satisfied with the application and enforcement of the termination laws. A summary of Australian termination law and its enforcement is provided in Table 1 of the Appendix.

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40. See, e.g., Abraham & Houseman, *supra* note 33, at 59–60, 88 (examining, among other things, the effect of changes in countries' job security laws on labor market flexibility); William W. Olney, *A Race to the Bottom? Employment Protection and Foreign Direct Investment* 2–5 (Williams Coll. Dep't of Econ., Working Paper No. 2011-02, rev. 2013), available at <http://web.williams.edu/Economics/wp/OlneyEmploymentProtectionAndFDI.pdf> (using OECD scores—which use objective scores on dismissal laws that for the most part do not take into account the actual implementation of those laws—to measure the effect of employment protection legislation on foreign investment).

41. See *Top Trading Partners - December 2012*, U.S. CENSUS BUREAU, <http://www.census.gov/foreign-trade/statistics/highlights/top/top1212yr.html> (last visited Jan. 2, 2014) (detailing top year-to-date trading partners as of December 2012).

### 1. Individual Unjust Dismissal

Although common-law breach of employment contract claims is available in Australia,<sup>42</sup> the Fair Work Act of 2009 (“FWA”)<sup>43</sup> provides the primary protection against unjust dismissal. The FWA, which also provides protection against workplace discrimination,<sup>44</sup> replaced the Workplace Relations Act of 1996 and its 2005 amendments, which were more deferential to employer decision-making.<sup>45</sup> One example of the FWA’s expanded reach is its coverage: by extending unjust dismissal protection to previously exempted firms with fewer than 100 employees, the FWA covers an additional 4.3 million workers.<sup>46</sup>

The FWA’s central unfair dismissal protection applies to employers with fifteen or more employees and prohibits dismissals that are “harsh, unjust or unreasonable” or are not the result of genuine redundancy.<sup>47</sup> Employers have the burden of establishing that a dismissal was not “harsh, unjust or unreasonable,” which is based on a non-exhaustive set of factors:

- (a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and

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42. See Colin Fenwick & Jane Hodges, *National Labour Law Profile: Australia*, INT’L LAB. ORG. § 3(a), [http://www.ilo.org/ifa/pdial/information-resources/national-labour-law-profiles/WCMS\\_158892/lang--en/index.htm](http://www.ilo.org/ifa/pdial/information-resources/national-labour-law-profiles/WCMS_158892/lang--en/index.htm) (last visited Jan. 2, 2014).

43. *Fair Work Act 2009* (Cth) (Austl.).

44. *Id.* s 772(1) (prohibiting employers from terminating an employee for certain reasons, and listing those reasons).

45. See generally Anna Chapman, *Protections in Relation to Dismissal: From the Workplace Relations Act to the Fair Work Act*, 32 U. NEW S. WALES L.J. 746 (2009) (discussing the development of dismissal rules under FWA); John Howe, Nicole Yazbek & Sean Cooney, *Study on Labour Inspections Sanctions and Remedies: The Case of Australia* 2–9 (Int’l Labour Org. Labour Admin. & Inspection Programme, Working Document No. 14, 2011) (discussing the FWA’s history and overall structure).

46. See *Jobs and Wages: Statistics and Comment*, WORKPLACEINFO (Mar. 12, 2010), <http://www.workplaceinfo.com.au/payroll/wages-and-salaries/jobs-and-wages-statistics-and-comment>.

47. *Fair Work Act 2009* (Cth) s 23 (defining “small business employer”); *id.* s 121 (exempting small business employers from redundancy pay requirements); *id.* s 385 (defining “unfair dismissal”); *id.* s 386 (defining dismissal and excluding from the definition, among other things, when an individual has reached the end of a fixed-period contract and when an individual is let go after the expiration of a fixed-term training agreement).

- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the [Fair Work Commission] considers relevant.<sup>48</sup>

Under this legislation, in addition to requiring a valid work-related reason for the cause of dismissal, the inquiry into whether there has been an unjust dismissal centers largely on the presence or absence of certain procedural safeguards.

Employees are not covered by the unjust dismissal provision until they have worked for their employer for six months.<sup>49</sup> Furthermore, certain categories of employees, such as trainees, employees on fixed-term contracts, and employees who earn more than the “high income threshold,” are excluded from unfair dismissal claims.<sup>50</sup>

The FWA also mandates written notice prior to dismissal, requiring between one and five weeks’ notice depending on the employee’s age and years of service.<sup>51</sup> There is no probationary

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48. *Id.* s 387.

49. *Id.* ss 382–83 (noting, however, a twelve-month “minimum employment period” for employees of small business employers).

50. *Id.* s 386 (excluding trainees and fixed-term contract employees). As of July 2013, “high income” is A\$129,300 (US\$118,792). *Id.* s 382(b)(iii).

51. *Id.* s 117 (requiring one week’s notice for employees with one year of service or less, two weeks’ notice for employees with one to three years of service, three weeks’ notice for employees with three to five years of service, four weeks’ notice for employees

period.<sup>52</sup> If an employer fails to provide the required notice of dismissal, then it must pay the employee's salary in lieu of notice.<sup>53</sup> However, no notice is required if the employee is dismissed for "serious misconduct."<sup>54</sup>

The less restrictive Small Business Fair Dismissals Code governs dismissals by small employers, defined as those with fewer than fifteen employees.<sup>55</sup> Employees of such businesses are not covered by the Code until they have worked for their employer for one year.<sup>56</sup> In most cases, an employer must have a "valid reason" for dismissal "based on the employee's conduct or capacity," and the employer must give the employee a warning, preferably in written form.<sup>57</sup> This warning serves as a precursor to giving the employee "an opportunity to respond" and a "reasonable chance" at correcting the problem.<sup>58</sup>

Exceptions to these requirements for dismissals include genuine redundancies<sup>59</sup> or justified summary dismissals.<sup>60</sup> A summary dismissal can occur without notice when the employer has reasonable grounds to believe that the employee has engaged in serious misconduct, such as criminal activity or serious breaches of health and safety procedures.<sup>61</sup>

## 2. Economic Dismissals and Layoffs

Different rules apply to dismissals due to redundancy or dismissals involving a group of employees. Redundancy dismissals are defined as layoffs caused by an employer no longer needing the type

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with more than five years of service, and an extra week if the employee is over forty-five years old and has "at least 2 years of continuous service").

52. *Employment Protection Legislation Database – EPLex: Australia*, INT'L LAB. ORG., [http://www.ilo.org/dyn/eplex/termmain.showCountry?p\\_lang=en&p\\_country\\_id=AU](http://www.ilo.org/dyn/eplex/termmain.showCountry?p_lang=en&p_country_id=AU) (last visited Jan. 2, 2014) [hereinafter *EPLex: Australia*].

53. *Fair Work Act 2009* (Cth) s 117(2)(b).

54. *Id.* s 123(1)(b).

55. See *id.* s 23 (defining "small business employer"); *id.* ss 385, 388 (combining to describe the Small Business Fair Dismissal Code's relevance to "unfair dismissal[s]" under the FWA); *Small Business Fair Dismissal Code 2009* (Cth) (Austl.), available at <http://www.fairwork.gov.au/Templatesformschecklists/Small-Business-Fair-Dismissal-Code-2011.pdf>. The Minister for Employment and Workplace Relations declared the Small Business Fair Dismissal Code pursuant to Section 388 of the FWA. *Fair Work Act 2009* (Cth) s 388(1).

56. *Small Business Fair Dismissal Code 2009* (Cth).

57. *Id.*

58. *Id.* (noting also that the employer may have the duty to provide additional training or ensure that the employee is aware of the employer's expectations).

59. *Fair Work Act 2009* (Cth) ss 388–89.

60. *Small Business Fair Dismissal Code 2009* (Cth).

61. *Id.*

of work provided by the affected employees, except for normal turnover, or caused by the employer's insolvency or bankruptcy.<sup>62</sup> The FWA requires special benefits for redundancy dismissals, except for employees of small businesses (those with fewer than fifteen employees) and employees who have worked with their employer for less than one year.<sup>63</sup> The amount of redundancy pay is based on employees' prior service and varies from four to sixteen weeks' salary.<sup>64</sup> The Fair Work Commission, which is the tribunal that enforces the FWA's unjust dismissal provisions, has authority to reduce the amount of redundancy pay if the employer found a new job for its dismissed employees or is unable to pay.<sup>65</sup> Thus, Australians tend to earn less redundancy pay than the average payout in other countries.<sup>66</sup> One report found that Australian employees receive on average 2.79 weeks' pay for every year worked—less than the worldwide average of 3.6 weeks per year.<sup>67</sup>

Collective dismissal in Australia is defined as the termination of fifteen or more employees because "of an economic, technological, structural or similar" reason.<sup>68</sup> An employer that wants to implement a collective dismissal must first give notice, "as soon as practicable," to a specified government official; the notice must provide the rationale behind the dismissals, "the number and category of employees," and the timing of the dismissals.<sup>69</sup> The employer must also provide a similar notice and an opportunity to discuss ways to avoid or mitigate group layoffs to any registered employee

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62. *Fair Work Act 2009* (Cth) s 119(1).

63. *Id.* s 23 (defining small businesses as those with fewer than fifteen employees); *id.* s 121 (providing exceptions for employees who have worked with their employer for less than one year and employees of small businesses).

64. *Id.* s 119(2) (setting forth a schedule that varies from four weeks' pay for employees with more than one and less than two years of tenure, to sixteen weeks' pay for employees with tenures of between nine and ten years); *id.* s 121 (defining when an employer is excluded from having to pay redundancy pay). Interestingly, employees with over ten years of tenure only receive twelve weeks' pay because those employees typically have more employer-based leave entitlements. *How Much Redundancy Pay?*, FAIR WORK OMBUDSMAN, <http://www.fairwork.gov.au/termination/redundancy/pages/how-much-redundancy-pay.aspx> (last updated Jan. 2, 2013).

65. *Fair Work Act 2009* (Cth) s 120.

66. See RICHARD DENNISS & DAVID BAKER, THE AUSTL. INST., POLICY BRIEF NO. 39: ARE UNEMPLOYMENT BENEFITS ADEQUATE IN AUSTRALIA? 2–3 (2012), available at <http://www.tai.org.au/node/1842>; *Australians Earn Less Severance Pay*, SMARTCOMPANY, <http://www.smartcompany.com.au/information-technology/028850-australians-earn-less-severance-pay.html> (last visited Jan. 2, 2014).

67. *Australians Earn Less Severance Pay*, *supra* note 66.

68. See *Fair Work Act 2009* (Cth) s 530(1).

69. *Id.* s 530(1)–(4).

association representing the affected employees.<sup>70</sup> If an employer fails to comply with these requirements, the Fair Work Commission may issue make-whole relief, pay in lieu of reinstatement, or severance pay—but the Fair Work Commission may not order reinstatement.<sup>71</sup>

### 3. Unemployment Assistance

Australia also has an unemployment assistance program. This program is primarily intended to help low-income families with unemployed individuals.<sup>72</sup> In contrast, other countries tend to extend unemployment assistance to unemployed individuals irrespective of income.<sup>73</sup>

One study scored Australia as having the least strict eligibility requirements out of thirty-six countries, largely because there is no probationary period.<sup>74</sup> Similarly, an employee who loses her job because of a voluntary act, including misconduct, can still receive benefits after an eight-week period.<sup>75</sup> Like most other unemployment schemes, eligibility for continued benefits requires a worker to engage in a job search and accept suitable work.<sup>76</sup> An individual can receive the benefits indefinitely; there is no cap on the length of time benefits can be received.<sup>77</sup> The benefits are based on recipients' characteristics—such as age, income, and parenting status—and typically begin after a seven-day waiting period.<sup>78</sup> The maximum standard weekly benefit for a single individual, with no children, in

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70. *Id.* s 531.

71. *Id.* s 532.

72. Wayne Vroman & Vera Brusentsev, Australian Unemployment Protection: Challenges and New Directions 2 (July 2001) (unpublished paper prepared for the National Social Policy Conference, University of New South Wales), available at <http://www.urban.org/UploadedPDF/AusUnemployment.pdf>.

73. *See id.*

74. See Danielle Venn, *Eligibility Criteria for Unemployment Benefits: Quantitative Indicators for OECD and EU Countries* 15 (Org. for Econ. Co-operation & Dev., Soc., Emp't & Migration Working Paper No. 131, 2012), available at [http://www.oecd-ilibrary.org/social-issues-migration-health/eligibility-criteria-for-unemployment-benefits\\_5k9h43kgkv4-en](http://www.oecd-ilibrary.org/social-issues-migration-health/eligibility-criteria-for-unemployment-benefits_5k9h43kgkv4-en) (noting that the lack of a probationary period results from the unemployment benefits' general tax funding rather than employer contributions).

75. *Id.* at 36.

76. *See id.* at 38.

77. See SOC. SEC. ADMIN., SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD: ASIA AND THE PACIFIC, 2012, at 38–39 (2013) [hereinafter SSA, ASIA AND THE PACIFIC], available at [http://www.ssa.gov/policy/docs/progdesc/ssptw/20122013/asia/ssptw\\_12asia.pdf](http://www.ssa.gov/policy/docs/progdesc/ssptw/20122013/asia/ssptw_12asia.pdf) (explaining the amount of unemployment benefits without specifying a cap).

78. *Waiting Periods*, AUSTL. GOV'T DEPARTMENT HUM. SERVICES, <http://www.humanservices.gov.au/customer/enablers/waiting-periods> (last updated June 28, 2013).

the lowest income bracket is A\$250.50 (US\$230.14),<sup>79</sup> which one study has found to be among the lowest payments among a large group of industrialized countries as a percentage of income (the United Kingdom was the only country ranked lower).<sup>80</sup> A maximum of A\$62.00 (US\$56.96) per week in rental assistance may also be available for the unemployed.<sup>81</sup>

#### 4. Enforcement

Generally, Australian authorities enforce employment dismissal laws efficiently. To begin, absent extenuating circumstances, a terminated employee has only twenty-one days to bring a claim for unfair dismissal.<sup>82</sup> Claims must be initially brought before the Fair Work Commission, although they can ultimately be litigated in federal court.<sup>83</sup> The Fair Work Commission then attempts to settle the dispute in a conciliation process similar to mediation.<sup>84</sup> The overwhelming majority of termination cases filed with the agency are settled at or before the conciliation stage.<sup>85</sup> Employee and employer

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79. See *Payment Rates for Newstart Allowance*, AUSTL. GOV'T DEPARTMENT HUM. SERVICES, <http://www.humanservices.gov.au/customer/enablers/centrelink/newstart-allowance/payment-rates-for-newstart-allowance> (last updated Sept. 19, 2013). Benefits decrease as income increases and can eventually result in no benefits. See generally DEPT OF HUMAN SERVS., AUSTL. GOV'T, CENTRELINK PAYMENT RATE CHARTS (2013), available at <http://ramsayfp.com.au/wp-content/uploads/Centrelink-Pensions-Rate-Charts-20-Mar-2014.pdf> (providing, among others, the "Allowance Income Test-Single Person" chart used from March 20, 2013, until June 30, 2013). Moreover, benefit rates can increase if the individual has dependents or meets other special criteria. See *id.*

80. See DENNIS & BAKER, *supra* note 66, at 3.

81. See *Payment Rates for Rent Assistance*, AUSTL. GOV'T DEPARTMENT HUM. SERVICES, <http://www.humanservices.gov.au/customer/enablers/centrelink/rent-assistance/payment-rates> (last updated Mar. 20, 2013) (providing data for a single individual with no children). Starting in March 2013, Australia began providing some additional funding (A\$210.00/US\$192.93 per year) for single workers receiving unemployment benefits; it appears that the plan is to maintain these additional benefits for four years, but that length of time is not certain. See Michael Klapdor, *New and Increased Benefits for Families and Job-Seekers*, PARLIAMENT OF AUSTL., [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/BudgetReview201213/FamiliesJobSeekers](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201213/FamiliesJobSeekers) (last visited Jan. 2, 2014).

82. *Fair Work Act 2009* (Cth) s 394(2)–(3) (noting factors for determining "exceptional circumstances," including the following: reason for delay, whether the employee was aware of the dismissal after it took effect, whether the employee tried to challenge the dismissal, possible prejudice to the employer caused by any delay, and fairness in comparison to similarly situated employees).

83. See *id.* s 394(1). The FWA expressly notes its intention to implement a "quick, flexible and informal" means of resolving termination disputes. *Id.* s 381.

84. FAIR WORK COMM'N, GUIDE: UNFAIR DISMISSAL 5–6 (2013), available at [http://www.fwc.gov.au/documents/dismissals/guide\\_dismissal.pdf](http://www.fwc.gov.au/documents/dismissals/guide_dismissal.pdf).

85. FAIR WORK AUSTL., ANNUAL REPORT 2009–2010, at 12–13 (2010) [hereinafter FWA, ANNUAL REPORT], available at [http://www.fwc.gov.au/documents/annual\\_reports](http://www.fwc.gov.au/documents/annual_reports)

satisfaction with the conciliation process introduced in 2009 appears to be very high,<sup>86</sup> probably because it occurs relatively quickly, with termination cases in the 2009–2010 fiscal year typically going through at least one conciliation within forty days of filing and being settled within eighty-seven days—much faster than the 106-day average the previous year.<sup>87</sup>

The FWA seems to have provided a broader opportunity for employees to challenge their dismissals than the previous legislation, although the statute is still too new to assess sufficiently. For instance, in the 2010 fiscal year, employees filed 13,054 termination claims—a significant increase over the 7,994 claims filed in the 2009 fiscal year under the previous statutory regime.<sup>88</sup>

If an employee's termination claim is successful, the available remedies include reinstatement, backpay, and if appropriate, compensation in lieu of reinstatement.<sup>89</sup> Damages for emotional injury are not available.<sup>90</sup> Further, in practice, reinstatement is not usually ordered.<sup>91</sup> Instead, to offset the loss of a job, employers are typically required to provide compensation to a discharged employee, as determined by Fair Work Australia.<sup>92</sup> The amount of compensation in lieu of reinstatement is capped at the lesser of twenty-six weeks' pay or A\$64,650 (US\$59,396).<sup>93</sup> Australia does not provide data on its average awards, but the Organisation for Economic Co-operation and Development ("OECD") has estimated

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/ar2010/FWA\_annual\_report\_2009-10.pdf (stating that out of 12,745 termination claims finalized during 2010 fiscal year, 11,823 (93%) were finalized at or before conciliation; moreover, 780 (6%) were finalized prior to an order, and 142 (1%) were finalized with an order). Over 80% of claims that go to conciliation settle as part of that process. FAIR WORK AUSTL., UNFAIR DISMISSAL CONCILIATION RESEARCH (2010) [hereinafter UNFAIR DISMISSAL CONCILIATION RESEARCH], available at [http://www.fwc.gov.au/documents/media/releases/Conciliation\\_Research\\_19-Nov2010.pdf](http://www.fwc.gov.au/documents/media/releases/Conciliation_Research_19-Nov2010.pdf).

86. See UNFAIR DISMISSAL CONCILIATION RESEARCH, *supra* note 85 (noting that 86% of employees, 82% of employers, and 87% of employee representatives "were satisfied or extremely satisfied" with Fair Work Australia's services).

87. See FWA, ANNUAL REPORT, *supra* note 85, at 77.

88. *Id.* at 10.

89. *Fair Work Act 2009* (Cth) ss 391–92.

90. *Id.* s 392(4).

91. ORG. FOR ECON. CO-OPERATION & DEV., DETAILED DESCRIPTION OF EMPLOYMENT PROTECTIONS IN OECD AND SELECTED NON-OECD COUNTRIES, 2008, at 16 (2009) [hereinafter OECD, DETAILED DESCRIPTION], available at <http://www.oecd.org/employment/emp/42740165.pdf> (giving Australia a score of "1.5" for reinstatement, which is "rarely made available to the employee").

92. See *Fair Work Act 2009* (Cth) s 392(2) (providing list of factors to determine compensation).

93. See *id.* s 392(5)–(6).

that, as of 2008, the average award for an employee with twenty years of tenure was worth approximately six months' pay.<sup>94</sup> Moreover, an independent estimate of average redundancy awards found that Australian workers received fewer than three weeks' pay for every year worked.<sup>95</sup>

### *B. Brazil*

In Brazil, the Consolidation of Labor Laws ("C.L.T.")<sup>96</sup> and the Guaranteed Fund for Length of Service ("FGTS")<sup>97</sup> system provide the two primary means by which an employee can seek remedies for a termination. The C.L.T., which applies to employers of all sizes,<sup>98</sup> provides the more traditional protections against unjust dismissals.<sup>99</sup> The FGTS is similar to unemployment insurance but provides benefits that change depending on whether cause existed for the termination.<sup>100</sup> For reasons described in this Section, the FGTS has become the dominant system in recent years. This has meant that employees in Brazil do not have strong protections against unjust dismissals; instead, they are usually entitled to only modest compensation. A summary of Brazilian termination law and its enforcement is provided in Table 2 of the Appendix.

#### 1. Individual Unjust Dismissal

Under the C.L.T., notice is required of either party to an employment contract prior to its cancellation, unless there is "lawful cause."<sup>101</sup> The period of notice varies from eight days, if wages are paid weekly or less, to thirty days, if wages are paid biweekly, monthly, or if the employee has worked for the employer for over

94. See OECD, DETAILED DESCRIPTION, *supra* note 91, at 16.

95. See *Australians Earn Less Severance Pay*, *supra* note 66 (stating that Australian employees receive an average of 2.79 weeks' pay for every year worked, which is less than the 3.6 weeks per year worldwide average).

96. CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] [CONSOLIDATION OF LABOR LAWS] art. 487 (Braz.), available as translated at [http://www.planalto.gov.br/ccivil\\_03/decreto-lei/del5452.htm](http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm).

97. Lei No. 8.036, de 11 de Maio de 1990, art. 18 (Braz.), available at [http://www.planalto.gov.br/ccivil\\_03/Leis/L8036compilada.htm](http://www.planalto.gov.br/ccivil_03/Leis/L8036compilada.htm).

98. See *Employment Protection Legislation Database – EPLex: Brazil*, INT'L LAB. ORG., [http://www.ilo.org/dyn/eplex/termmain.showCountry?p\\_lang=en&p\\_country\\_id=79](http://www.ilo.org/dyn/eplex/termmain.showCountry?p_lang=en&p_country_id=79) (last visited Jan. 2, 2014) [hereinafter *EPLex: Brazil*] (no small-employer exception).

99. W. Gary Vause & Dulcina De Holanda Palhano, *Labor Law in Brazil and the United States—Statism and Classical Liberalism Compared*, 33 COLUM. J. TRANSNAT'L L. 583, 612 (1995).

100. *Id.* at 615.

101. C.L.T. art. 487.

one year.<sup>102</sup> The remedy for a failure to provide the required notice is the amount of wages during the period of inadequate notice.<sup>103</sup>

The C.L.T. defines lawful cause for dismissal to include the following: dishonesty; misconduct or bad behavior; habitual gambling; regular, unauthorized competition with the employer; a criminal sentence; failure to perform work duties; betraying trade secrets; insubordination; and acts that harm the honor of others without justification.<sup>104</sup> The employer bears the burden of establishing the existence of lawful cause for the dismissal.<sup>105</sup>

The parties can establish a probationary period, during which the C.L.T. will not apply, of up to ninety days.<sup>106</sup> However, employees with at least ten years of service with their employer are entitled to extra protection. These “permanent employees” can be lawfully terminated only for a serious offense or a *force majeure*.<sup>107</sup> These employees are also entitled to extra severance pay if a business closes for reasons other than *force majeure*.<sup>108</sup> “Serious offense” is not precisely defined, but the statute notes that any of the above-mentioned enumerated lawful causes can constitute a serious offense if they are repeated or severe enough to be considered a “violation of the duties and obligations of the employee.”<sup>109</sup> Notably, permanent employees accused of a serious offense are entitled to keep their jobs until either the Board of Conciliation and Judgment—the trial level for Brazil’s labor court system—or justice of the peace has completed an inquiry.<sup>110</sup> Moreover, if it is found that an employer has dismissed

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102. *Id.* But see CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 7, § XXI (Braz.), translated in WORLD CONSTITUTIONS ILLUSTRATED: CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, 1988, AS AMENDED TO 2 APRIL 2013 (Jefri Jay Ruchti ed., Keith S. Rosenn trans., 2013) (suggesting at least thirty days’ notice).

103. C.L.T. art. 487(II)(1)–(2) (noting also that the employee’s term of service will continue until notice period ends); *see also id.* art. 488 (mandating that the employee will have to work for two less hours each day, while receiving full pay, during period of inadequate notice).

104. *Id.* art. 482. Moreover, the C.L.T. lists several circumstances that effectively serve as grounds for constructive discharge, which entitle the employee to compensation. *Id.* art. 483. Finally, the C.L.T. bars many types of discrimination, such as pregnancy, *id.* art. 391, and union activity, *id.* art. 544.

105. Vause & De Holanda Palhano, *supra* note 99, at 612.

106. C.L.T. art. 445.

107. *Id.* art. 492; *see also id.* art. 501 (defining “force majeure” as “any unavoidable event, outside the control of the employer, to the occurrence of which he did not contribute, either directly or indirectly”).

108. *Id.* art. 497.

109. *Id.* art. 493.

110. *See id.* arts. 494, 853–54.

an employee with the intent of preventing permanent status, the employee may be awarded double the ordinary award.<sup>111</sup>

## 2. Economic Dismissals and Layoffs; Unemployment Assistance

The FGTS, discussed below, governs both redundancy claims and the unemployment insurance system, which covers private-sector workers.<sup>112</sup> To be eligible for unemployment benefits, an individual must have worked for at least six months over the past thirty-six months, and the dismissal must not have been voluntary or the result of employee misconduct.<sup>113</sup> Moreover, the benefits are means-tested. To receive benefits, an individual must lack other sources of income and, if an individual qualifies, the benefits are tied to her previous annual earnings.<sup>114</sup> Under this formula, the minimum monthly benefit in 2011 was R\$545.00 (US\$359.46), and the maximum was R\$1,019.70 (US\$672.56).<sup>115</sup> Benefits are available for up to three to five months, depending on the individual's length of service, although benefits may be extended for an additional two months under certain limited conditions.<sup>116</sup>

Finally, unique among the surveyed countries, Brazil has no special provisions for collective dismissals.

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111. Vause & De Holanda Palhano, *supra* note 99, at 613–14 (noting that any dismissal within six months of an employee's ten-year mark will be considered this type of "obstructive dismissal").

112. See *infra* notes 129–36 and accompanying text.

113. SOC. SEC. ADMIN., SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD: THE AMERICAS, 2011, at 65 (2012) [hereinafter SSA, THE AMERICAS], available at <http://www.ssa.gov/policy/docs/progdesc/ssptw/2010-2011/americas/ssptw11americas.pdf>.

114. *Id.* at 65–66 (noting formula of 80% of last three months' average salary for monthly earnings of R\$899.67 (US\$593.39); 50% of average salary plus R\$719.12 (US\$474.30) lump sum for monthly salary of R\$899.68 (US\$593.40) to R\$1,499.58 (US\$989.07); and R\$1,019.70 (US\$672.56) lump sum for monthly earnings of more than R\$1,499.58 (US\$989.07)).

115. *Id.* at 66. This minimum amount, which mirrors the national minimum wage, rose to R\$678.00 (US\$303.54) in 2013 (the decrease in the U.S. dollar amount is a result of the diminished strength of the Brazilian real when compared to the U.S. dollar). See *Brazil: New Monthly Minimum Salary for 2013*, T MAG. (Jan. 4, 2013), <http://tmagazine.ey.com/news/ibfd/brazil-new-monthly-minimum-salary-2013/>. However, because data on the maximum level of benefits were unavailable at the time this Article's publication, 2011 figures are used.

116. See SSA, THE AMERICAS, *supra* note 113, at 65–66 (providing up to three months of benefits for service of between six and eleven months; four months of benefits for twelve to twenty-three months' service; and five months of benefits for twenty-four or more months' service).

### 3. Enforcement

Enforcing termination claims in Brazil is often a time-consuming process that does not provide realistic opportunity for significant relief. The statute of limitations for dismissal claims is two years.<sup>117</sup> These cases first come to the Board of Conciliation and Judgment, which consists of one professional judge, one member who represents employers, and one member who represents employees.<sup>118</sup> Appeals can then be made to the regional labor courts and then to the Superior Labor Court.<sup>119</sup> Claims can take several years—typically three to four—to be litigated through this system.<sup>120</sup> Filing a claim entails significant risk, as the losing party usually pays litigation costs, although low-wage employees may qualify for free legal representation.<sup>121</sup> In 2010, a significant number of the over 2.6 million pending workplace claims (43.4%) were resolved through reconciliation.<sup>122</sup>

For employees suffering early termination under a fixed-term contract, dismissal without cause gives rise to a claim for one-half of the compensation they would have received had the contract been fulfilled.<sup>123</sup> However, fixed-term contracts are disfavored. The maximum term for a fixed-term contract is two years, and such a contract may be renewed only once before it automatically converts to a contract of indefinite duration.<sup>124</sup> For employees working for more than one year under a contract of indefinite duration, an unjust dismissal will result in compensation equal to one month's salary for

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117. C.L.T. art. 11.

118. *Id.* art. 647.

119. *Id.* art. 644.

120. PROSKAUER, WORLDS OF WORK: EMPLOYMENT DISPUTE RESOLUTION SYSTEMS ACROSS THE GLOBE 26 (2011), available at <http://www.proskauer.com/files/News/4a13f735-d2ee-4954-a18c-1b413ef25cbc/Presentation/NewsAttachment/b8ae0006-6826-4d0a-89ed-2294878f5553/Proskauer%20Worlds%20of%20Work%20Symposium%207.21.11.pdf>.

121. *Id.* at 34.

122. TRIBUNAL SUPERIOR DO TRABALHO [SUPERIOR LABOR COURT], CONSOLIDAÇÃO ESTATÍSTICA DA JUSTIÇA DO TRABALHO: RELATÓRIO ANALÍTICO 2010, at 62–63 (2010), available at <http://www.trt18.jus.br/portal/arquivos/2012/03/Ind2010.pdf>. In 2010, there were 855,644 new cases in addition to 1,748,716 claims still pending from previous years. *Id.* at 63. Moreover, in 2010, employers paid a total of R\$11.29 billion (US\$6.68 billion) to all claimants with approximately 30% of that amount made pursuant to a judicial award. See *id.* at 26. No average award information was available.

123. See C.L.T. art. 479.

124. *Id.* arts. 445, 451. Parties are also not permitted to sign a series of fixed-term contracts; they must instead wait six months in between new contracts. *Id.* art. 452.

each year of service.<sup>125</sup> Reinstatement is not available under the C.L.T.<sup>126</sup>

Although adjudication before a Board of Conciliation and Judgment is similar to American arbitrations, it involves enough expense and such a low probability of success that most permanent employees forgo their rights under this provision and simply seek new work.<sup>127</sup> Moreover, when employees do seek protection, most of them abandon the more traditional employee protections in favor of the more certain payments under the FGTS.<sup>128</sup>

The FGTS provides an alternative to C.L.T. remedies that approximates an unemployment insurance system or mandated severance pay.<sup>129</sup> Currently, the FGTS establishes a mandatory system under which an employer contributes at least 8.5% of each employee's salary every month into an account tied to that employee.<sup>130</sup> An employee who has been unfairly dismissed or laid off because of a redundancy, defined as lacking just cause, is entitled to the account balance plus a penalty paid by the employer that is equivalent to 40% of the balance.<sup>131</sup> If both the employer and employee are at fault for the termination, the penalty equals 20% of the FGTS account.<sup>132</sup> Employees can receive their FGTS balances—without the extra penalty—for retirement and other special conditions; however, employees terminated for cause must typically

125. *Id.* art. 478.

126. See *id.* arts. 450, 496, 504 (explaining that reinstatement is only an option for permanent employees or those appointed by special commission). Reinstatement is also an infrequently used option under the FGTS. See *infra* note 136 and accompanying text.

127. See Vause & De Holanda Palhano, *supra* note 99, at 613.

128. See *id.* at 614.

129. See *id.* at 614–16 (noting also the difficulties caused by employees' lack of access to their employment documents); see also Leigh Anne DeWine, *Termination of Employment Legislation Digest: Brazil*, INT'L LAB. ORG. 6–8 (2007), [www.ilo.org/dyn/eplex/docs/19/Brazil%202007.pdf](http://www.ilo.org/dyn/eplex/docs/19/Brazil%202007.pdf) (explaining the changes in severance pay since the establishment of FGTS, as well as the avenues for redress through the labor courts).

130. DeWine, *supra* note 129, at 6. The account is adjusted for inflation and interest. See Lei No. 8.036, de 11 de Maio de 1990, art. 18 § 1.

131. Lei No. 8.036, de 11 de Maio de 1990, art. 18 § 2; see also DeWine, *supra* note 129, at 6 (noting that the government also receives an extra penalty from the employer that equals 10% of the relevant FGTS account). This system replaced—except for workers grandfathered into the old system—the former practice of giving one month per year worked to dismissed employees with between one and nine years of service and two months' pay per year for employees with over ten years of service. *Id.*

132. Caixa Econômica Federal [CAF] [Federal Savings Bank], *Circular Caixa No. 548 § 1.2.3.1* (Apr. 20, 2011), available at [http://downloads.caixa.gov.br/\\_arquivos/circulare\\_scaixa/fgts2011/CIRCULAR\\_CAIIXA\\_548\\_2011\\_ARRECADA%C7%C3O.pdf](http://downloads.caixa.gov.br/_arquivos/circulare_scaixa/fgts2011/CIRCULAR_CAIIXA_548_2011_ARRECADA%C7%C3O.pdf).

wait until they retire or are out of work for three consecutive years before receiving their balance.<sup>133</sup>

The OECD has estimated that, as of 2008, the average FGTS payout for an employee with twenty years of service dismissed for cause approximated 7.7 months' pay.<sup>134</sup> Many Brazilian employers choose not to contest whether they have cause for the employment termination because remedies under the FGTS are fairly modest and obviate the costs of litigating whether cause existed.<sup>135</sup> Moreover, FGTS compensation has rendered reinstatement, which is technically available, quite rare.<sup>136</sup> In short, employees have little protection against dismissals, even when they occur without cause, but are entitled to modest compensation.

### C. Canada

Among the surveyed countries, Canada's regulation of unjust dismissals is most similar to that of the United States. Like the United States, Canada's system operates at both federal and local (provincial in the case of Canada) levels and through both legislation and common law. Similarly, Canada also lacks a general unjust dismissal statute that applies to most employees. Yet, substantial differences exist. Despite a general statutory limit on unjust dismissals, Canadian federal common law provides a de facto remedy for unjust dismissals. Moreover, Canada's modest remedial scheme is more similar to the other surveyed countries than the United States. A summary of Canadian federal termination law and its enforcement is provided in Table 3 of the Appendix.

#### 1. Canadian Federal Law

##### a. Individual Unjust Dismissal

Federal statutory Canadian termination law has a limited impact on both employees working for government agencies and employees

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133. See *Preguntas Frecuentes: Quando Sacar o FGTS?*, FUNDO DE GARANTIA DO TEMPO DE SERVICO, <http://www.fgts.gov.br/perguntas/trabalhador/pergunta07.asp> (last visited Jan. 2, 2014); Vause & De Holanda Palhano, *supra* note 99, at 614, 627.

134. OECD, DETAILED DESCRIPTION, *supra* note 91, at 16. Earlier estimates from 1992 found that approximately 300,000 workers—over 71% of those who had been dismissed—received an average of US\$106.81 (US\$177.43 in 2013 dollars). See Edward J. Amadeo & José Márcio Camargo, *Institutions and the Labor Market in Brazil* 29–30 (Dep't of Econ., Discussion Paper No. 315, 1994).

135. Vause & De Holanda Palhano, *supra* note 99, at 615.

136. OECD, DETAILED DESCRIPTION, *supra* note 91, at 16 (giving Brazil a score of “1”—“rarely used”—for reinstatement).

working for private companies that operate in the federal sector.<sup>137</sup> Rather, federal common law and provincial law are the primary sources of protection against unjust dismissal.

For the limited number of private-sector employees covered by the federal Labour Code, a major protection is the notice-of-termination requirement.<sup>138</sup> Employees who have worked for more than three consecutive months with the same employer are entitled to at least two weeks' notice prior to a termination without "just cause" or, if no notice is given, two weeks of regular pay.<sup>139</sup> The Labour Code lists several non-exclusive reasons for a dismissal deemed not to constitute just cause, including the employee's involvement in union activity, whistleblowing about health and safety matters, becoming pregnant or requesting maternity or parental leave, or requesting absence for qualifying medical leave.<sup>140</sup>

#### *b. Economic Dismissals and Layoffs*

Under the Labour Code, group dismissals and redundancies require special notice rules and severance pay.<sup>141</sup> The Labour Code extends the required notice period when employers plan to make group terminations—which generally result from economic redundancies, such as when a business shuts down or relocates, or changes in business operations that render an employee's services unnecessary.<sup>142</sup> These "redundancy" or group dismissals basically cover situations in which an employee is terminated for a valid economic reason rather than any deficiencies in the employee's conduct or work performance.

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137. Canada Labour Code, R.S.C. 1985, c. L-2, § 4 (Supp. 2013). Canada's federal Labour Code applies to employees in a limited number of specific private-sector industries or to employees who either are employed in, or work in connection with, federal operations. *See id.* Those employees, who make up only about 10% of Canada's workforce, enjoy unjust dismissal protection. *See id.* § 240; *Employment Protection Legislation Database – EPLex: Canada (Federal Only)*, INT'L LAB. ORG., [http://www.ilo.org/dyn/eplex/termmain.showCountry?p\\_lang=en&p\\_country\\_id=162](http://www.ilo.org/dyn/eplex/termmain.showCountry?p_lang=en&p_country_id=162) (last visited Jan. 2, 2014) (describing part of Canada's Labour Code and noting that it applies to only 10% of the labor force).

138. *See* Canada Labour Code, c. L-2, § 230.

139. *Id.* § 230(1).

140. *Id.* §§ 94(3)(a) (union activity), 147(a) (whistleblowing), 209.3 (pregnancy), 239(1) (medical leave).

141. *Id.* § 212(1)–(2) (requiring employers to provide notice to the Minister of Labour at least sixteen weeks in advance of a group dismissal); *id.* § 235(1) (requiring severance pay for employees who worked at least twelve consecutive months).

142. *Compare id.* § 212(1)–(2) (requiring sixteen weeks' notice for group dismissals), with *id.* § 230(1) (requiring two weeks' notice for individual dismissals).

Under the Labour Code, when a covered employer plans redundancy layoffs of fifty or more employees within any four-week period, it must provide at least sixteen weeks' notice prior to the first termination.<sup>143</sup> Following this notice, a joint planning commission will be created that has representatives of both the employer and employees (both non-union and union, if applicable) and will seek to minimize the number of layoffs and assist employees who are ultimately terminated.<sup>144</sup>

In addition to the notice requirement, the Labour Code also provides for severance pay, which might apply to employees dismissed as part of an economic redundancy or without just cause.<sup>145</sup> Employees who have continuously worked for an employer for at least twelve consecutive months, and are not covered by a collective-bargaining agreement, are entitled to a severance payment worth the greater of five days' pay or two days' pay for every year of work.<sup>146</sup> Such employees may also demand that the employer provide a written explanation of the reason for their termination.<sup>147</sup>

### c. *Unemployment Assistance*

Canada provides unemployment insurance through its federal Employment Insurance Act, a contribution-based social insurance program.<sup>148</sup> Virtually all salaried workers are eligible for Employment Insurance benefits if they meet certain conditions, including that the worker was unemployed involuntarily for at least two weeks through no fault of her own, is capable of working, is actively looking for work, has paid premiums into the Employment Insurance Account, and has worked the requisite amount of hours during the qualifying period.<sup>149</sup> The basic payment rate is 55% of a claimant's average

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143. *Id.* § 212(1)–(2). Furthermore, all of the provinces except one include a collective-dismissal requirement in the provincial statutes. OECD, DETAILED DESCRIPTION, *supra* note 91, at 30 (noting Prince Edward Island as the only province without such a requirement).

144. Canada Labour Code, c. L-2, §§ 215–16, 221(1).

145. *See id.* § 235(1).

146. *Id.*

147. *Id.* § 241(1).

148. Employment Insurance Act, S.C. 1996, c. 23 (Can.).

149. *Id.* §§ 5 (covered workers), 7 (hours required), 8 (qualified period), 13 (two weeks' waiting period), 18 (capability), 27 (pursuing employment), 30 (involuntarily unemployed), 50(7) (registration); *see* SERV. CAN., EMPLOYMENT INSURANCE REGULAR BENEFITS § 2 (2010), *available at* [http://www.servicecanada.gc.ca/eng/ei/types/regular.shtml#EI\\_premiums](http://www.servicecanada.gc.ca/eng/ei/types/regular.shtml#EI_premiums) (last modified Oct. 17, 2013) (noting that premiums in 2013 equal C\$1.88 (US\$1.79) for every C\$100 (US\$95.13) of earnings up to C\$47,400 (US\$45,092) per year—resulting in a maximum annual premium of C\$891.12 (US\$847.73)).

weekly insurable earnings and, in 2013, the maximum weekly benefit payment was C\$501.00 (US\$476.60).<sup>150</sup> The duration of these benefits typically varies from fourteen to forty-five weeks based on regional rates of unemployment and the number of insurable hours the claimant had during the qualifying period.<sup>151</sup> In 2011, claimants making over C\$44,200.00 (US\$47,577.93) received on average C\$467.50 (US\$503.22) per week in benefits and claimants earning less than that threshold received an average payment of C\$275.43 (US\$296.48) per week in benefits.<sup>152</sup>

#### *d. Enforcement*

As is the case for many of the countries in this study, federal Canadian termination law uses an administrative enforcement scheme. Complaints about most violations under the Labour Code may be made to a government inspector and must be filed within ninety days of termination.<sup>153</sup> The inspector will try to help mediate the dispute, but if mediation is not successful, the employee can have the case moved to the Minister of Labour, who can then appoint an adjudicator.<sup>154</sup> Although the Labour Code states that an adjudicator's decision is not subject to judicial review, Canadian courts may still be able to review such decisions in the rare occasion where the decision violates employees' constitutional rights.<sup>155</sup>

The employer carries the burden of proving that a termination was justified.<sup>156</sup> If an adjudicator finds that a termination was made without just cause, the adjudicator may order backpay, reinstatement, and any other equitable relief needed "to remedy or counteract the

150. Employment Insurance Act, c. 23, § 14(1); *Employment Insurance—Important Notice About Maximum Insurable Earnings for 2013*, SERVICE CAN., <http://www.servicecanada.gc.ca/eng/ei/information/maximum2013.shtml> (last updated Jan. 15, 2013).

151. Employment Insurance Act, c. 23, §§ 9–10, 24 (giving the statutory rules for duration of benefits); SERV. CAN., *supra* note 149, § 3 (noting the typical range of length of benefits).

152. CAN. EMP'T INS. FIN. BD., 2013 ACTUARIAL REPORT ON THE EMPLOYMENT INSURANCE PREMIUM RATE 77 (2012), available at [http://www.ceifb-ofaec.ca/en/PDF\\_Reports/Rate%20Setting/CA%20English%20Report%202013%20FINAL.pdf](http://www.ceifb-ofaec.ca/en/PDF_Reports/Rate%20Setting/CA%20English%20Report%202013%20FINAL.pdf).

153. Canada Labour Code, R.S.C. 1985, c. L-2, §§ 240, 249–51 (Supp. 2013). Disputes involving union activity are handled by the Canada Labour Relations Board. *Id.* § 97.

154. *Id.* §§ 241–42.

155. *Id.* § 243; see C.U.P.E. v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, 237 (Can.) (noting that in order for a decision to be reviewed by the court, it must be so "patently unreasonable" that it cannot be rationally supported by the relevant legislation).

156. Canada Labour Code, c. L-2, §§ 98(4) (union activity), 133(6) (other terminations).

consequence of the dismissal.”<sup>157</sup> Reinstatement, however, is not frequently ordered.<sup>158</sup>

## 2. Canadian Provincial Law

Because most Canadian workers are employed outside of the federal sector, provincial law provides the primary source of protection for the majority of the working population. Most of these provincial statutes require some period of notice before an unjust dismissal.<sup>159</sup> However, only two provinces—Nova Scotia and Quebec—currently have statutory bans against unjust dismissals.<sup>160</sup>

Nova Scotia and Quebec have similar statutes that require some notice prior to certain terminations or layoffs; the notice period can vary from one to eight weeks depending on the employee’s length of service.<sup>161</sup> Employees with fewer than three months’ service cannot invoke these requirements.<sup>162</sup> An employer who fails to provide proper notice may have to pay employees the wages they would have earned during the period without the required notice.<sup>163</sup>

These two provinces display some significant differences with regard to their treatment of more general unjust dismissal claims. In particular, the length of service required for employees to enjoy

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157. *Id.* § 242(4). These remedies do not interfere with any severance pay due to the employee. *Id.* § 235.

158. See OECD, DETAILED DESCRIPTION, *supra* note 91, at 16 (showing reinstatement is only rarely or sometimes made available).

159. See, e.g., Employment Standards Act, S.O. 2000, c. 41, §§ 54, 61, 64(1), 65(5) (Can. Ont.) (requiring severance pay—capped at twenty-six weeks’ pay—for employees with five or more years at a large employer or employees at an employer with a C\$2.5 million or more payroll); see also Judy Fudge, *The Spectre of Addis in Contracts of Employment in Canada and the UK*, 36 INDUS. L.J. 51, 54 (2007).

160. Labour Standards Code, R.S.N.S. 1989, c. 246, § 71 (Can. N.S.); Respecting Labour Standards, R.S.Q. 1979, c. N-1.1, § 124 (Supp. 2013) (Can. Que.).

161. Labour Standards Code, c. 246, §§ 72(1), 73(1) (Can. N.S.) (mandating notice for termination that is not due to “willful misconduct or disobedience or neglect of duty that has not been condoned by the employer”); Respecting Labour Standards, c. N-1.1, § 82 (Can. Que.) (mandating notice before a termination without just cause or layoff of greater than six months); see also OECD, DETAILED DESCRIPTION, *supra* note 91, at 30 (listing other provincial notice requirements).

162. Labour Standards Code, c. 246, § 72(3) (Can. N.S.) (excepting other situations, including terminations for reasons outside of the employer’s control and construction workers); Respecting Labour Standards, c. N-1.1, § 82.1 (Can. Que.) (excepting other situations, such as employees terminated at the end of a fixed contract or as the result of “superior force”).

163. Labour Standards Code, c. 246, § 72(4) (Can. N.S.); Respecting Labour Standards, c. N-1.1, § 83 (Can. Que.). There are also provisions for notice of group dismissals. Labour Standards Code, c. 246, § 72(2) (Can. N.S.); Respecting Labour Standards, c. N-1.1, §§ 84.0.1–84.0.15 (Can. Que.).

protection against unjust dismissal, even if notice was provided, differs substantially. In Quebec, an employee with two years of continuous service with an employer can bring a statutory claim for unjust dismissal;<sup>164</sup> however, in Nova Scotia, only an employee with at least ten years of continuous service can bring a claim for a termination without just cause.<sup>165</sup> The key inquiry in cases under both statutes is whether there was “good and sufficient cause,” a term that courts generally interpret in line with arbitration decisions involving just-cause provisions in collective-bargaining agreements.<sup>166</sup>

Unjust dismissal complaints brought under both the Nova Scotia and Quebec provincial statutes are handled by administrative agencies that attempt to mediate or ultimately adjudicate disputes.<sup>167</sup> The statute of limitations is six months in Nova Scotia and forty-five days in Quebec.<sup>168</sup> Under the provincial statutes, decisions of these agencies are generally unreviewable, although the courts are able to exercise review in rare instances.<sup>169</sup> Possible remedies include

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164. Respecting Labour Standards, c. N-1.1, § 124.

165. Labour Standards Code, c. 246, § 71(1). The exclusions under the notice provision apply to Nova Scotia’s unjust dismissal protection as well. *See id.* § 72(3).

166. *See* John D.R. Craig, *Privacy in the Workplace and the Impact of European Convention Incorporation on United Kingdom Labour Law*, 19 COMP. LAB. L. & POL’Y J. 373, 387 n.59 (1998) (discussing the interpretation of “just cause”); Todd H. Girshon, *Wrongful Discharge Reform in the United States: International & Domestic Perspectives on the Model Employment Termination Act*, 6 EMORY INT’L L. REV. 635, 664 (1992) (discussing the “good and sufficient cause” language).

167. Labour Standards Code, c. 246, § 21(3) (Can. N.S.); Respecting Labour Standards, c. N-1.1, §§ 124–30 (Can. Que.) (providing state-run mediation and arbitration procedures). Quebec resolves the majority of disputes under its Respecting Labour Standards Act (which includes several other regulations in addition to those addressing unjust dismissals) through mediation. *See* COMMISSION DES RELATIONS DU TRAVAIL, RAPPORT ANNUEL DE GESTION 22 (2010), available at [http://www.crt.gouv.qc.ca/file/admin/documents/fichiers/Sections\\_contenu/Publications/Rapports\\_annuels/RappAnn09-10.pdf](http://www.crt.gouv.qc.ca/file/admin/documents/fichiers/Sections_contenu/Publications/Rapports_annuels/RappAnn09-10.pdf) (noting that 81.7% of cases brought to mediation were successfully resolved).

168. Labour Standards Code, c. 246, § 21(3D) (Can. N.S.); Respecting Labour Standards, c. N-1.1, § 123 (Can. Que.).

169. Decisions made by Quebec’s “Commission des relations du travail” are not reviewable under the provincial statute. Respecting Labour Standards, c. N-1.1, § 130. Disputes adjudicated by Nova Scotia’s newly formed Labour Board—which replaced the previous six specialized boards—are unreviewable under the provincial statute except for “question[s] of law or jurisdiction.” Labour Standards Code, c. 246, § 20(1)–(2); *see also* Labour Board, GOV’T OF N.S., <http://www.gov.ns.ca/lae/labourboard/default.asp#lst> (last visited Jan. 2, 2014) (explaining the consolidation of the six boards into the single Labour Board). The Supreme Court of Canada has ruled that in order for a decision by a government agency board to be overturned, it must be so “patently unreasonable” that it cannot be rationally supported by the relevant legislation. C.U.P.E. v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, 237 (Can.).

reinstatement, backpay, and other equitable measures.<sup>170</sup> However, reinstatement is not typically ordered.<sup>171</sup>

### 3. Canadian Common Law

Despite the lack of a broad statutory dismissal law in most Canadian provinces, in many instances employees terminated without cause can seek recourse under federal common law. Typically, two types of claims may be available: (1) backpay and benefits lost during a judicially set notice period, and (2) “*Wallace damages*” that result from the employer’s bad faith in dismissing the employee.<sup>172</sup> Although reinstatement is not available, these claims can result in considerable damage awards for dismissed employees.<sup>173</sup>

The most widespread of these claims is for lost wages and benefits during a common law reasonable notice period. This claim is typically available for employees who were not terminated for cause and who did not receive reasonable notice of the termination.<sup>174</sup> The length of the notice period is largely up to the court’s discretion but it seems to loosely follow a general rule of one month for every year of service.<sup>175</sup> However, the period can be modified based on factors such as the nature of the job, the length of service, the age of the employee, and the current labor market for workers similar to the employee.<sup>176</sup>

The second and less common claim is for so-called *Wallace damages* due to the employer’s “bad faith” conduct in its handling of

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170. Labour Standards Code, c. 246, § 21(3) (Can. N.S.); Respecting Labour Standards, c. N-1.1, § 128 (Can. Que.); *see also* COMMISSION DES NORMES DU TRAVAIL, LABOUR STANDARDS IN QUÉBEC 29 (2013), available at [http://www.cnt.gouv.qc.ca/fileadmin/pdf/publications/c\\_0149a.pdf](http://www.cnt.gouv.qc.ca/fileadmin/pdf/publications/c_0149a.pdf) (listing the decisions the Commission can make).

171. *See* OECD, DETAILED DESCRIPTION, *supra* note 91, at 16 (showing that reinstatement is rarely made available).

172. The term “*Wallace damages*” refers to the rationale used to calculate damages in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, ¶¶ 103–08 (Can.).

173. E-mail from Michael Lynk, Faculty of Law, Univ. of W. Ont. Law, to Jeffrey Hirsch, Assoc. Dean for Academic Affairs & Geneva Yeargan Rand Distinguished Professor of Law, Univ. of N.C. Sch. of Law (Mar. 31, 2013) (on file with the North Carolina Law Review).

174. *See generally* 2 GEOFFREY ENGLAND & INNIS M. CHRISTIE, EMPLOYMENT LAW IN CANADA § 14.3 & n.2 (Peter Barnacle et al. revising authors, 4th ed. 2013) (describing the common-law presumption of an indefinite-term employment contract terminable with reasonable notice or payment in lieu of notice and citing cases).

175. *See id.* §§ 14.107, 14.177 (noting variances to this rule of thumb, especially among provinces); Letter from Michael Lynk, Faculty of Law, Univ. of W. Ont. Law, to Jeffrey Hirsch, Assoc. Dean for Academic Affairs & Geneva Yeargan Rand Distinguished Professor of Law (Apr. 18, 2013) (on file with the North Carolina Law Review).

176. *See* 2 ENGLAND & CHRISTIE, *supra* note 174, §§ 14.106–14.165.

the dismissal.<sup>177</sup> The action is primarily grounded in the employer's implied duty of good faith and fair dealing.<sup>178</sup> Employees covered by a collective-bargaining agreement cannot pursue this common-law claim.<sup>179</sup>

*Wallace* damages usually result not from the dismissal decision itself, but from the employer's failure to follow basic principles of good faith and fair dealing in the way in which the dismissal was made.<sup>180</sup> *Wallace* damages typically result in an order requiring the employer to pay for an additional period of common-law notice, although a recent ruling by the Supreme Court of Canada suggests that the damages are better treated as "true aggravated damages" that compensate for the additional unemployment resulting from the employer's misconduct.<sup>181</sup>

The precise boundaries of acceptable employer behavior are not clear, but the Supreme Court of Canada has held that when dismissing employees, an employer "at a minimum . . . ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive."<sup>182</sup> Employers must also provide some degree of procedural fairness, including investigating alleged misconduct and allowing employees an opportunity to respond to such allegations.<sup>183</sup> Among the actions that could lead to *Wallace* damages are falsely creating or citing grounds for just cause,<sup>184</sup> ridiculing employees,<sup>185</sup>

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177. See *Wallace*, [1997] 3 S.C.R. ¶¶ 98, 103–08.

178. See *Mitchell v. Westburne Supply Alta.*, 2000 ABQB 377, ¶ 30 (Can.) (discussing *Wallace*, [1997] 3 S.C.R. ¶¶ 98, 103–08); David J. Doorey, *Employer "Bullying": Implied Duties of Fair Dealing in Canadian Employment Contracts*, 30 QUEEN'S L.J. 500, 523–25 (2005).

179. See *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, 724–26 (Can.) (holding that employees cannot pursue individual contract or tort common-law termination claims).

180. See *Wallace*, [1997] 3 S.C.R. ¶ 103; Judy Fudge, *The Limits of Good Faith in the Contract of Employment: From Addis to Vorvis to Wallace and Back Again?*, 32 QUEEN'S L.J. 529, 538 (2007).

181. See 2 ENGLAND & CHRISTIE, *supra* note 174, § 14.167 (internal quotation marks omitted) (discussing *Honda Can., Inc. v. Keays*, [2008] 2 S.C.R. 362, ¶ 59 (Can.)).

182. *Wallace*, [1997] 3 S.C.R. ¶ 98. The Court in *Wallace* upheld an award of two years' salary to compensate for the lack of notice. *Id.* ¶ 109.

183. Fudge, *supra* note 180, at 561.

184. See *Mitchell v. Westburne Supply Alta.*, 2000 ABQB 377, ¶¶ 33–35 (Can.); *Hampton v. Thirty-Five Charlotte Ltd.* (1999), 558 A.P.R. 109, ¶¶ 40–52 (Can. N.B. Q.B.); see also 2 ENGLAND & CHRISTIE, *supra* note 174, §§ 14.167 n.8, 14.169 & n.6 (discussing other examples).

and terminating employees when they are particularly vulnerable.<sup>186</sup> What constitutes reasonable notice as a baseline for calculating *Wallace* damages is highly case-specific. Courts consider factors such as an employee's age, length of service, future employment prospects, importance within the firm, and other factors.<sup>187</sup> However, a 1998 study found that *Wallace* damages equal 33% of the basic reasonable notice period, on average.<sup>188</sup> Ultimately, most disputes regarding whether notice of dismissal was reasonable are settled rather than litigated.<sup>189</sup>

#### D. China

Possibly more than any other country in this survey, China illustrates the distinction between law on the books and law on the ground. Especially following its 2008 labor law reforms, China's dismissal legislation has become relatively employee-friendly. It is still too early to adequately judge the impact of those reforms, but thus far they appear underwhelming. This is because the actual enforcement of the laws—including employees' ability to seek enforcement and the actual damages obtained in successful challenges—is not nearly as favorable for employees as the substantive protections on the books. A summary of Chinese termination law and its enforcement is provided in Table 4 of the Appendix.

##### 1. Individual Unjust Dismissal

In China, workers rely on the Labor Contract Law ("LCL")—specifically Article 39—to protect them from unjust dismissals.<sup>190</sup> The Chinese government enacted the LCL in 2007, along with the Labor

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185. See *Musgrave v. Levesque Sec., Inc.* (2000), 568 A.P.R. 349, ¶¶ 76–78 (Can. N.S. S.C.).

186. *Id.*

187. Fudge, *supra* note 180, at 564 (citing *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. 2d 140, 145 (Can. Ont. H.C.)).

188. 2 ENGLAND & CHRISTIE, *supra* note 174, § 14.169 (citing Barry B. Fisher, *The Wallace Factor: An Analysis of the Effect of the Bad Faith Dismissal Doctrine on Reasonable Notice Periods in Wrongful Dismissal Actions* 12 (unpublished manuscript), available at [http://www.barryfisher.ca/papers/Wallace\\_Factor.pdf](http://www.barryfisher.ca/papers/Wallace_Factor.pdf) (last visited Jan. 2, 2014)).

189. See Arnow-Richman, *supra* note 5, at 53 & n.235 (citing anecdotal sources).

190. See *Láodòng hétóng fǎ* [Labor Contract Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008) (China), available as translated at [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471106.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471106.htm).

Dispute Mediation and Arbitration Law (“LDMAL”)<sup>191</sup> and the Employment Promotion Law (“EPL”).<sup>192</sup> However, because the EPL is largely a policy mandate and the LDMAL is focused on dispute resolution, the LCL provides Chinese employees their central workplace rights.<sup>193</sup> This law, enacted partly in response to slave labor scandals in the country’s coal mines,<sup>194</sup> established significant protections for workers, both public and private.<sup>195</sup> However, the LCL lacks a small-employer exception,<sup>196</sup> and like much of Chinese employment law, the extent to which the LCL’s protections will actually be enforced remains an open question.<sup>197</sup>

As an initial matter, the LCL requires all employment relationships to be memorialized in a written contract.<sup>198</sup> Employment contracts are either fixed-term or indefinite-term.<sup>199</sup> In addition, the LCL permits probationary periods from one to six months, depending on the type of contract.<sup>200</sup> Probationary employees can receive lower

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191. *Id.*; *Láodòng zhēngyì tiáojiě zhòngcái fǎ* [Labor Dispute Mediation and Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008) (China), available as translated at [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471614.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471614.htm).

192. *Jiùyè cùjìn fǎ* [Employment Promotion Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) (China), available as translated at [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471590.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471590.htm).

193. See Virginia E. Harper Ho, *From Contracts to Compliance? An Early Look at Implementation Under China's New Labor Legislation*, 23 COLUM. J. ASIAN L. 35, 67 (2009).

194. Jovita T. Wang, Comment, *Article 14 of China's New Labor Contract Law: Using Open-Term Contracts to Appropriately Balance Worker Protection and Employer Flexibility*, 18 PAC. RIM L. & POL'Y J. 433, 435 (2009). See generally Li Jing, Comment, *China's New Labor Contract Law and Protection of Workers*, 32 FORDHAM INT'L L.J. 1083 (2008) (providing a thorough description of the LCL, particularly with regard to rural and migrant workers).

195. Labor Contract Law, arts. 1–2.

196. See *Employment Protection Legislation Database – EPLex: China*, INT'L LAB. ORG., [http://www.ilo.org/dyn/eplex/termmain.showCountry?p\\_lang=en&p\\_country\\_id=52](http://www.ilo.org/dyn/eplex/termmain.showCountry?p_lang=en&p_country_id=52) (last visited Jan. 2, 2014) [hereinafter *EPLex: China*] (stating that no enterprises are excluded from the new law's requirements because of size).

197. See *infra* notes 253–54 and accompanying text.

198. Labor Contract Law, arts. 10, 17. The employer must also inform employees of the relevant terms and conditions of employment at the start of the employment relationship. *Id.* art. 8.

199. *Id.* art. 12.

200. *Id.* art. 19 (stating that open-ended contracts and fixed-term contracts of at least three years can have up to a six-month probationary period; fixed-term contracts of less than three years can have probationary periods of between one and three months, depending on the length of contract).

wages and, although they are entitled to an explanation of the reason for termination, they are not provided cause protection.<sup>201</sup>

Once a fixed-term contract has expired, the employer can refuse to continue the employment relationship for virtually any reason.<sup>202</sup> During the term of the contract, however, termination must generally be based on cause.<sup>203</sup> To prevent employers' use of continuous short-term contracts to avoid cause protection for employees working for indefinite terms, the LCL allows only two fixed-term contracts for any given employee; after these two contracts, continued employment is automatically treated as an indefinite-term contract that can be terminated only for cause.<sup>204</sup>

For those employees who qualify, the primary statutory protection against unjust dismissal is contained in Article 39 of the LCL.<sup>205</sup> Under Article 39, an employer can terminate an employment contract if the employee:

- (1) does not satisfy the recruitment requirements during the probation period;
- (2) commits a serious violation of the rules and regulations of the employer;
- (3) causes any major losses to the employer due to grave negligence in performing work duties or as the result of seeking private benefits;
- (4) establishes a labor relationship with other employers that may seriously influence the employee's work, or the employee refuses to make a correction even though the employer has pointed out such conflict;
- (5) violates the employment contract because the employee concluded or modified the contract through deception,

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201. *Id.* arts. 20–21; *see also* Zhōnghuá rénmín gònghéguó láodòng hétóng fǎ shíshí tiáoli [Implementation Regulations of the Labor Contract Law] (promulgated by the State Council, Sept. 3, 2008, effective Sept. 18, 2008), art. 24 (China), available as translated at <http://www.paulhastings.com/Resources/Upload/Publications/1066.pdf> (stating the requirements for explanation of termination). A probationary worker can quit after giving the employer three days' notice. Labor Contract Law, art. 37 (requiring thirty days' notice from a non-probationary employee).

202. Labor Contract Law, art. 44(1).

203. *Id.* art. 39.

204. *Id.* art. 14(3); *see also* Stephen M. Dickinson & Daniel P. Harris, *Dickinson and Harris on China's New Labor Law*, 2008 EMERGING ISSUES 1369, available at LEXIS.

205. Labor Contract Law, art. 39.

coercion, or by taking advantage of the employer's difficulties to force it to enter into a contract against its true will; or

(6) is subject to criminal liabilities according to law.<sup>206</sup>

No notice is required for dismissals under Article 39.<sup>207</sup>

Even when an employer cannot meet the requirements of Article 39, it may still be able to terminate an employee with thirty days' written notice—or pay in lieu of such notice—if the employee has a non-work-related illness or injury that renders the employee incapable of doing the job, regardless of possible training or job modifications, or if the labor agreement cannot be performed because of a significant change in circumstances.<sup>208</sup> An employer must also generally provide some type of severance pay if invoking one of these circumstances.<sup>209</sup> Moreover, the employer must certify that a dismissal complies with the firm's termination procedures and, if contemplating a collective dismissal, must meet additional procedural requirements.<sup>210</sup>

## 2. Economic Dismissals and Layoffs

The LCL does not have specific rules for redundancy dismissals. However, the statute does make an exception to the cause requirement when a significant change in "objective conditions" on which the labor contract is based has made performance of the contract impossible.<sup>211</sup> Under this exception, the employer must pay

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206. *Id.*; see also Implementation Regulations of the Labor Contract Law, art. 19 (providing regulations that further define appropriate reasons for employer to terminate labor contract). What constitutes a "severe violation" or "severe damage" will generally be defined in the employer's labor manual. Dan Harris, *Terminating Your China Employee. It Ain't Easy . . .*, CHINA LAW BLOG (Jan. 9, 2010), [http://www.chinalawblog.com/2010/01/terminating\\_your\\_china\\_employe.html](http://www.chinalawblog.com/2010/01/terminating_your_china_employe.html).

207. See Labor Contract Law, art. 39.

208. *Id.* art. 40; see also Implementation Regulations of the Labor Contract Law, art. 20 (expressly allowing pay in lieu of notice).

209. Labor Contract Law, art. 46 (also requiring severance if termination is due to bankruptcy or an ordered shutdown of firm). The amount of payment is based on the employee's time of service, with the usual rate being one month's pay for each year of service; the severance is capped by limiting the monthly pay rate to three times the average local salary and the number of service years to twelve. *Id.* art. 47; see Implementation Regulations of the Labor Contract Law, art. 27.

210. Labor Contract Law, arts. 41, 50 (noting procedural requirements such as soliciting the opinion of union or workers, notifying the appropriate government entity, issuing a certificate of discharge, and transferring social insurance information). The Labor Contract Law also prohibits certain forms of discriminatory terminations, such as those based on pregnancy and workplace injury or illness. *Id.* art. 42.

211. *Id.* art. 40(3).

the employee one month's salary for every year of work, although there are caps for highly paid employees.<sup>212</sup>

The LCL defines a collective dismissal as a layoff affecting at least twenty employees or 10% of the workforce.<sup>213</sup> Before implementing a collective dismissal, an employer must give thirty days' notice to the employees or a union, solicit input from the employees or the union, and notify the appropriate state official.<sup>214</sup> Appropriate grounds for a collective dismissal are bankruptcy, serious problems with production or business operations, a change in products, a significant technical or operational change, or a significant change in an objective economic circumstance upon which the contract is based that makes performance impossible.<sup>215</sup> The LCL mandates that certain employees be given priority to keep their jobs, including employees with fixed long-term contracts, employees without fixed-period contracts, and employees who have families with elderly relatives or minors to support and no other workers helping to provide that support.<sup>216</sup> Moreover, if the employer hires new employees within six months of the collective dismissal, it must notify the dismissed employees of their priority for rehire.<sup>217</sup>

Finally, the justifications for "objective circumstances" and collective dismissals are not available against employees who are within five years of the legal retirement age and who have more than fifteen years of continuous service with the employer.<sup>218</sup>

### 3. Unemployment Assistance

China expanded and unified its various social insurance programs, including unemployment insurance, through the Social Insurance Law, which went into effect on July 1, 2011.<sup>219</sup> Among the expansions was the provision of unemployment assistance to migrant rural workers working in cities, who had previously been excluded from receiving unemployment benefits like their urban

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212. *Id.* arts. 46(3), 47 (mandating that payments to employees with three or more times the average monthly salary in a given municipality are capped at three times the monthly average rate, and compensation cannot exceed more than twelve years of work).

213. *Id.* art. 41.

214. *Id.* China allows only one form of trade union representation, the All-China Federation of Trade Unions ("ACFTU"). Andrew Batson, *How U.S. Labor Leaders Chart a Global Course*, WALL ST. J., May 23, 2007, at A6.

215. Labor Contract Law, art. 41.

216. *Id.*

217. *Id.*

218. *Id.* art. 42(5).

219. SSA, ASIA AND THE PACIFIC, *supra* note 77, at 59.

counterparts.<sup>220</sup> To be eligible to receive benefits, a worker must have at least one year of covered employment, must have been involuntarily terminated, and must actively seek work or accept suitable employment.<sup>221</sup> While the new law was enacted on a national level, local governments set the amount of the benefit, which must be higher than the minimum living security standard of urban residents but lower than the minimum wage.<sup>222</sup> For instance, in 2012, Shenzhen province raised its monthly unemployment benefit to ¥1,056.00 (US\$169.15), which equaled 80% of the previous year's minimum wage.<sup>223</sup> Similarly, in 2011, Beijing's unemployment benefits ranged from a minimum of ¥752.00 (US\$120.44) per month to ¥861.00 (US\$137.90) per month, depending on workers' years of employment.<sup>224</sup> These benefits are fixed and are not based on employees' previous earnings or premium contributions.<sup>225</sup> A worker

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220. See Zhōnghuá rénmín gònghéguó shèhuì bǎoxiǎnfǎ [Social Insurance Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective July 1, 2011), art. 95 (China), available as translated at <http://www.bycpa.com/html/news/20116/1585.html>.

221. *Id.* arts. 45, 50, 51(5). Employee and employer contributions also vary by province. See Sharon Wong & Liya Zhang, *China's Labour Revolution Continues: New Social Insurance Law*, KING & WOOD MALLESONS (July 7, 2011), <http://www.mallesons.com/publications/marketAlerts/2011/Pages/China%20%80%99s-labour-revolution-continues-New-social-insurance-law.aspx>. In 2011, Beijing's employee contribution rate was 0.2% of salary, up to a monthly maximum of ¥25.00 (US\$4.00), and Shanghai's employee contribution rate was 1%, up to a monthly maximum of ¥117.00 (US\$18.74). *Id.*

222. Social Insurance Law, art. 47; SSA, ASIA AND THE PACIFIC, *supra* note 77, at 64.

223. *Shenzhen Raises Monthly Jobless Insurance Payment to 1056 Yuan*, SHENZHEN POST (July 4, 2012), <http://www.szcpo.com/2012/07/shenzhen-raises-monthly-jobless-insurance-to-1056-yuan.html>.

224. Du Yan, *Beijing Next Year to Increase the Six Social Security Treatment Since the Minimum Wage Rose by 20.8%*, TENCENT NEWS (Dec. 27, 2010, 11:47 AM), <http://news.qq.com/a/20101227/001070.htm>. Other provinces with varying benefit levels include (1) Shanghai, where the 2010 unemployment benefits ranged from a minimum of ¥555.00 (US\$87.35) to a maximum of ¥660.00 (US\$103.87) per month, *Shanghai to Raise Minimum Wage Levels and Social Benefits from April 1*, CHINA BRIEFING (Mar. 31, 2010), <http://www.china-briefing.com/news/2010/03/31/shanghai-to-raise-minimum-wage-levels-and-social-benefits-from-april-1.html>, and (2) Changsha City, in the Hunan province, where the 2009 standard monthly benefit for urban workers was ¥532.00 (US\$84.47) per month and ¥448.00 (US\$71.13) per month in other areas, *Independent Business Starters Enjoy One-off Unemployment Insurance Benefits in Changsha*, HUNAN GOV'T (Feb. 4, 2009), [http://www.englishunan.gov.cn/wwwHome/200902/t20090204\\_281075.htm](http://www.englishunan.gov.cn/wwwHome/200902/t20090204_281075.htm).

225. Adam Livermore, *Mandatory Social Welfare Benefits for Chinese Employees*, CHINA BRIEFING (Feb. 21, 2012), <http://www.china-briefing.com/news/2012/02/21/mandatory-social-welfare-benefits-for-chinese-employees.html>.

may receive benefits for one to two years, depending on the number of years of work.<sup>226</sup>

#### 4. Enforcement

China's 2008 employment law reforms affected not just substantive protections, but the methods of enforcing those protections as well.<sup>227</sup> Those changes appear to have dramatically increased the number of dismissal claims,<sup>228</sup> but the reforms are still too recent to determine whether employees are able to achieve meaningful remedies.

Dismissals that violate the LCL entitle an employee to damages that are double the severance pay owed in the event of a lawful termination.<sup>229</sup> However, punitive damages are not permitted and, in practice, awards for damages are usually quite modest in comparison to the awards provided in most of the other studied countries.<sup>230</sup> Courts may also require the losing party to pay the winner's administrative and court costs but not her attorney's fees.<sup>231</sup> An employee can also demand reinstatement if the termination violated the LCL and, if reinstatement is impossible, then the employee is entitled to double the severance pay that would have been owed if the termination had been lawful.<sup>232</sup> Because of the recent passage of the LCL, it is difficult to determine the extent to which reinstatement is a realistic option for aggrieved employees; yet, reinstatement appeared to be a common remedy for pre-LCL unjust dismissal cases in China.<sup>233</sup>

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226. Social Insurance Law, art. 46 (mandating that if the amount of covered employment is less than five years, benefits last for up to twelve months; five to ten years of service results in eighteen months of benefits; and ten or more years of service entitles a worker to up to twenty-four months of benefits).

227. Labor Contract Law, arts. 73–95 (discussing both public enforcement mechanisms and employers' private legal liability).

228. See Dan Harris & Brad Luo, *The Impact of China's Labor Contract Law*, CHINA LAW BLOG (Sept. 15, 2008), [http://www.chinalawblog.com/2008/09/the\\_impact\\_of\\_chinas\\_labor\\_con.html](http://www.chinalawblog.com/2008/09/the_impact_of_chinas_labor_con.html). Within eight months of the Labor Contract Law's effectiveness, labor dispute cases had doubled in Beijing and had doubled or nearly doubled in a number of other provinces. *Id.*

229. See Labor Contract Law, arts. 80, 87; *see also supra* note 209 (describing the severance calculation).

230. See Ho, *supra* note 193, at 51–52 (noting that, in 2007, the average fine per case in Shenzhen was ¥30,000 (US\$4,423.48)); *infra* Part II.D.5 (providing a comparison of awards among the studied countries).

231. Ho, *supra* note 193, at 101 n.290.

232. Labor Contract Law, arts. 48, 87.

233. See OECD, DETAILED DESCRIPTION, *supra* note 91, at 16 (giving China a score of "3" for reinstatement, indicating frequent orders of reinstatement); Herbert Smith

Under the LCL, state administrative councils have the responsibility to ensure that labor contracts are fulfilled.<sup>234</sup> Enforcement is intended to take place through inspections, although individuals can file complaints with the councils.<sup>235</sup> As explained below, unresolved disputes over terminations are adjudicated through a mediation and arbitration system—and ultimately in a local court.<sup>236</sup> In practice, most disputes are resolved through settlement or other informal dispute mechanisms.<sup>237</sup>

Prior to the 2008 reforms, mandatory arbitration (including periods of prior mediation and provisional arbitration) occurred before a workplace dispute could be brought to court.<sup>238</sup> Employees tended to do well in arbitration; however, there were significant problems related to the amount of time and costs required to bring claims, a lack of adequate representation, a short statute of limitations, and a lack of finality.<sup>239</sup>

The LDMAL—Labor Dispute Mediation and Arbitration Law—was intended to address these problems through several new measures. The law extends the statute of limitations from sixty days to one year.<sup>240</sup> It also shortens the time period for arbitration processing by providing no more than five days to accept a valid arbitration claim and forty-five days to issue a decision after acceptance in a typical case.<sup>241</sup> Under the new law, arbitration decisions (which can take a long time in practice) immediately go into effect and only employees can challenge a decision in court.<sup>242</sup>

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Freehills LLP, *China's New Employment Contracts Law*, LEXOLOGY (July 13, 2007), <http://www.lexology.com/library/detail.aspx?g=3b7ef5d6-7b0c-4ef7-93af-53f4426ebfe3>.

234. Labor Contract Law, art. 73. The official state labor union also has a role in contract compliance. *Id.* art. 78. For a general description of public enforcement mechanisms, see Ho, *supra* note 193, at 47–53.

235. Labor Contract Law, arts. 73–75, 79; *see also* Ho, *supra* note 193, at 53–54 (describing weak inspection system).

236. Dickinson & Harris, *supra* note 204 (“More importantly, virtually every violation of the law gives the employee the right to sue the employer for penalties and damages in the local employment arbitration bureau or in the local courts.”).

237. Ho, *supra* note 193, at 54–55; Yun Zhao, *China's New Labour Dispute Resolution Law: A Catalyst for the Establishment of Harmonious Labour Relationship?*, 30 COMP. LAB. L. & POL'Y J. 409, 419–20 (2009).

238. See RON BROWN, CHINA LABOUR DISPUTE RESOLUTION 2–3 (2008), available at <http://www.fljs.org/content/china-labour-dispute-resolution>.

239. *Id.* at 3–5. Out of the 306,027 cases resolved in 2005, employees won 47%, employers won 13%, and the remaining 40% were split decisions. *Id.* at 3.

240. Labor Dispute Mediation and Arbitration Law, art. 27.

241. *Id.* arts. 30, 43. For especially complex cases, the arbitration panel could take an additional fifteen days. *Id.* art. 43.

242. *Id.* arts. 47–48.

Further, the LDMAL mandates that arbitration be free of charge.<sup>243</sup> By facilitating the filing of claims, the LDMAL appears to have contributed to a substantial increase in mediation-arbitration claims. In the LDMAL's first year, the number of arbitration claims doubled to 693,000 and remained high in subsequent years.<sup>244</sup> This rise in claims has overwhelmed the arbitration system and created additional delay.<sup>245</sup>

If an employee decides to challenge an arbitration decision by filing a lawsuit, the case goes to a general civil court because China does not have a specialized labor court. Many employees still seek court review, especially after the costs of litigation were reduced in 2007.<sup>246</sup> Recent estimates are that 286,221 workplace lawsuits were filed in civil court in 2008—nearly double the number from the previous year.<sup>247</sup> Part of the increase may be due to a perception that courts are more inclined to side with employees than are arbitration committees. For instance, 2005 data from one city showed that employees won, or partially won, 58.6% of arbitration cases and 80.6% of court cases.<sup>248</sup> Finally, the Chinese government has been promoting mediation by, among other things, setting up mediation committees in large workplaces and encouraging arbitration or court claims to go through mediation.<sup>249</sup>

Comprehensive information on average awards is largely unavailable and the information that does exist indicates that awards are low.<sup>250</sup> For instance, a 2007 report on awards in an urban area found the average award to be ¥30,000 (US\$4,423.48).<sup>251</sup> The same

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243. *Id.* art. 53.

244. Dimitri Kessler, *Chinese Labor Contract Law: Business Response to Long-Term Employment Commitments in a Moment of Crisis*, in PROCEEDINGS OF NYU CENTER FOR LABOR AND EMPLOYMENT LAW AND U.S.-ASIA LAW INSTITUTE: RESEARCH CONFERENCE ON THE CHINESE LABOR MARKET 239, 246 (2012) (on file with the North Carolina Law Review); *China's Labour Dispute Resolution System*, CHINA LAB. BULL. (Nov. 26, 2009), <http://www.clb.org.hk/en/node/100618>.

245. *China's Labour Dispute Resolution System*, *supra* note 244 (noting delays in the processing of cases); Ho, *supra* note 193, at 58, 95–97; Wang Wen, *Labor Disputes Skyrocket in Beijing*, CHINA DAILY (Dec. 10, 2009), [http://www.chinadaily.com.cn/cndy/2009-12/10/content\\_9151565.htm](http://www.chinadaily.com.cn/cndy/2009-12/10/content_9151565.htm) (describing the number of labor disputes in Beijing as increasing from 26,000 in 2007, to 49,000 in 2008, to over 80,000 in 2009).

246. *China's Labour Dispute Resolution System*, *supra* note 244.

247. *Id.* (noting an increase of 94% and accompanying problems such as overworked judges).

248. *Id.* (citing data from Dongguan, as well as similar data from the Hunan Province).

249. *Id.* (citing data showing an increased use of mediation in some areas, while also noting employee resistance to mediation in many instances).

250. *See id.*

251. *See* Ho, *supra* note 193, at 51–52 (describing awards in Shenzhen).

report found even lower averages of ¥3,000 (US\$442.35) in a manufacturing district.<sup>252</sup>

What remains to be seen is whether the increase in claims is a trend that indicates an end to the traditionally weak enforcement of Chinese labor laws. Some commentators have argued that the private right of action and widespread knowledge of the LCL will result in a substantial number of attempts to invoke the law's protections.<sup>253</sup> Yet, a shortage of lawyers and other obstacles still present significant hurdles to effective enforcement.<sup>254</sup>

#### *E. France*

In France, employees enjoy quite strong substantive dismissal rights. Moreover, an employee's ability to challenge unlawful dismissals is bolstered by an enforcement system that more often than not results in a win for the employee. However, as is typical for most of the countries in this survey, the monetary awards associated with these wins are modest. A summary of French termination law and its enforcement is provided in Table 5 of the Appendix.

##### 1. Individual Unjust Dismissal

France has one of the world's most robust sets of protections against dismissals, although recent legislation pulled back on some of those protections when collective dismissals occur.<sup>255</sup> Most of these

252. *See id.* at 52 (describing awards in Guangzhou).

253. Dickinson & Harris, *supra* note 204 ("Chinese lawyers are already salivating about suing foreign companies pursuant to this new law and have indicated to the authors of this Commentary that they have plaintiffs all lined up and ready to sue various foreign companies if and when those foreign companies fail to comply with the law.").

254. Marisa Anne Pagnattaro, *Is Labor Really "Cheap" in China? Compliance with Labor and Employment Laws*, 10 SAN DIEGO INT'L L.J. 357, 378 (2009).

255. Employer and employee representatives agreed to a National Interprofessional Agreement ("ANI") on January 11, 2013. *See ACCORD NATIONAL INTERPROFESSIONNEL DU 11 JANVIER 2013 POUR UN NOUVEAU MODELE ECONOMIQUE ET SOCIAL AU SERVICE DE LA COMPETITIVITE DES ENTREPRISES ET DE LA SECURISATION DE L'EMPLOI ET DES PARCOURS PROFESSIONNELS DES SALARIES [ANI] [NATIONAL INTERPROFESSIONAL AGREEMENT ON THE STABILIZATION OF EMPLOYMENT]* (2013), available at <http://www.lefigaro.fr/assets/pdf/Accord%20de%20securisation%20de%20l'emploi.pdf>. On May 13, 2013, the French Senate passed legislation to enforce the agreement. *See France Introduces Radical Labour Market Reforms*, SQUIRE SANDERS (May 2013), <http://www.squiresanders.com/files/Publication/5fdc90a3-c1d2-4c6a-b71d-ab4fc7429426/Presentation/PublicationAttachment/0fbce787-35f0-4c05-becd-b2a7e4620235/France-Introduces-Radical-Labour-Market-Reforms-Newsletter.pdf>; *see also* BRYAN CAVE LLP, EMPLOYMENT SECURIZATION AGREEMENT: A COMPROMISE BETWEEN MORE FLEXIBILITY FOR EMPLOYERS AND MORE RIGHTS FOR EMPLOYEES IN FRANCE 1 (2013), available at <http://www.bryancave.com/files>

protections are contained in the French Labor Code, which gives employers the ability to terminate employees, but only after satisfying certain conditions.<sup>256</sup> The Labor Code requires notice prior to all terminations except those for serious cause; employees with between six months and two years of service are entitled to one month's notice and employees with more than two years of service are entitled to two months' notice.<sup>257</sup> An employer that fails to provide the required notice must recompense the employee for that time.<sup>258</sup>

The centerpiece of French dismissal protection is the requirement that employers have a real and serious reason for termination.<sup>259</sup> The requirement applies to virtually all employers, no matter their size.<sup>260</sup> This protection is usually triggered after an agreed-upon initial trial period, during which either party may terminate employment at will.<sup>261</sup>

Case law is the major source for defining valid reasons for dismissal.<sup>262</sup> The reasons can vary but they are generally classified as actions that significantly impede the managerial efforts of the employer, that prejudice the employer, or that undermine the employer's trust in the employee (e.g., poor job performance, such as the failure to meet job targets, incompetence, failure to follow rules, or engaging in sexual harassment).<sup>263</sup> Neither party has the burden to prove the existence *vel non* of a real and serious reason for a

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/Publication/32ed876c-3893-4bf7-9840-526b8485ab1a/Presentation/PublicationAttachment/6356d8a0-8274-452a-a3a2-576c80cde4d0/Publication\_Briefing\_Paris\_L%26E\_Employment%20Securization%20Agreement\_ENG.pdf (explaining that the ultimate legislation will largely reflect the provisions of the ANI and noting the changes from previous legislation).

256. CODE DU TRAVAIL [C. TRAV.] art. L1231-1 (Fr.). For convenience, this Article refers to the Code du travail as the French Labor Code. Also, this Article will use the French Labor Code's recently updated numbering system.

257. *Id.* art. L1234-1. Employees with less than six months' service are entitled to notice based on local law, collective-bargaining agreements, or custom. *Id.* Also, collective-bargaining agreements can provide for longer periods of notice. *Id.*

258. *Id.* art. L1234-5.

259. *Id.* art. L1232-1.

260. See Roland Voize-Valayre, *The French Law of Unjust Dismissals*, 23 N.Y.U. J. INT'L L. & POL. 519, 544 (1991).

261. See C. TRAV. art. L1231-1.

262. See BLANPAIN ET AL., *supra* note 9, at 639.

263. See *id.* at 639–42 (discussing case law); Voize-Valayre, *supra* note 260, at 548–57. There also exists a suggested administrative test for this determination, but it is generally ignored by courts. See *id.* at 557–58.

dismissal;<sup>264</sup> it is up to the judge to determine whether enough evidence exists to support the validity of a dismissal.<sup>265</sup>

The Labor Code, however, requires an employer to follow different procedures when dismissing an employee for non-economic or non-disciplinary reasons.<sup>266</sup> The employer must provide notice of its intent to dismiss and arrange a meeting at which the employer explains its rationale for the dismissal and gives the employee an opportunity to respond.<sup>267</sup> Following the meeting, the employer must also give final notice of a dismissal,<sup>268</sup> with a minimum notice period that varies from one to two months, depending on the employee's age, seniority, position within the firm, and applicable collective-bargaining provisions.<sup>269</sup> Failure to provide the necessary procedures when a dismissal is for just cause entitles the employee to an indemnity payment that usually equals one month of wages, although the court may instead order the employer to complete the proper procedures.<sup>270</sup>

## 2. Economic Dismissals and Layoffs

Special rules under the French Labor Code govern redundancy or economic-layoff dismissals, defined as those made for "real and serious" economic reasons, such as substantial economic difficulties or technological changes.<sup>271</sup> These special rules do not apply to dismissals related to employee performance.<sup>272</sup> In the majority of reports to labor authorities, employers cite economic factors as the justification for dismissals.<sup>273</sup>

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264. See Voize-Valayre, *supra* note 260, at 574.

265. C. TRAV. art. L1235-1; *see also* Voize-Valayre, *supra* note 260, at 574–75 (noting, however, that where the employer presents a motive that is real and serious on its face, employees appear to have the burden in practice to undermine the existence or validity of the motive).

266. See generally Voize-Valayre, *supra* note 260, at 529–43 (discussing the procedural requirements and practices involved with dismissal).

267. C. TRAV. arts. L1232-2 to -3. However, courts may allow employers to cite different reasons for a dismissal in subsequent litigation. See Voize-Valayre, *supra* note 260, at 536.

268. C. TRAV. art. L1232-6.

269. See *id.* arts. L1234-1 to -2; *see also* BLANPAIN ET AL., *supra* note 9, at 637 (discussing the procedures for dismissals for personal reasons). No notice is required if gross negligence or willful misconduct is involved. C. TRAV. art. L1234-1.

270. C. TRAV. art. L1235-2; BLANPAIN ET AL., *supra* note 9, at 638 (discussing the remedial norm); Voize-Valayre, *supra* note 260, at 539.

271. C. TRAV. arts. L1233-2 to -3.

272. *Id.* art. L1233-3.

273. See MINISTÈRE DU TRAVAIL [MINISTRY OF LABOR], REQUESTS FOR DISMISSAL OF PROTECTED EMPLOYEES (2009) (noting, based on 2004 data, that economic reasons

An employer that, within thirty days, lays off fewer than ten employees for redundancy faces relatively few requirements: principally, a meeting with the individual employee prior to termination during which the employer gives the reasons for its decision, and the employee or representative of the employee's choosing has an opportunity to respond.<sup>274</sup> The employer must also provide its reasons in writing prior to the meeting, along with notice of the employee's right to be rehired and the employer's strategy for implementing the layoff.<sup>275</sup> If, within thirty days, an employer lays off ten or more employees because of redundancy, it must follow the interview requirement unless a works council or other representative exists—in which case the employer must meet with the council or representative instead.<sup>276</sup> Employers in these circumstances must also provide written notice at least thirty days before dismissal.<sup>277</sup>

When an employer with fifty or more employees intends to implement a collective dismissal of ten or more employees within a period of thirty days, it must first hold several meetings with the relevant works council or other employee representative.<sup>278</sup> Such employers must also create a job preservation plan that attempts to

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are listed as the rationale for 65.3% of dismissal requests), *table available at [http://www.travail-emploi-sante.gouv.fr/IMG/xls/tableaux\\_LSP\\_98\\_04.xls](http://www.travail-emploi-sante.gouv.fr/IMG/xls/tableaux_LSP_98_04.xls).*

274. C. TRAV. arts. L1233-11 to -13. If the employer has fifty or more employees, it must meet with the appropriate works council instead. *Id.* arts. L1233-8 to -10. The local administrative authorities must be kept informed as well. *Id.* arts. L1233-19 to -20, -46, -48.

275. *Id.* arts. L1233-10, -15 to -16, -45 (providing one year of rehiring priority for employees dismissed for economic reasons). The implementation information includes the reasons for the layoffs, the number of planned dismissals, the criteria and schedule of dismissals, and the assistance proposed. *Id.* art. L1233-10. The criteria used for all group dismissals should consider factors such as family status, work seniority, and characteristics such as age or disability, that make reemployment especially difficult. *See id.* art. L1233-5.

276. *Id.* art. L1233-39 (describing the notification requirements for collective dismissals); *id.* arts. L1233-28, -36 (requiring an employer to meet with a works council or other representative if the employer wishes to carry out a collective dismissal). For a description of works councils, *see infra* Part I.F.5.

277. C. TRAV. art. L1233-39. For employers dismissing fewer than ten employees, there must be at least fifteen days from the date of the interview to the date of termination for employees in a managerial position, and seven days for all others. *Id.* art. L1233-15. The parties, including a union, can contract for longer notice periods. *Id.* art. L1233-39.

278. *Id.* art. L1233-30; *see also id.* art. L1233-35 (explaining the responsibilities of the works council expert). The ANI allows certain union-negotiated collective-bargaining agreements to waive some of the collective-dismissal procedures, including the selection criteria for the dismissals; in addition, the ANI limits the amount of time that a works council can consider an employer's proposed collective-dismissal plan to two to four months, depending on the number of dismissals involved. *See* BRYAN CAVE LLP, *supra* note 255, at 1-2. The ANI also makes "professional competence" the most important criteria for identifying employees to be laid off. *See id.* at 2.

limit layoffs and reclassify dismissed workers.<sup>279</sup> The plan may include measures such as transfers, new operations, training, and reduction in work to decrease the number of layoffs.<sup>280</sup> Also, the employer must provide the plan (including individualized plans for employees in many instances,<sup>281</sup> as well as proposed measures for monitoring and implementing the job preservations strategies) to the relevant labor authorities.<sup>282</sup>

Furthermore, the Labor Code mandates that employers make severance payments to employees who have at least one year of continuous service with the employer and have been dismissed for reasons short of “serious fault.”<sup>283</sup> The employer must provide these payments in addition to any unjust dismissal remedies that are applicable.<sup>284</sup> Under current regulations, an employee is usually entitled to severance pay that is equal to one-fifth of the employee’s previous monthly pay for each year of service, with an additional two-fifteenths of monthly pay for each year of service beyond ten years.<sup>285</sup>

### 3. Unemployment Assistance

France provides both unemployment assistance benefits and unemployment insurance for unemployed workers. The unemployment assistance program is a means-tested benefit available to workers who are unemployed for the long term, are not eligible for unemployment insurance, or have used all the benefits available to them under that program.<sup>286</sup> The unemployment insurance program covers all workers who are younger than the statutory retirement age

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279. C. TRAV. art. L1233-61.

280. *Id.* art. L1233-62.

281. See *id.* art. L1233-65 (noting that in all but the largest companies (1,000 or more employees, which have additional reclassification leave requirements under C. TRAV art. L1233-71), the plan is intended to offer the dismissed employee career guidance and skills assessment in order to help develop a career plan in the then-current market).

282. *Id.* arts. L1233-58, -63.

283. *Id.* art. L1234-9. Termination of the business does not relieve an employer of the duty to provide notice and severance, *id.* art. L1243-10, unless by *force majeure*, *id.* art. L1234-12.

284. See *infra* Part I.E.4.

285. C. TRAV. art. R1234-2.

286. See SOC. SEC. ADMIN., SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD: EUROPE, 2012, at 105 (2012) [hereinafter SSA, EUROPE], available at <http://www.socialsecurity.gov/policy/docs/progdesc/ssptw/2012-2013/europe/ssptw12europe.pdf> (noting various categories of claimants, each of which has specific maximum income requirements, including the following: those who have at least five years of employment in the last ten years and are no longer entitled to unemployment insurance benefits, those who are seeking asylum and are not entitled to unemployment benefits, and those who are eligible for a pension but have not reached the statutory retirement age).

or entitled to a full pension, except civil servants and the self-employed, who are not unemployed because of a voluntarily choice, misconduct, or rejection of a suitable job.<sup>287</sup> To receive benefits, workers under fifty years old must have worked for either 122 days or 610 hours during the twenty-eight-month period preceding unemployment; workers over fifty must have completed the same work requirements, but only over the preceding thirty-six months.<sup>288</sup> The amount of benefits is based on the worker's average daily wage over the last twelve months and results in a benefit that is generally equal to 57.4%–75% of that wage.<sup>289</sup> Workers are entitled to receive benefits for as many months as they contributed, with a minimum of 122 days and a maximum of 730 days for workers under the age of fifty and 1,095 days for those over fifty.<sup>290</sup> Daily payments in 2013 could not be lower than €28.21 (US\$36.77) or higher than 75% of the worker's average daily wage.<sup>291</sup> Because the average wage was capped at €12,344 (US\$16,090.30) per month for calculation purposes, the maximum daily benefit was approximately €236.18 (US\$307.86).<sup>292</sup>

#### 4. Enforcement

France's dismissal enforcement system promotes informal resolution of disputes, but when litigation occurs, employees tend to fare well. Monetary awards, however, are modest.

Where an employer cannot show that the grounds for dismissal were "real and serious" under the Labor Code, the remedies include a minimum of six months' wages for employees who have at least two years' service in addition to any severance pay due.<sup>293</sup> This damage award is increased in most cases to take into account an employee's particular circumstances.<sup>294</sup> For employees with fewer than two years' service or who worked for employers with fewer than eleven employees, the award for unjustified dismissal will compensate the

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287. *See id.*

288. *Id.*

289. *See id.* The benefits are funded by employers at 4% of each employee's salary and by employees at 2.4% of their salary. *See id.*

290. *The French Social Security System: Unemployment Insurance*, CENTRE DES LIAISONS EUROPÉENNES ET INTERNATIONALES DE SÉCURITÉ SOCIALE [CLEISS], [http://www.cleiss.fr/docs/regimes/regime\\_france/an\\_5.html](http://www.cleiss.fr/docs/regimes/regime_france/an_5.html) (last visited Jan. 2, 2014).

291. *See id.*

292. *See id.* (dividing the cap €12,344, by thirty days, then multiplying by 57.4%).

293. C. TRAV. art. L1235-3.

294. *Id.* art. L1235-5. The employer's failure to follow proper procedures will be considered when determining the award. Voize-Valayre, *supra* note 260, at 581. However, there are no published award decisions or guidelines for these awards.

employee for her actual damages, with no minimum award.<sup>295</sup> Also, courts will often order the employer to reimburse the state fund for all or part of the unemployment benefits the employee received, up to a maximum of six months of benefits.<sup>296</sup> But unemployment benefit reimbursement will not be ordered if the only violation is a procedural one,<sup>297</sup> or if the terminated employee had fewer than two years of service or worked for a firm with fewer than eleven employees.<sup>298</sup> Although dismissals for economic reasons used to trigger payments greater than those for personal reasons, since 2008 the payments for either type of dismissal have been the same.<sup>299</sup> Reinstatement is technically available, but it requires the agreement of both parties and is not common.<sup>300</sup>

Despite the claimant-favorable character of French employment law, the actual awards rendered by French tribunals are somewhat modest. An OECD study estimated that the average unjust dismissal award in 2008 for a French employee with twenty years of service was approximately sixteen months' pay.<sup>301</sup> A 2003 study found that a typical severance award for a forty-year-old white-collar employee earning €30,000 (US\$43,924.64) per year who was laid off after ten years of service was €7,187.94 (US\$10,529.27)—less than one-half of the €16,047.80 (US\$23,507.67) average payment to similarly situated employees in the EU as a whole.<sup>302</sup>

Parties initially litigate Labor Code disputes that have gone through the required consultation process before French Labor Courts, which are made up of a professional judge and laypersons

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295. C. TRAV. art. L1235-5.

296. *See id.* art. L1235-4.

297. Voize-Valayre, *supra* note 260, at 581 (“[W]hen the employee has no substantive cause of action . . . compliance with the procedure becomes pointless.”).

298. C. TRAV. art. L1235-5.

299. BLANPAIN ET AL., *supra* note 9, at 644 (noting that under the former law, dismissals based on economic reasons trigger twice the amount as those based on personal reasons).

300. C. TRAV. art. L1235-3 (providing reinstatement as an option); *see also* OECD, DETAILED DESCRIPTION, *supra* note 91, at 16 (“The option of reinstatement is available to the employee in cases of discriminatory dismissals only.”); Voize-Valayre, *supra* note 260, at 583–84 (“In practice, [reinstatement] does not have deterrent or punitive effects on the employer, and employees probably do not rely on it.”).

301. *See* OECD, DETAILED DESCRIPTION, *supra* note 91, at 16.

302. *See* Brian Amble, *UK Redundancy Pay Less Than Half the EU Average*, MANAGEMENT-ISSUES.COM (June 2, 2003), <http://www.management-issues.com/news/610/uk-redundancy-pay-less-than-half-the-eu-average/>. The Amble article provided the amount of severance pay in British pounds, which have been converted to Euros for convenience.

representing both employers and employees.<sup>303</sup> The statute of limitations for unjust dismissal claims is five years from the notice of dismissals, and redundancy claims must be filed within twelve months of the notice.<sup>304</sup> The first stage of litigation goes before a Conciliation Panel after which, if there is not a settlement, the case goes to the full lower Labor Court.<sup>305</sup> Claims above a certain amount may be appealed to the social chambers of a general appellate court.<sup>306</sup> Cases decided by an appellate court may generally be appealed to the French Supreme Court.<sup>307</sup> The average litigation process, in which just over one-half of employees have attorney representation, lasts approximately one year.<sup>308</sup>

Most cases brought before the lower Labor Courts result in a favorable outcome for employee-claimants. In 2007, 23.7% of claims resulted in settlement, 39.4% of the cases resulted in a partial decision in favor of the employee, and 21.7% of the cases resulted in a win for the employer.<sup>309</sup> The settlement rate probably reflects the fact that the lower Labor Courts are intended to be informal and to

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303. C. TRAV. arts. L1411-1 to -6, L1421-1 to 1423-16, R1422-4 to 1423-36.

304. *Id.* art. L1235-7 (noting the twelve-month filing period for redundancy claims); *see also* BRYAN CAVE LLP, *supra* note 255, at 2 (stating that the ANI would shorten the statute of limitations for unjust dismissal claims to two years, from the current five). The ANI would allow employers to unilaterally end a claim that is before the conciliation board by paying the employee an indemnity of between two and fourteen months' salary, depending on the employee's years of service. *See id.* at 3.

305. C. TRAV. art. L1454-2; *see also* BLANPAIN ET AL., *supra* note 9, at 633 (describing the two-stage process).

306. *See* C. TRAV. art. D1462-3 (stating that the amount is €4,000 (US\$5,213.96)); BLANPAIN ET AL., *supra* note 9, at 633.

307. C. TRAV. arts. R1461-1 to -2 (discussing the appeals procedure); *id.* arts. R1462-1 to -2, D1462-3 (discussing when judgments are final and not subject to appeal); *see also* BLANPAIN ET AL., *supra* note 9, at 632-33 (noting that employment claims go to the highest judicial court, as opposed to the highest administrative court).

308. *See* Henri Fraisse, Francis Kramarz & Corinne Prost, *Labor Court Inputs, Judicial Cases Outcomes and Labor Flows: Identifying Real EPL* 17 (Banque de France, Working Paper No. 256, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1630258](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1630258) (finding that 53% of cases involved attorney representation and that cases lasted an average of 343 days). The study, based on data from 1990–2004, also found that of the cases that went to trial—which included unjust dismissal, severance pay, and other pay disputes—employees won 75% of the time. *See id.* No less than 20% of cases reached settlement, and another 20% of cases were dropped. *Id.*

309. Laure de Maillard Taillefer & Odile Timbart, *Les Affaires Prud'homales en 2007 [The Industrial Tribunal Cases in 2007]*, INFOSTAT JUSTICE NO. 105 (Ministère de la Justice [Dep't of Justice], Paris, Fr.), Feb. 2009, at 3-4, available at [http://www.justice.gouv.fr/art\\_pix/1\\_stat\\_infostat105cph\\_20090218.pdf](http://www.justice.gouv.fr/art_pix/1_stat_infostat105cph_20090218.pdf). In 2007, 80% of cases involved a judge breaking the employment contract, and 15.2% of cases were held in abeyance by a judge. *Id.* at 3.

promote conciliation rather than litigation.<sup>310</sup> In addition, a study of lower Labor Court cases from 1990 to 2004 found that in 58% of cases, employees sought to void their dismissal; however, even when those claims were successful, actual reinstatement was very rare.<sup>311</sup>

#### *F. Germany*

Much of German dismissal law is reflective of other countries in Europe, with fairly substantial dismissal rights yet modest remedies. However, Germany's strong system of works councils can play a significant role in dismissals, particularly those involving a group of employees. A summary of German termination law and its enforcement is provided in Table 6 of the Appendix.

##### 1. Individual Unjust Dismissal

The protection that German employment law provides to different employees can vary greatly depending on the amount of time an employee has worked with her employer. Like many other European countries, Germany requires that employers provide employees with written notice prior to termination.<sup>312</sup> Under the German Civil Code, the statutory period of notice is based on length of service and varies from a minimum of two weeks' notice for probationary employees with six months or less of service, to seven months' notice for employees with twenty years of service.<sup>313</sup> Collective agreements can provide longer or shorter periods of notice, but individual employment contracts can provide only longer notice.<sup>314</sup> Germany is one of only two countries in this study (the

310. See Fraisse et al., *supra* note 308, at 8–9 (“Prud’hommes were designed to foster agreements rather than trials.”).

311. *See id.* at 9 & n.8 (noting that compensatory awards were typically given instead of reinstatement).

312. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGBl.] 195, as amended, §§ 622–23 (Ger.), available as translated at [http://www.gesetze-im-internet.de/englisch\\_bgb/german\\_civil\\_code.pdf](http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf).

313. *Id.* § 622. A rule excluding from this calculation all periods of service that occurred before employees turn twenty-five years old was recently struck down on age discrimination grounds by the European Court of Justice. *See* Bundesarbeitsgericht [BAG] [Federal Labor Court] Sept. 1, 2010, 5 AZR 700/09 (Ger.).

314. *See* BLANPAIN ET AL., *supra* note 9, at 573 (noting that collective bargaining agreements can lengthen or shorten the notice period); Manfred Weiss, *Labor Law*, in INTRODUCTION TO GERMAN LAW 299, 330 (Mathias Reimann & Joachim Zekoll eds., 2d ed. 2005) (“The mandatory minimum terms of notice only apply to individual labor contracts.”). Employees of firms with less than twenty employees may contract for a shorter period of notice not to be less than four weeks. BGB § 622(5) (allowing shorter notice for temporary employees). Moreover, an employer’s contractual notice

other is Mexico)<sup>315</sup> that does not expressly provide for payment in lieu of notice.<sup>316</sup> The Federal Labor Court—Germany’s highest employment court—has a split among its independent “Senates” on how to handle lack of notice situations.<sup>317</sup> Some Senates require that the employment relationship end only when the required amount of notice has occurred,<sup>318</sup> while one Senate will allow the relationship to end based on improper notice if the employee does not challenge the deficiency within three weeks.<sup>319</sup>

Employers, however, need not always provide notice. For example, employers need not give notice if they can show that there was a compelling reason for immediate dismissal—often referred to as an “extraordinary” dismissal—although they must provide an employee with the reason for the termination, if requested.<sup>320</sup> Examples of extraordinary dismissals include persistent refusals to complete work assignments, commission of job-related crimes, and frequent violations of work rules.<sup>321</sup> Employees who have completed their probationary period must provide at least four weeks’ notice

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requirement can never be less (but can be more) than the period required for an employee’s notice before quitting. *Id.* § 622(6).

315. See *Employment Protection Legislation Database – EPLex: Mexico*, INT’L LAB. ORG., [http://www.ilo.org/dyn/eplex/termmain.showCountry?p\\_lang=en&p\\_country\\_id=MX](http://www.ilo.org/dyn/eplex/termmain.showCountry?p_lang=en&p_country_id=MX) (last visited Jan. 2, 2014) [hereinafter *EPLex: Mexico*].

316. *Employment Protection Legislation Database – EPLex: Germany*, INT’L LAB. ORG., [http://www.ilo.org/dyn/eplex/termmain.showCountry?p\\_lang=en&p\\_country\\_id=DE](http://www.ilo.org/dyn/eplex/termmain.showCountry?p_lang=en&p_country_id=DE) (last visited Jan. 2, 2014) [hereinafter *EPLex: Germany*].

317. The “Senates” are panels of judges on the Federal Labor Court that hear cases. *Responsibilities of the Federal Labour Court and Remedies at Law*, BUNDESARBEITSGERICHT—FED. LAB. COURT, <http://www.bundesarbeitsgericht.de/englisch/general.html> (last visited Jan. 2, 2014). Each Senate is made up of three judges, a layperson representing employers, and a layperson representing employees. *Id.*

318. See E-mail from Daniel Hund, Assoc. Attorney, Labor & Emp’t Law Practice Grp., Beiten Burkhardt, to authors (Mar. 6, 2013) (on file with the North Carolina Law Review) (noting that employers are typically willing to pay employees to drop notice challenges, but employees usually do not accept because settlements are deducted from unemployment benefits).

319. See BAG Sept. 1, 2010, 5 AZR 700/09.

320. BGB § 626(1) (stating that compelling reasons exist “if facts are present on the basis of which the party giving notice cannot reasonably be expected to continue the service relationship to the end of the notice period . . . taking all circumstances of the individual case into account and weighing the interests of both parties to the contract”). An employer wishing to take advantage of this exception must terminate the employee within two weeks of discovering the compelling reason. *Id.* § 626(2).

321. BAG June 10, 2010, 2 AZR 541/09. Since each case presents its own unique circumstances, however, “any generalization of what constitutes a justified reason for extraordinary dismissal would be misleading.” Weiss, *supra* note 314, at 330.

before ending the employment relationship, no matter how long they worked for an employer.<sup>322</sup>

Germany also enacted protection against unjust—or “ordinary”—dismissals of employees with six or more months of service under its Protection Against Dismissals Act (“PADA”).<sup>323</sup> PADA governs employers with more than ten employees.<sup>324</sup> Employees of smaller firms must seek protection through their individual employment contracts.

PADA renders dismissals unlawful, even when accompanied by proper notice, unless the employer can prove that its decision was “socially justified” based upon one of the following: (1) the employee’s conduct, if misconduct continues after an employer’s warning; (2) unsolvable personal problems, such as illness or other conditions that make the employee unable to work; or (3) urgent operational reasons.<sup>325</sup> PADA essentially requires a balancing of employer, employee, and social interests, with dismissal intended as an option of last resort.<sup>326</sup> Examples of terminations that are socially justifiable include those where an employee cannot meet her job duties, when work performance consistently fails to meet the employer’s reasonable expectations, when changed economic circumstances make it almost impossible to keep the employee, and where changes in the employer’s operations make the employee’s workplace obsolete.<sup>327</sup> The employer has the burden of proving that a dismissal was justified.<sup>328</sup> Moreover, if an employer wishes to invoke the urgent operational requirement exception, it must take into account any affected employee’s years of service, age, maintenance obligations, disabilities, and status as an employee vital to the existence of the firm.<sup>329</sup>

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322. BGB § 622(1).

323. Kündigungsschutzgesetz [KSchG] [Protection Against Dismissal Act], Aug. 25, 1969, BUNDESGESETZBLATT, TEIL I [BGBL. I] 1317, as amended, § 1(1) (Ger.), available at <http://www.gesetze-im-internet.de/bundesrecht/kschg/gesamt.pdf>.

324. *Id.* § 23. For employment relationships that began before January 1, 1999, when the small-employer exception was raised to ten employees from five employees, the previous five-employee limit still applies. See STEPHEN HARDY & MARK BUTLER, EUROPEAN EMPLOYMENT LAWS: A COMPARATIVE GUIDE 105 (2d ed. 2011).

325. KSchG § 1(2); see HARDY & BUTLER, *supra* note 324, at 105.

326. KSchG § 1(2)–(3); BLANPAIN ET AL., *supra* note 9, at 574–75.

327. BLANPAIN ET AL., *supra* note 9, at 574–75 (noting that many reasons justifying “ordinary” dismissals would not justify an “extraordinary” dismissal).

328. KSchG § 1(2); see Weiss, *supra* note 314, at 331.

329. KSchG § 1(3) (requiring also, upon an employee’s or employee representative’s request, that the employer explain its reasoning for deciding that the dismissal was socially justified under this provision).

For employees not covered by PADA or other specific laws, the courts may employ a theory of good faith and fair dealing<sup>330</sup> to address terminations that are not justified, sometimes importing statutory limitations into the employment contract.<sup>331</sup> Employers and employees not covered by PADA or other laws can also enter into a written agreement to terminate an employment relationship, even if that agreement does not comply with what would otherwise be statutorily required.<sup>332</sup> Despite arguments that employees are often unable to properly judge the value of such agreements or lack the power to freely negotiate them, they still remain common.<sup>333</sup>

## 2. Economic Dismissals and Layoffs

German employment law mandates severance pay under certain conditions, but severance payments occur more frequently through an agreement between employers and employees and their representatives.<sup>334</sup> Employees dismissed for “urgent operational reasons” may be entitled to statutorily mandated severance pay—but only if the employer offers severance pay in the notice letter and the employee waives her right to challenge the dismissal.<sup>335</sup> This option is rarely invoked,<sup>336</sup> but when it is, the employee receives one-half of her monthly salary for every year of service.<sup>337</sup>

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330. See BGB §§ 138, 242. Germany's Civil Code proscribes transactions that violate public policy and fail to exhibit good faith. *Id.* § 138 (“In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgment or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.”); *see also id.* § 242 (“An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.”).

331. See Achim Seifert & Elke Funken-Hötzel, *Wrongful Dismissals in the Federal Republic of Germany*, 25 COMP. LAB. L. & POL'Y J. 487, 495 & n.41 (2004) (citing BAG Feb. 6, 2003, 2 AZR 672/01; BAG Feb. 21, 2001, 2 AZR 15/00).

332. See Weiss, *supra* note 314, at 329 (“It is always possible to terminate the labor contract by mutual consent.”).

333. See *id.* (“There have been attempts to establish a right for employees to revoke the cancellation contract during a ‘cooling off’ period or, alternatively, to require involvement of the works council prior to the conclusion of the cancellation contract. So far, these efforts have failed and courts have refused to step in.”).

334. See Laszlo Goerke & Markus Pannenberg, *Trade Union Membership and Dismissals* 7 (CESifo, Working Paper No. 3,196, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1688251](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1688251).

335. KSchG § 1a.

336. See E-mail from Daniel Hund, *supra* note 318. Section 1a severance pay is usually limited to cases where there is uncertainty over the dismissal's justification, and both the employer and employee face a similar risk of losing subsequent litigation. *See id.* (“It is generally neither in the interest of the employer nor of the employee to use the procedure

In practice, about one-quarter to one-third of all dismissed employees receive severance payments.<sup>338</sup> The statutory mandate is not responsible for most of these payments. Instead, they are primarily the result of agreements between employers and individual employees, unions, and works councils.<sup>339</sup> In addition to these severance requirements, employees who are part of a collective dismissal have protections under Germany's works council regime, which is discussed below, *infra* Part I.F.5.

### 3. Unemployment Assistance

Germany has both social insurance and social assistance programs.<sup>340</sup> The social insurance benefit, referred to as "Arbeitslosengeld I" ("ALG I"), is a contributory program that covers all former regularly employed workers who contributed insurance premiums for twelve months in the last two years, are involuntarily unemployed, and are actively searching for work.<sup>341</sup> Employers and workers each pay 1.5% of covered income, up to a statutory cap.<sup>342</sup> If a worker has children, the ALG I program pays 67% of average net income over the past year; if the worker does not have children, the program pays 60% of average net income.<sup>343</sup> For a childless beneficiary whose salary met or exceeded the maximum, the monthly benefit in western Germany would be €1,814.10

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provided by § 1a PADA."). This is because an employer has little incentive to provide severance when it believes there is justification for a termination, and the employer will usually seek a settlement rather than make an initial offer of severance. *See id.*

337. KSchG § 1a.

338. *See Goerke & Pannenberg, supra* note 334, at 7 ("Severance payments occur in about 25% of all dismissals, there being strong variations over time and across industries."); Christian Grund, *Severance Pay for Dismissed Employees in Germany* 11–15 (Inst. for the Study of Labor (IZA), Discussion Paper No. 875, 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=446381](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=446381) (finding that women, employees of big firms, and employees with longer tenure receive more severance pay).

339. *See Goerke & Pannenberg, supra* note 334, at 7–8.

340. *See SSA, EUROPE, supra* note 286, at 114 (noting that the social assistance program is means-tested and covers both the employed and unemployed).

341. SOZIALGESETZBUCH III ARBEITSFÖRDERUNG [SGB III] [SOCIAL INSURANCE CODE III], Mar. 24, 1997, BGBl. I at 594, as amended, §§ 137–38, 142–43 (Ger.), available at [http://www.gesetze-im-internet.de/bundesrecht/sgb\\_3/gesamt.pdf](http://www.gesetze-im-internet.de/bundesrecht/sgb_3/gesamt.pdf).

342. *Sozialversicherungsbeiträge 2013 [Social Security Contributions in 2013]*, LOHN INFO, <http://www.lohn-info.de/sozialversicherungsbeitraege2013.html> (last visited Jan. 2, 2014) (noting that the maximum gross earnings for both the employer's and the employee's contribution are €69,600 (US\$90,722.90) in western Germany and €58,800 (US\$76,645.20) in eastern Germany).

343. SGB III § 149.

(US\$2,364.66).<sup>344</sup> These benefits will be paid out over anywhere from six to twenty-four months, depending on how many months of covered employment the claimant has as well as the claimant's age.<sup>345</sup>

Germany's social assistance program, "Arbeitslosengeld II" ("ALG II") or "Hartz IV," is a means-tested benefit that is available to unemployed workers at least fifteen years old who are seeking and capable of work and are in need of assistance to maintain their standard of living.<sup>346</sup> This benefit is also available to qualifying employed workers, as well as workers receiving unemployment benefits.<sup>347</sup> As of 2013, the basic monthly benefit was €382.00 (US\$497.93), which could be adjusted higher or lower depending on family status or income.<sup>348</sup>

#### 4. Enforcement

Comparatively, Germany provides dismissed employees with good opportunities to challenge their dismissals. To begin, employees seeking to challenge their dismissal must bring a claim before the local labor court, which intentionally keeps costs low to expand access to the court.<sup>349</sup> The statute of limitations is only three weeks following notice of the termination.<sup>350</sup> The local labor court decision may be

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344. Because benefits are based on net income, which excludes taxes and other payments, the base income rate is usually much lower than the gross income cap. The maximum monthly benefit was calculated by using the administrative calculator. See *Selbstberechnung Arbeitslosengeld I (Kalenderjahr 2013)* [Calculating Unemployment Compensation (2013 Calendar Year)], BUNDESAGENTUR FÜR ARBEIT [FED. AGENCY FOR WORK], <http://www.pub.arbeitsamt.de/selbst.php?jahr=2013> (last visited Jan. 2, 2014).

345. SGB III § 147 (mandating that a worker with twelve months of covered service in the last three years will receive six months of benefits; sixteen months of service results in eight months of benefits; twenty months of service results in ten months of benefits; twenty-four months of service results in twelve months of benefits; workers over fifty years old with thirty months of service receive fifteen months of benefits; workers over fifty-five years old with thirty-six months of service receive eighteen months of benefits; workers over fifty-eight years old with forty-eight months of service receive twenty-four months of benefits).

346. SOZIALGESETZBUCH II GRUNDSICHERUNG FÜR ARBEITSUCHENDE [SGB II] [SOCIAL CODE BOOK II BASIC SECURITY FOR JOB SEEKERS], Dec. 24, 2003, BGBl. I at 2,954, as amended, §§ 7 (beneficiaries), 7a (unemployed over certain age are excluded), 8 (work requirement), 9 (neediness), 11 (means-test) (Ger.), available at [http://www.gesetze-im-internet.de/bundesrecht/sgb\\_2/gesamt.pdf](http://www.gesetze-im-internet.de/bundesrecht/sgb_2/gesamt.pdf).

347. See SSA, EUROPE, *supra* note 286, at 114–15.

348. SGB II § 20.

349. Gerichtskostengesetz [GKG] [Court Costs Act], May 5, 2004, BGBl. I at 718, as amended, § 42 (Ger.), available at [http://www.gesetze-im-internet.de/bundesrecht/gkg\\_2004/gesamt.pdf](http://www.gesetze-im-internet.de/bundesrecht/gkg_2004/gesamt.pdf).

350. KSchG §§ 4, 7.

reviewed de novo by a state labor court, and under certain circumstances, the Federal Labor Court provides final review.<sup>351</sup>

If a labor court adjudicates a dismissal improper, it voids the termination decision, and the employment relationship is typically considered to still exist, thereby entitling the employee to a continued salary or, if judgment is rendered after the period of notice had expired, backpay and reinstatement.<sup>352</sup> The unjust dismissal award is typically capped at one year's salary, except that employees who are between fifty and fifty-four years old with at least fifteen years' service may receive up to fifteen months' pay, and employees fifty-five and over with at least twenty years' service may receive up to eighteen months' pay.<sup>353</sup> When a labor court finds that the dismissal was unjust but serious circumstances make the continuation of the employment relationship infeasible, the court must grant an employer's motion to end the relationship and award severance pay.<sup>354</sup> Under these circumstances, an employee can also request severance pay instead of reinstatement.<sup>355</sup>

In 2011, labor courts heard 192,724 dismissal cases—approximately 36% of all claims in those courts.<sup>356</sup> It takes about 14.2 months for a case to go through the labor court and the appeals process.<sup>357</sup> One study found that two-thirds of suits filed in 2002 settled, with 80% of settlements involving severance awards, and that court awards varied from a mean of €9,000–€14,000 (US\$11,554.99–\$17,974.43) and a median of €4,500–€6,000 (US\$5,777.49–

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351. Arbeitsgerichtsgesetz [ArbGG] [Labor Court Act], Sept. 3, 1953, BGBl. I at 1,036, as amended, §§ 33, 40, 48 (Ger.), available at <http://www.gesetze-im-internet.de/bundesrecht/arbgg/gesamt.pdf>; see also Judith Sawang, *Termination of Employment Legislation Digest: Germany*, INT'L LAB. ORG. 10-11 (2006), <http://www.ilo.org/dyn/eplex/docs/23/Germany.pdf> (discussing the avenues for redress).

352. KSchG §§ 10-12.

353. *Id.* § 10(1)–(2).

354. *Id.* § 9(1).

355. See *id.*; BLANPAIN ET AL., *supra* note 9, at 576 (noting that severance is usually about one-half month's salary for every year of service, up to twelve months' salary).

356. BUNDESMINISTERIUM FÜR ARBEIT UND SOZIALES [FED. MINISTRY OF LABOR & SOC. AFFAIRS], TÄTIGKEIT DER ARBEITSGERICHTE (2011) [ACTIVITIES OF THE COURTS (2011)] 104, available at [http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Statistiken/Ergebnisse-Statistik--Arbeitsgerichtsbarkeit-2011.pdf;jsessionid=8D619D59E15CE3A7F734054FFF0F7358?\\_\\_blob=publicationFile](http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Statistiken/Ergebnisse-Statistik--Arbeitsgerichtsbarkeit-2011.pdf;jsessionid=8D619D59E15CE3A7F734054FFF0F7358?__blob=publicationFile) (dividing the total number of actions pending in all German Labor Courts—523,698—by the number of dismissal cases—192,724); see E-mail from Daniel Hund, Assoc. Attorney, Labor & Emp't Law Practice Grp., Beiten Burkhardt, to authors (Feb. 24, 2013) (on file with the North Carolina Law Review).

357. See EPlex: Germany, *supra* note 316.

\$7,703.33).<sup>358</sup> Moreover, the OECD has estimated that, as of 2008, the average unjust dismissal award for an employee with twenty years of tenure was worth approximately eighteen months' pay.<sup>359</sup>

Prior to 1985, reinstatement during litigation rarely occurred, as employees usually sought such orders only as a negotiating strategy to extract more compensation from the employer.<sup>360</sup> However, in 1985, the Federal Labor Court shifted its view towards maintaining the employment relationship during litigation if the employee won at the first stage.<sup>361</sup> This shift made it more difficult for an employer to convince a court that reinstatement was unworkable, which made employees less likely to settle early.<sup>362</sup> Yet, it remains unclear how often a reinstatement during litigation in fact occurs, with some sources suggesting that it is prevalent while others suggest that it is not.<sup>363</sup>

Reinstatement *after* litigation is more clearly a rare occurrence because employees typically use unjust dismissal litigation to reach a severance pay agreement.<sup>364</sup> In the vast majority of cases, such an

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358. See Laszlo Goerke & Markus Pannenberg, *An Economic Analysis of Dismissal Legislation: Determinants of Severance Pay in West Germany*, 30 INT'L REV. L. & ECON. 71, 73 (2010).

359. See OECD, DETAILED DESCRIPTION, *supra* note 91, at 17.

360. See Goerke & Pannenberg, *supra* note 358, at 74 n.8 (noting that 9% of cases in 1978, when unemployment was very low, resulted in reinstatement orders and also noting the probability of a case resulting in a reinstatement order was 15% in 2002); Weiss, *supra* note 314, at 334 (noting that in 1985, the Federal Labor Court made it more difficult "for employers to argue that 'further fruitful co-operation' would not be possible").

361. Weiss, *supra* note 314, at 334.

362. *Id.*

363. *Compare id.* (noting that the German default is to maintain employment during litigation), with OECD, DETAILED DESCRIPTION, *supra* note 91, at 17 (stating that it is "possible," but rare). It also appears that the 1985 shift in favor of reinstatement and the accompanying possibility of payment obligations in lieu of reinstatement during litigation has made dismissals more risky for employers, resulting in a decrease in the number of unlawful dismissal cases at all levels of jurisdiction. Weiss, *supra* note 314, at 334. See generally Dorothea Alewell, Eileen Schott & Franziska Wiegand, *The Impact of Dismissal Protection on Employers' Cost of Terminating Employment Relations in Germany: An Overview of Empirical Research and Its White Spots*, 30 COMP. LAB. L. & POL'Y J. 667 (2009) (reviewing empirical literature, and lack thereof, on the effects of German dismissal law).

364. Cf. Goerke & Pannenberg, *supra* note 358, at 71 ("Yet even if severance pay arises from a negotiation, [employment protection legislation] and its interpretation by labour courts can have a strong impact. This is because employees may initiate a court procedure to enforce the restrictions on dismissals which [employment protection legislation] constitutes."); Weiss, *supra* note 314, at 334 ("[E]mployees are no longer willing to agree to a compromise on compensation prior to the first judgment.").

agreement is reached by the parties.<sup>365</sup> The size of the agreed-upon severance pay is not regulated and depends largely on the strength of the employee's case, although the employer's finances, the employee's age, and the employee's chances of obtaining new employment can be significant factors as well.<sup>366</sup>

The size of court-awarded severance pay varies considerably based on industry and time, but one recent survey of studies noted a mean award of approximately €11,100 (US\$16,982.10) and a median of €6,500 (US\$9,944.46).<sup>367</sup> However, individual awards can be much higher, with some even exceeding €100,000 (US\$132,113.58).<sup>368</sup> Factors that tend to increase the size of a severance award include disability—possibly because employers may offer higher severance packages to avoid the risk of litigation from employees with special dismissal protection—and being individually dismissed rather than being part of a group dismissal.<sup>369</sup> Moreover, although filing a lawsuit increases an employee's chance of receiving a severance award, it appears to have no effect on the size of the award.<sup>370</sup>

## 5. German Works Councils

German works councils also play a significant role in the system of protection against unjust dismissals.<sup>371</sup> Established as a firm-level representative body of employees, whether or not they are members

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365. Goerke & Pannenberg, *supra* note 358, at 71 (“[T]he majority of [severance] payments in Germany result from private agreements between firms and employees.”).

366. See Weiss, *supra* note 314, at 334 (“It is up to the court to determine the exact amount [of compensation], taking into account the circumstances of the particular case.”). See generally Goerke & Pannenberg, *supra* note 358, at 81–82 (noting the effects of different variables—notably age, tenure, firm size, and re-employment opportunities—on the likelihood of receiving a severance payment).

367. See Goerke & Pannenberg, *supra* note 358, at 72–73 (examining the award—based on 2005, 2006, and 2009 studies—for a typical employee and noting that employees of small firms receive less severance pay and that union members are more likely to receive a severance award, although the amount is not affected).

368. Goerke & Pannenberg, *supra* note 334, at 7.

369. Goerke & Pannenberg, *supra* note 358, at 81.

370. *Id.* at 73 (“The probability of obtaining severance pay will be higher if a labour court suit has been filed, whereas this will have no impact on its magnitude.”).

371. See Betriebsverfassungsgesetz [BetrVG] [Works Constitution Act], Jan. 15, 1972, BGBl. I at 2518, as amended, § 102 (Ger.), available at <http://www.gesetze-im-internet.de/bundesrecht/betrvg/gesamt.pdf>; see also Weiss, *supra* note 314, at 332 (“The Works Constitution Act, Section 102 I, requires the employer to consult the works council prior to any dismissal, be it for ordinary or extraordinary reasons.”). See generally *German Labour Law*, NEWSL. NO. 24 (EN) (Lorenz & Partners Co.), June 2005, available at [http://www.lorenz-partners.com/de/newsletter-broschueren/cat\\_view/5-thailand/44-older-publications-2005-2009](http://www.lorenz-partners.com/de/newsletter-broschueren/cat_view/5-thailand/44-older-publications-2005-2009) (providing an overview of German labor law, including information about PADA and works councils).

of a union, works councils have a statutory right to be consulted before the employer may implement layoffs, terminations, and other matters.<sup>372</sup>

When a dismissal is being considered, the employer must provide the works council an opportunity to provide input and challenge an ultimate decision to terminate.<sup>373</sup> The reasons that the employer gives to the works council have an estoppel effect, as the employer cannot raise additional reasons in subsequent proceedings.<sup>374</sup> If the works council challenges a dismissal that is also the subject of a PADA suit, the employee is entitled to remain employed until the case is resolved.<sup>375</sup>

Works councils also play an important role when employers contemplate collective dismissals. Collective dismissals are defined as the dismissal of more than five employees in operations with twenty-one to fifty-nine employees, the dismissal of more than twenty-five employees or 10% of the workforce in operations with sixty to 499 employees, and the dismissal of more than thirty employees in operations with 500 or more employees.<sup>376</sup> When contemplating a collective dismissal, an employer must provide to the relevant works council the following information “in due time” before giving notice: the reasons for the dismissals; the number and categories of employees made redundant, including factors such as age, tenure, family status, and disabilities; how the employer intends to identify the employees who will be laid off or terminated; and how it will calculate any severance payments.<sup>377</sup> The employer must attempt to reach an agreement with the works council regarding if and how the dismissals are to occur and what measures will be taken to mitigate the impact on employees.<sup>378</sup> Works councils can also insist on establishing guidelines to select workers for dismissals in very large companies, but they are usually reticent to do so for fear of being held

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372. BetrVG §§ 99, 102.

373. *Id.* § 102 (permitting challenges to dismissal under certain circumstances, such as when an affected employee could be transferred within a firm or when the employer did not sufficiently consider whether the dismissal is socially justified).

374. See BLANPAIN ET AL., *supra* note 9, at 599.

375. BetrVG § 102(5) (noting exceptions though, such as if continued employment causes an unreasonable financial burden to the employer or if the suit is abusive or unlikely to succeed).

376. KSchG § 17(1).

377. *Id.* § 17(2)–(3).

378. BetrVG §§ 111–12. This duty also requires the employer to provide the works council with full information prior to the negotiations. Weiss, *supra* note 314, at 317. If the parties cannot agree upon a plan, the dispute may go to arbitration for a final decision. *Id.* at 318.

responsible for the dismissals.<sup>379</sup> However, similar to individual dismissals, if a works council has properly objected to a collective dismissal, employees generally have the right to keep their jobs during a challenge.<sup>380</sup>

### G. Ireland

Ireland has a fairly typical dismissal regulatory system, with substantial protections for employees, specialized enforcement tribunals, and modest awards. Reflecting its British roots, Ireland's common-law system also provides some additional causes of action for employees. A summary of Irish termination law and its enforcement is provided in Table 7 of the Appendix.

#### 1. Irish Statutory Law

##### a. Individual Unjust Dismissal

Unless an employee brings forth a common-law claim, as discussed below, Ireland has a set of statutes—the Unfair Dismissals Act,<sup>381</sup> the Minimum Notice and Terms of Employment Act,<sup>382</sup> the Protection of Employment Act,<sup>383</sup> and the Redundancy Payments Act of 1967,<sup>384</sup> as amended—that govern dismissals. To begin, the Unfair Dismissals Act and Minimum Notice and Terms of Employment Act (“MNTEA”) require employers to provide a written contract to employees setting forth any procedures that exist for dismissal.<sup>385</sup> When a dismissal occurs, the employee has a right to demand a

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379. See Weiss, *supra* note 314, at 333.

380. BetrVG § 102. Section 102, however, also “enables the employer to avoid this obligation by way of injunctive relief.” Weiss, *supra* note 314, at 333.

381. Unfair Dismissals Act 1977 (Act No. 10/1977) (Ir.), available at <http://www.irishstatutebook.ie/1977/en/act/pub/0010/print.html>.

382. Minimum Notice and Terms of Employment Act 1973 (Act No. 4/1973) (Ir.), available at <http://www.irishstatutebook.ie/1973/en/act/pub/0004/print.html>.

383. Protection of Employment Act 1977 (Act No. 7/1977) (Ir.), available at <http://www.irishstatutebook.ie/1977/en/act/pub/0007/print.html>.

384. Redundancy Payments Act 1967 (Act No. 21/1967) (Ir.), available at <http://www.irishstatutebook.ie/1967/en/act/pub/0021/print.html>.

385. Unfair Dismissals Act 1977 § 14(1); see also Minimum Notice and Terms of Employment Act 1973 § 9 (providing employees with the right to demand the terms of employment in writing); Carol Daugherty Rasnic, *Die Kundigung, Licenciemment, Recesso Dal Contrato, ‘Firing’, or ‘Sacking’: Comparing European and American Laws on Management Prerogatives and Discretion in Termination Decisions*, 18 IND. INT'L & COMP. L. REV. 19, 25–26 (2008) (describing the case of *Mulcahy v. H.C. Cahill Ltd.*, [2004] M.N. 769 (Ir.), in which the employee was awarded €4,000 (US\$6,003.78 in 2013 dollars) following dismissal for illegal drug use because of the employer's failure to comply with investigation procedures).

written explanation of the grounds for the action.<sup>386</sup> Moreover, employees who have worked for an employer for longer than thirteen weeks are entitled to notice before termination, and although parties can agree to more notice, the minimum period of time varies from one to eight weeks, depending on the length of the employee's tenure.<sup>387</sup> Failure to provide the required notice may result in damages covering any losses sustained by the employee as a result of the failure.<sup>388</sup>

The Unfair Dismissals Act, which applies to employers of all sizes, deems a dismissal unfair unless "there were substantial grounds justifying the dismissal."<sup>389</sup> Thus, employers have the burden of overcoming this presumption by establishing the fairness of a dismissal.<sup>390</sup> In particular, the employer must prove that the dismissal was due wholly, or at least mainly, to one of the enumerated just causes or to other substantial grounds justifying dismissal.<sup>391</sup>

Among the circumstances that give rise to just cause are an employee's lack of ability to perform her work, misconduct, and redundancy.<sup>392</sup> A redundancy dismissal that does not comply with company procedures will be considered unfair unless the employer had special reasons for departing from the standard procedure.<sup>393</sup> An unjust dismissal claim is unavailable when the dismissal occurred at the end of a fixed-term contract.<sup>394</sup>

Employees become eligible to make claims under the Unfair Dismissals Act after they have worked for the employer for one year.<sup>395</sup> However, some employees are excluded from the Act's protections, such as those who have reached the normal retirement age for their occupation,<sup>396</sup> members of the Armed Forces and police

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386. Unfair Dismissals Act 1977 § 14(4).

387. Minimum Notice and Terms of Employment Act 1973 § 4(1)–(2). Further, the employer is entitled to at least one week's notice before the employee quits. *Id.* § 6.

388. *Id.* § 12(1).

389. Unfair Dismissals Act 1977 §§ 1, 2, 6(1).

390. *Id.* § 6(6).

391. *Id.*

392. *Id.* § 6(4). The statute also lists various forms of discrimination that constitute unfair dismissal. *Id.* § 6(2). Discrimination claims may also be available under the Employment Equality Act 1998 (Act No. 21/1998), § 8(6)(a) (Ir.), available at <http://www.irishstatutebook.ie/1998/en/act/pub/0021/>.

393. Unfair Dismissals Act 1977 § 6(3)(b).

394. *Id.* § 2(2)(b).

395. *Id.* § 2(1)(a) (stating that the one year of continuous employment requirement does not apply to cases of pregnancy discrimination).

396. *Id.* § 2(1)(b).

service,<sup>397</sup> certain apprentices,<sup>398</sup> certain probationary or training workers,<sup>399</sup> certain government workers,<sup>400</sup> and workers employed overseas.<sup>401</sup>

### b. Economic Dismissals and Layoffs

The Redundancy Act governs redundancy dismissals in Ireland.<sup>402</sup> A dismissal is considered a redundancy dismissal if the employer ceases doing business where the employee works or has eliminated, or intends to eliminate, the employee's work for business reasons.<sup>403</sup> Even when a dismissal is due to redundancy, an employer must provide notice to the employee in compliance with the MNTEA.<sup>404</sup> The required time period for the notice ranges from one to eight weeks, depending on the employee's length of service.<sup>405</sup> To qualify for redundancy benefits, employees must have worked at least 208 continuous weeks for their employer while they were over sixteen years old.<sup>406</sup> Claims for redundancy benefits must be made within one year, or within two years if an employment tribunal decides to extend the time period.<sup>407</sup>

On the other hand, under the Protection of Employment Act, collective dismissals require procedures that differ from individual redundancies. Collective dismissals are defined by the number of layoffs and the size of the employer, varying from five employees laid off within thirty days by a small employer, to thirty employees laid off over the same amount of time by a large employer.<sup>408</sup> At least thirty

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397. *Id.* § 2(1)(d)–(e).

398. *Id.* §§ 2(1)(g), 4.

399. *Id.* § 3.

400. *Id.* § 2(1)(h)–(j).

401. *Id.* § 2(3). Part-time employees have been covered without regard to the number of hours worked since 2001. Rasnic, *supra* note 385, at 26.

402. Redundancy Payments Act 1967 (Act No. 21/1967), available at <http://www.irishstatutebook.ie/1967/en/act/pub/0021/print.html>.

403. *Id.* § 7(2).

404. Minimum Notice and Terms of Employment Act 1973 (Act No. 4/1973), § 4(1), available at <http://www.irishstatutebook.ie/1973/en/act/pub/0004/print.html>.

405. *Id.* § 4(2) (mandating notice of one week for employees with less than two years' tenure, two weeks for employees with two to five years' tenure, four weeks for employees with five to ten years' tenure, six weeks for employees with ten to fifteen years' tenure, and eight weeks for employees with fifteen or more years' tenure).

406. Redundancy Payments Act 1967 § 7 (requiring also that the job be insured by the Social Welfare Act).

407. Redundancy Payments Act 1971 (Act No. 20/1971), § 12 (Ir.), available at <http://www.irishstatutebook.ie/1971/en/act/pub/0020/index.html>.

408. Protection of Employment Act 1977 (Act No. 7/1977), § 6(1) (Ir.), available at <http://www.irishstatutebook.ie/1977/en/act/pub/0007/print.html> (defining "collective

days before implementing a collective dismissal, an employer must notify the Minister of Labor, consult with employee representatives, and provide those representatives with information regarding options to avoid layoffs and the process of identifying employees for any layoffs that ultimately occur.<sup>409</sup> Failure to comply with the notice requirement can lead to a fine of up to £500.00 (US\$760.88), and starting layoffs before the thirty-day waiting period can result in a fine of up to £3,000 (US\$4,565.25).<sup>410</sup>

### c. *Unemployment Assistance*

Ireland provides both social insurance and social assistance benefits for many unemployed workers under the age of sixty-six.<sup>411</sup> The Jobseeker's Benefit provides contribution-based unemployment insurance benefits to workers aged sixteen to sixty-five who are capable of and actively looking for new work.<sup>412</sup> To qualify for benefits, workers must be unemployed for at least four of the last seven days prior to initiating a claim and must have made the proper social insurance contributions while they were employed.<sup>413</sup> Workers are entitled to benefits even if they voluntarily left their job or were terminated for misconduct, although such actions lead to nine weeks without benefits.<sup>414</sup> Moreover, workers can still receive benefits if they find no more than three days per week of part-time work, but their benefit level is reduced.<sup>415</sup> Under this provision, a claimant is entitled

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redundancies" as: (a) at least five dismissals in companies with more than twenty and less than fifty employees, (b) at least ten dismissals in companies with fifty to ninety-nine employees, (c) at least 10% of employees dismissed in companies with 100 to 299 employees, and (d) at least thirty dismissals in companies with 300 or more employees).

409. *Id.* §§ 9–10, 12(1), 14(1).

410. *Id.* §§ 11, 13, 14(2).

411. Social Welfare Consolidation Act 2005 (Act No. 26/2005), §§ 2(1), 62, 141 (Ir.), available at <http://www.irishstatutebook.ie/pdf/2005/en.act.2005.0026.pdf>. See generally *Jobseeker's Allowance*, DEPT OF SOC. PROTECTION (Oct. 25, 2013), [http://www.welfare.ie/en/Pages/1057\\_Jobseekers-Allowance.aspx](http://www.welfare.ie/en/Pages/1057_Jobseekers-Allowance.aspx) (providing an overview of the Jobseeker's Allowance, formerly called Unemployment Assistance); *Jobseeker's Benefit*, DEPT OF SOC. PROTECTION (Oct. 25, 2013), <http://www.welfare.ie/en/Pages/Jobseeker%27s-Benefit.aspx> (providing an overview of the Jobseeker's Benefit, formerly called the Unemployment Benefit).

412. *Jobseeker's Benefit*, *supra* note 411.

413. *Id.* (requiring at least 104 weeks of contributions during the employee's career, with at least thirty-nine of those weeks paid or credited during the relevant tax year—with at least thirteen of those weeks being paid, rather than credited—or at least twenty-six weeks of contributions paid in the two years before the relevant tax year).

414. *Id.*

415. *Id.* (noting that for each day of part-time work, the benefit is reduced by one-fifth, which is equivalent to one day under benefit calculations).

to anywhere from 10% to 16.67% of the appropriate weekly rate depending on how many part-time work deductions apply.<sup>416</sup> After a three-day waiting period, a worker is entitled to a benefit between the minimum of €84.50 (US\$110.15) per week and the maximum of €188 (US\$245.06) per week.<sup>417</sup> Ireland shortened the maximum duration of benefits by three months, effective April 3, 2013, resulting in a duration of six or nine months, depending on the amount of contributions paid by the worker.<sup>418</sup>

If workers do not qualify for the Jobseeker's Benefit or have used up their eligibility, they may be entitled to social assistance benefits through the Jobseeker's Allowance, which is a means-tested benefit for unemployed workers aged eighteen to sixty-five.<sup>419</sup> Many of the qualifications for obtaining the Jobseeker's Allowance are the same as those for the Jobseeker's Benefit, including the requirements that workers are unemployed for at least four of the last seven days before making a claim and that workers are capable of and actively searching for work.<sup>420</sup> Similar to the Jobseeker's Benefit, workers lose nine weeks of benefits if they voluntarily quit or were terminated for misconduct.<sup>421</sup> A significant difference between the Jobseeker's Benefit and the Jobseeker's Allowance is that the Jobseeker's Allowance has a means-testing requirement, which takes into account an entire family's income and number of dependents,<sup>422</sup> rather than a contribution-based test for qualification.<sup>423</sup> In addition, under the Jobseeker's Allowance, the maximum payment for a single beneficiary over twenty-five years old is €188 (US\$245.06) per week; younger beneficiaries are entitled to a maximum that varies from €100 (US\$130.35) to €144 (US\$187.70) per week, depending on their age.<sup>424</sup> Another notable difference between the two programs is that

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416. Social Welfare and Pensions Act 2012 (Act No. 12/2012), § 16(a) (Ir.), available at <http://www.irishstatutebook.ie/pdf/2012/en.act.2012.0012.pdf>.

417. *Jobseeker's Benefit*, *supra* note 411.

418. *Id.* (noting that workers under eighteen years old will face a shorter duration).

419. *Jobseeker's Allowance*, *supra* note 411.

420. *See id.*

421. *Id.*

422. *Id.* See generally *Means Test for Jobseeker's Allowance*, CITIZENS INFO., [http://www.citizensinformation.ie/en/social\\_welfare/irish\\_social\\_welfare\\_system/means\\_test\\_for\\_social\\_welfare\\_payments/means\\_test\\_for\\_jobseekers\\_allowance.html](http://www.citizensinformation.ie/en/social_welfare/irish_social_welfare_system/means_test_for_social_welfare_payments/means_test_for_jobseekers_allowance.html) (last updated Jan. 31, 2013) (providing specific details of the means-test for the Jobseeker's Allowance).

423. Compare *Jobseeker's Allowance*, *supra* note 411, with *Jobseeker's Benefit*, *supra* note 411.

424. *Jobseeker's Allowance*, *supra* note 411.

the Jobseeker's Allowance benefits can run for an unlimited amount of time.<sup>425</sup>

*d. Enforcement*

Claims related to unfair dismissals, redundancies, and collective dismissals may be brought before an Employment Rights Commissioner, if both parties agree to allow one of these government officials to hear the dispute, or the Employment Appeals Tribunal ("EAT").<sup>426</sup> In 2011, the average wait time for a hearing before the EAT was approximately seventy-seven weeks—a marked increased over the pre-recession average of thirty-one weeks.<sup>427</sup> The EAT also hears appeals from the commissioners, and the courts, in turn, hear appeals from the EAT.<sup>428</sup> The majority of cases filed with the EAT are withdrawn before a decision is made.<sup>429</sup> When cases related to unjust dismissals, redundancies, and collective dismissals are decided by the EAT, employees appear to win around one-half of the time.<sup>430</sup>

In 2011, of the 8,458 claims referred to the EAT, 2,598 came under the Redundancy Payment Act, 2,107 under the Unfair Dismissal Act, 2,070 under the MNTEA, and one under the Protection of Employment Act, which covers collective dismissals.<sup>431</sup> The EAT disposed of 1,599 unfair dismissal claims that year.<sup>432</sup> Among the 1,758 of these claims brought directly to the EAT, 280

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425. *Jobseeker's Allowance: Guidelines for Processing Claims*, DEPT OF SOC. PROTECTION, <http://www.welfare.ie/en/Pages/Jobseekers-Allowance.aspx#durpay> (last modified Nov. 18, 2013) ("[Jobseeker's Allowance] is payable for as long as the qualifying conditions are satisfied.").

426. Unfair Dismissals Act 1977 (Act No. 10/1977), § 8, available at <http://www.irishstatutebook.ie/1977/en/act/pub/0010/print.html> (mandating a six-month statute of limitations for an unfair dismissal claim); see also DEPT OF ENTER., TRADE & INNOVATION, GUIDE TO REDUNDANCY PAYMENTS SCHEME ¶ 24 (2010), available at <http://www.djei.ie/publications/employment/2009/guideredscheme.pdf> ("The [EAT] was originally set up in 1968 under Section 39 of the Redundancy Payments Act 1967 for the purpose of resolving disputes relating to redundancy matters and has since expanded to cover many other areas of employment rights legislation including unfair dismissals, minimum notice etc.").

427. EMP'T APPEALS TRIBUNAL, EMPLOYMENT APPEALS TRIBUNAL ANNUAL REPORT 2011, 5 (2012) [hereinafter EAT, ANNUAL REPORT 2011], available at [http://www.labourcourt.ie/en/Publications\\_Forms/EAT\\_44th\\_Annual\\_Report\\_English\\_.pdf](http://www.labourcourt.ie/en/Publications_Forms/EAT_44th_Annual_Report_English_.pdf).

428. Unfair Dismissals Act 1977 §§ 9–10.

429. See EAT, ANNUAL REPORT 2011, *supra* note 427, at 8, 11–16; George Nicolau, *A Comparison of Union and Non-Union Employee Protections in Ireland and the United States*, 14 N.Y. INT'L L. REV. 33, 52–53 (2001).

430. See *infra* notes 431–37 and accompanying text.

431. See EAT, ANNUAL REPORT 2011, *supra* note 427, at 4, 9.

432. *Id.* at 10.

were allowed, 323 were dismissed, and 807 were withdrawn.<sup>433</sup> In other words, of the “first instance” Unfair Dismissals Act cases decided by the EAT, employees won 46% of the time.<sup>434</sup>

The EAT also disposed of 2,416 redundancy claims in 2011.<sup>435</sup> Of the disposed claims, the employee-claimant prevailed in 1,121 cases (46.4% of all claims), 319 claims were dismissed (13.2%), and 976 claims were withdrawn (40.4%).<sup>436</sup> Finally, out of the 1,612 claims under the MNTEA that it closed in 2011, the EAT allowed 560 claims (34.7%), dismissed 327 (20.3%), and 725 were withdrawn (45%).<sup>437</sup>

Any redundancy payments are provided in a tax-free lump sum that equals two weeks’ pay for every year of service, plus one additional week’s pay.<sup>438</sup> The amount of one week’s pay in this formula is capped—currently at €600.00 (US\$782.09).<sup>439</sup> In the three years before the recession that began in 2008, Ireland averaged about 20,000 to 25,000 redundant workers per year.<sup>440</sup> From 2008 to 2010, that number stayed above 40,000 and jumped as high as 77,000 employees in a single year, although it decreased to just under 30,000 in 2011.<sup>441</sup>

An employee who successfully brings a claim for unfair dismissal may be entitled to reinstatement, backpay, and compensatory

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433. *Id.* at 12.

434. *See id.*

435. *Id.* at 11.

436. *Id.*

437. *Id.* at 13.

438. *Id.*; Redundancy Payments Act 2003 (Act No. 14/2003), § 11, available at <http://www.irishstatutebook.ie/pdf/2003/en.act.2003.0014.pdf>.

439. DEP’T OF ENTER., TRADE & INNOVATION, *supra* note 426, at app.3.

440. *See Redundancy Figures: Figures for the Year 2005*, IRISH NAT’L ORG. OF THE UNEMPLOYED, [http://www.inou.ie/policy/statistics/redundancies/&\\_figures=national&\\_year=2005](http://www.inou.ie/policy/statistics/redundancies/&_figures=national&_year=2005) (last visited Jan. 2, 2014); *Redundancy Figures: Figures for the Year 2006*, IRISH NAT’L ORG. OF THE UNEMPLOYED, [http://www.inou.ie/policy/statistics/redundancies/&\\_figures=national&\\_year=2006](http://www.inou.ie/policy/statistics/redundancies/&_figures=national&_year=2006) (last visited Jan. 2, 2014); *Redundancy Figures: Figures for the Year 2007*, IRISH NAT’L ORG. OF THE UNEMPLOYED, [http://www.inou.ie/policy/statistics/redundancies/&\\_figures=national&\\_year=2007](http://www.inou.ie/policy/statistics/redundancies/&_figures=national&_year=2007) (last visited Jan. 2, 2014).

441. *See Redundancy Figures: Figures for the Year 2008*, IRISH NAT’L ORG. OF THE UNEMPLOYED, [http://www.inou.ie/policy/statistics/redundancies/&\\_figures=national&\\_year=2008](http://www.inou.ie/policy/statistics/redundancies/&_figures=national&_year=2008) (last visited Jan. 2, 2014); *Redundancy Figures: Figures for the Year 2009*, IRISH NAT’L ORG. OF THE UNEMPLOYED, [http://www.inou.ie/policy/statistics/redundancies/&\\_figures=national&\\_year=2009](http://www.inou.ie/policy/statistics/redundancies/&_figures=national&_year=2009) (last visited Jan. 2, 2014); *Redundancy Figures: Figures for the Year 2010*, IRISH NAT’L ORG. OF THE UNEMPLOYED, [http://www.inou.ie/policy/statistics/redundancies/&\\_figures=national&\\_year=2010](http://www.inou.ie/policy/statistics/redundancies/&_figures=national&_year=2010) (last visited Jan. 2, 2014); *Redundancy Figures: Figures for the Year 2011*, IRISH NAT’L ORG. OF THE UNEMPLOYED, [http://www.inou.ie/policy/statistics/redundancies/&\\_figures=national&\\_year=2011](http://www.inou.ie/policy/statistics/redundancies/&_figures=national&_year=2011) (last visited Jan. 2, 2014).

damages.<sup>442</sup> Monetary damages are capped at the amount the employee would earn over a 104-week period.<sup>443</sup> In 2011, the average award for unfair dismissals was €18,047.85 (US\$27,119.39).<sup>444</sup> Although permitted in theory, reinstatement remedies occur quite rarely.<sup>445</sup>

## 2. Irish Common Law

In addition to statutory remedies, recently dismissed Irish employees also have a body of common law at their disposal. The Unfair Dismissals Act explicitly states that it does not preempt any common-law causes of action.<sup>446</sup> However, employees must choose either a common-law or statutory claim; they cannot pursue both.<sup>447</sup> Some employees pursue common-law claims because of the longer statute of limitations, although these cases typically take longer to resolve than they would before the employment tribunal.<sup>448</sup>

Typically, a common-law claim is one for breach of contract.<sup>449</sup> Therefore, this cause of action is often invoked by high-level employees, such as executives, whose employment contracts limit the reasons for which they can face dismissal. Failure to provide notice according to the terms of the employment contract—or, if the contract is silent on the issue, failure to provide “reasonable” notice—may also give rise to a claim.<sup>450</sup>

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442. Unfair Dismissals Act 1977 (Act No. 10/1977), § 7(1), available at <http://www.irishstatutebook.ie/1977/en/act/pub/0010/print.html>.

443. *Id.* § 7(1)(c). The act also sets forth factors for calculating damages. *See id.* § 7(2).

444. EAT, ANNUAL REPORT 2011, *supra* note 427, at 13 (noting that awards ranged from €0 to over €25,000 (US\$37,565.89)). The average award for an employee with twenty years of service is twenty-four months’ pay. OECD, DETAILED DESCRIPTION, *supra* note 91, at 17.

445. EAT, ANNUAL REPORT 2011, *supra* note 429, at 13 (noting that in 2011, the EAT made only thirteen reinstatement or reengagement orders out of 338 compensation awards); *see also* Nicolau, *supra* note 429, at 55–56 (noting that in 1998, the average award was £4,000 (US\$9,485.77), with 70% of awards being under £3,000 (US\$7,114.32)); OECD, DETAILED DESCRIPTION, *supra* note 91, at 17 (giving Ireland a score of “1 out of 3” for reinstatement). A “re-engagement,” which generally occurs when the employee returns to her previous position but does not receive backpay. *See Unfair Dismissal*, CITIZENS INFO., [http://www.citizensinformation.ie/en/employment/unemployment\\_and\\_redundancy/dismissal/unfair\\_dismissal.html](http://www.citizensinformation.ie/en/employment/unemployment_and_redundancy/dismissal/unfair_dismissal.html) (last updated Oct. 1, 2013).

446. Unfair Dismissals Act 1977 § 15(1).

447. *Id.* § 15(2)–(3).

448. Rasnic, *supra* note 385, at 35.

449. *See* Barry Walsh & Noeleen Meehan, *An Overview of Irish Employment Law, in Doing Business in Ireland* § 6.13[2] (2013).

450. *Id.* (citing Lyons v. MF Kent & Co., [1986] 3 I.R. 322; Carville v. Irish Indus. Bank, [1968] I.R. 325 (stating that “reasonable notice” was one year)).

Finally, public employees not covered by the Unfair Dismissals Act can, in addition to a breach of contract claim, seek judicial review of a dismissal.<sup>451</sup> Here, an employee is required to demonstrate that the dismissal did not comply with the basic principles of natural or constitutional justice.<sup>452</sup> Essentially, an employee must claim that the dismissal was arbitrary, did not follow the employer's procedures, or was implemented without giving the employee an opportunity to respond to the employer's reasons for seeking the dismissal.<sup>453</sup> Employees rarely raise this cause of action.<sup>454</sup>

#### H. Italy

Italy is very protective of unemployed workers. Indeed, the Italian Constitution expressly states that “[w]orkers have the right to be assured adequate means for their needs and necessities in the case of . . . involuntary unemployment.”<sup>455</sup> However, in the wake of the recent financial crisis, Italy’s new leadership pushed through revisions in 2012 that scaled back certain aspects of its unjust dismissal regime (the so-called “Monti Law” or “Fornero Reform”).<sup>456</sup> A summary of Italian termination law and its enforcement is provided in Table 8 of the Appendix.

##### 1. Individual Unjust Dismissal

Many of the statutory protections for dismissals fall under Italy’s Civil Code.<sup>457</sup> Initially, the law only applied to relatively big firms—those with more than thirty-five workers—but its reach now extends

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451. See Walsh & Meehan, *supra* note 449, § 6.13[1]. Although public employees were formerly excluded from the Unfair Dismissals Act, most state employees have been covered since the Civil Service Regulation (Amendment Act) of 2005. EAT, ANNUAL REPORT 2011, *supra* note 427, at 31.

452. Gleeson v. Minister for Def., [1976] I.R. 280; Walsh & Meehan, *supra* note 449, § 6.13[1] (citing Connolly v. McConnell [1983] I.R. 172; Ryan v. CIE U.D. 27/84).

453. See Walsh & Meehan, *supra* note 449, § 6.13[1].

454. See IR. COURTS SERVS., ANNUAL REPORT 2010, at 69, available at [http://www.courts.ie/Courts.ie/library3.nsf/%28WebFiles%29/4523C03355124B90802578CC0033B0A F/\\$FILE/Courts%20Service%20Annual%20Report%202010.pdf](http://www.courts.ie/Courts.ie/library3.nsf/%28WebFiles%29/4523C03355124B90802578CC0033B0A F/$FILE/Courts%20Service%20Annual%20Report%202010.pdf) (noting in 2010, only 207 Circuit Court employment claims—less than 3% of all claims).

455. Art. 38 Costituzione [Cost.] (It.), available as translated at [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).

456. Legge [L.] 28 giugno 2012, n. 92 (It.). See generally Baker & McKenzie, *The Reform of Italian Employment Law (92/2012): A Practical Overview*, LEXOLOGY (July 11, 2012), <http://www.lexology.com/library/detail.aspx?g=9ab9c7b6-ba7b-4b3e-8a75-cae72bda d0aa> (providing an overview of the Fornero Reform).

457. See Codice civile [C.c.] (It.), translated in THE ITALIAN CIVIL CODE 1 (Susanna Beltramo ed., 2012).

to firms with more than fifteen employees.<sup>458</sup> Early termination of fixed-term employment, without having to pay for the remainder of the term, requires just cause.<sup>459</sup> Similarly, termination under an indefinite contract requires employers to provide either sufficient notice<sup>460</sup> or just cause if there is inadequate notice.<sup>461</sup> No cause is required to dismiss probationary employees, among others, and the probation period may be set by the parties for up to six months.<sup>462</sup>

The employer has the burden of establishing just cause, which typically encompasses severe conduct that creates a substantial breach of the employment contract.<sup>463</sup> Examples include a breach of the duty of loyalty, intentional insubordination, rioting, or willful damage to the employer's property.<sup>464</sup> A "justified reason" is something less than just cause and generally involves an employee's inability to perform or some justification related to the employer's operations.<sup>465</sup>

In addition, the Civil Code requires notice of a dismissal in many cases.<sup>466</sup> The amount of notice depends on various factors, such as custom and the employee's seniority and position within the firm.<sup>467</sup> However, dismissal for cause requires no notice.<sup>468</sup> The remedy for

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458. Legge [L.] 11 maggio 1990, n. 108 (It.); Aldo De Matteis, Paola Accardo & Giovanni Mammome, *National Labour Law Profile: Italy*, INT'L LAB. ORG. (June 17, 2011), available at [http://www.ilo.org/itpdial/information-resources/national-labour-law-profiles/WCMS\\_158903/lang--en/index.htm](http://www.ilo.org/itpdial/information-resources/national-labour-law-profiles/WCMS_158903/lang--en/index.htm) (stating that the law previously applied only to firms with more than thirty-five employees).

459. See C.c. art. 2119, translated in THE ITALIAN CIVIL CODE, *supra* note 457, at 450.

460. See *id.* art. 2118, translated in THE ITALIAN CIVIL CODE, *supra* note 457, at 450.

461. See *id.* art. 2119, translated in THE ITALIAN CIVIL CODE, *supra* note 457, at 450. Moreover, there are protections against many forms of employment discrimination. See L. n. 108/1990, art. 3.

462. See C.c. art. 2096, translated in THE ITALIAN CIVIL CODE, *supra* note 457, at 444 (explaining, however, that parties can set a minimum probation period); see also Legge [L.] 15 luglio 1966, n. 604, art. 10 (It.) (capping the probation period at six months); EUROPEAN COMM'N, TERMINATION OF EMPLOYMENT RELATIONSHIPS: LEGAL SITUATION IN THE MEMBER STATES OF THE EUROPEAN UNION 59 (2006), available at <http://ec.europa.eu/social/BlobServlet?docId=4623&langId=en> (noting that domestic workers, directors, and workers who have reached retirement age can be dismissed without any grounds).

463. See L. n. 604/1966, arts. 3, 5.

464. See *Termination of Employment*, INT'L FIN. L. REV. (May 16, 2000), <http://www.iflr.com/Article/2027662/Termination-of-Employment.html>.

465. See L. n. 604/1966, art. 3.

466. See C.c. art. 2118, translated in THE ITALIAN CIVIL CODE, *supra* note 457, at 450.

467. See INT'L LABOR ORG., TERMINATION OF EMPLOYMENT DIGEST 192 (2000), available at [http://www.ilo.org/public/libdoc/ilo/2000/100B09\\_152\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/2000/100B09_152_engl.pdf). Dismissals based on redundancy require notification to a union or other employee representative, discussions, and possibly conciliation. See *id.* at 192–93.

468. C.c. art. 2119, translated in THE ITALIAN CIVIL CODE, *supra* note 457, at 450.

inadequate notice—or indemnity in lieu of notice—is the salary the employee would have received during the period of inadequate notice.<sup>469</sup> A study based on 1990 data estimated that the average amount of notice compensation was equivalent to forty-five weeks' pay.<sup>470</sup>

In addition to giving notice and establishing a valid reason for a dismissal, employers must also follow certain procedures. For example, if an employer wants the opportunity to allege employee misconduct, it must first display a disciplinary code in a place accessible to all employees.<sup>471</sup> Before dismissing the employee—indeed, before any action more severe than a verbal warning—the employer must detail all disciplinary charges in a letter to the employee.<sup>472</sup> Under the new Fornero Reform, failure to provide adequate explanation for a justified dismissal would result not in reinstatement but in an award of between six and twelve months' salary.<sup>473</sup> The employee is then entitled to submit a defense to the employer within five days of receipt of the disciplinary letter.<sup>474</sup> At the expiration of the five-day period, the employer can then impose the disciplinary sanction upon the employee.<sup>475</sup> However, if the case is litigated, the employer must still prove that it had a valid reason for dismissing the employee—that is, that the action had appropriate grounds and was proportionate to the misconduct.<sup>476</sup> Finally, an applicable National Collective Labor Agreement may alter some of the procedures.<sup>477</sup>

Challenges to a dismissal must be filed within sixty days of notice.<sup>478</sup> A challenge to a dismissal from a firm with fewer than fifteen employees may, at the employee's request, go to conciliation

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469. *Id.* art. 2118, translated in THE ITALIAN CIVIL CODE, *supra* note 457, at 450.

470. See INT'L LABOR ORG., *supra* note 467, at 18 & n.83 (noting that E.U. average was twenty-two weeks' pay).

471. BAKER & MCKENZIE, BREAKING NEW GROUND IN ITALY 19–20 (2006), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1007&context=lawfirms>.

472. See L. n. 604/1966, art. 2; see also BAKER & MCKENZIE, *supra* note 471, at 20 (describing the procedure an employer must follow during a disciplinary action).

473. L. n. 92/2012, art. 1.

474. See EUROPEAN COMM'N, *supra* note 462, at 63; *Termination of Employment*, *supra* note 464.

475. See *Termination of Employment*, *supra* note 464.

476. See L. n. 604/1966; Baker & McKenzie, *supra* note 456; E-mail from Luca Allevi, Assoc. Attorney, Jones Day, to authors (Sept. 20, 2010) (on file with the North Carolina Law Review).

477. See *Termination of Employment*, *supra* note 464; E-mail from Luca Allevi, *supra* note 476.

478. L. n. 604/1966, art. 6.

and arbitration before being heard by a magistrate.<sup>479</sup> These small firms must either reinstate the employee (which is classified as a new hire)<sup>480</sup> or pay damages of between two-and-one-half and six months' salary.<sup>481</sup>

Claims of unjust dismissal against employers with fifteen or more employees go to the employment tribunal within Italy's general civil court system.<sup>482</sup> Previously, if the court ruled in favor of the employee, the employer would have to reinstate the employee and provide backpay from the time of dismissal to the time of reinstatement.<sup>483</sup> One of the central aims of the Fornero Reform was to weaken the reinstatement mandate, which is now required only in certain instances.<sup>484</sup> Where reinstatement is not required—for instance, when it is judged that the employer's economic reason for the dismissal was not justified—damages of between twelve and twenty-four months' salary may be ordered.<sup>485</sup> How much this reform actually changes the previous law is unclear because some dismissals that require reinstatement are those which employers allege are for disciplinary or performance reasons, but are later judged to be unjust.<sup>486</sup> Furthermore, the Fornero Reform also reduced backpay for employees who successfully challenge dismissals based on alleged disciplinary or performance reasons to a maximum of twelve months' salary.<sup>487</sup>

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479. See INT'L LABOR ORG., *supra* note 467, at 193. However, parties can contract for an initial magistrate hearing. *See id.*

480. See *Termination of Employment*, *supra* note 464; E-mail from Francesca Marinelli, Faculty of Law, Univ. of Milan, to Jeffrey Hirsch, Assoc. Dean for Academic Affairs & Geneva Yeargan Rand Distinguished Professor of Law, Univ. of N.C. Sch. of Law (Mar. 25, 2013) (on file with the North Carolina Law Review).

481. See L. n. 604/1966, art. 8; BAKER & MCKENZIE, *supra* note 471, at 33. The vast majority of firms in Italy are small. See Jonathan R. Macey, *Italian Corporate Governance: One American's Perspective*, 1998 COLUM. BUS. L. REV. 121, 141 (estimating that 94% of firms in Italy employ nine or fewer permanent workers).

482. See L. n. 604/1966, art. 6.

483. Legge [L.] 20 maggio 1970, n. 300, art. 18 (It.); *see also* Baker & McKenzie, *supra* note 456 (describing the impact of the Fornero Reform).

484. *See* Baker & McKenzie, *supra* note 456.

485. L. n. 92/2012, art. 1, para. 42(b) (requiring reinstatement for discriminatory dismissals and where dismissal was not the proper sanction); *see* Baker & McKenzie, *supra* note 456.

486. *See* L. n. 92/2012, art. 1, para. 42(b). One report estimates that this exception covers 90% of all dismissals. *See* Baker & McKenzie, *supra* note 456.

487. L. n. 92/2012, art. 1, para. 42(b); *see also* Baker & McKenzie, *supra* note 456 ("In this scenario, and unlike the previous Article 18, where damages did not suffer any cap, the maximum awardable damages are assessed by the court at a maximum of 12 months plus social security contributions, deducted what the employee may have earned by some other job in the interim of the court proceeding.").

## 2. Economic Dismissals and Layoffs

In contrast to the other surveyed countries, Italy provides unique funding for employees affected by economic dismissals and layoffs—even when a dismissal is for cause. In general, Italy mandates something that resembles severance pay after a dismissal; reinstatement is not an option for economic dismissals in most instances.<sup>488</sup> The severance-pay obligation is triggered by any break in the employment relationship and is based on the employee's previous year's salary and length of service; under the Fornero Reform, the payment cannot exceed twenty-four months' salary.<sup>489</sup> One difference from most other severance schemes is that this compensation comes from a fund consisting of employer contributions that are tied to each employee.<sup>490</sup> As a result, terminated employees are always entitled to this compensation, regardless of the reason for their dismissal.<sup>491</sup> Moreover, the Fornero Reform attempts to reduce litigation by compelling parties to enter into a conciliation procedure before an economic dismissal occurs.<sup>492</sup>

A similar fund exists for collective dismissals,<sup>493</sup> which occur when an employer with fifteen or more employees lays off five or more employees within 120 days for the same reason.<sup>494</sup> The employer must follow certain procedures, including notifying the employees, labor authorities, and relevant unions prior to the dismissals.<sup>495</sup> The employee or union can then engage in an examination of the employer's plans, seek out job security agreements, and, if no agreement can be reached, participate in a conciliation proceeding.<sup>496</sup> Prior to the Fornero Reform, the OECD ranked Italy as having the third strongest collective-dismissal protection among OECD nations.<sup>497</sup>

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488. See Baker & McKenzie, *supra* note 456.

489. L. n. 92/2012, art. 1, para. 42(b); see also C.c. art. 2120, *translated in THE ITALIAN CIVIL CODE*, *supra* note 457, at 451 (stating that the formula equals one year's salary divided by 13.5 plus an additional 1.5% for each year of service, adjusted for inflation).

490. See C.c. art. 2120, *translated in THE ITALIAN CIVIL CODE*, *supra* note 457, at 451.

491. *Id.*

492. See L. n. 92/2012, art. 1, para. 40.

493. See Baker & McKenzie, *supra* note 456. Generally, remedies are the same as with individual economic dismissals unless an employer violates a union agreement. *See id.*

494. Legge [L.] 23 luglio 1991, n. 223, art. 24 (It.); see *Collective Dismissal/Redundancy: Italy*, EUROFOUND, <http://www.eurofound.europa.eu/emi/re/ITALY/COLLECTIVE DISMISSALREDUNDANCY-IT.htm> (last updated Aug. 14, 2009).

495. See *Collective Dismissal/Redundancy: Italy*, *supra* note 494.

496. *See id.*

497. See *Strictness of Employment Protection – Collective Dismissals (Additional Restrictions)*, OECD.STATETRACTS, <http://stats.oecd.org/Index.aspx?QueryId=19465>

### 3. Unemployment Assistance

Italy's protection for unemployed workers is unique in that the right to unemployment benefits is guaranteed by Italy's Constitution.<sup>498</sup> The Fornero Reform, however, has implemented changes in the unemployment insurance system—now called Assicurazione Sociale per l'Impiego (“ASPI”)—that began to come into effect in 2013 and will be fully in force in 2017.<sup>499</sup>

The newly configured benefits under the ASPI are to be funded by an additional 1.4% tax on all fixed-term contracts.<sup>500</sup> The ASPI's biggest change gradually increases the duration of the benefit period, eventually up to twelve months for most workers and eighteen months for workers age fifty-five years or older.<sup>501</sup> The new law also tightens benefit eligibility; beneficiaries must have been involuntarily terminated and have worked a job with unemployment contributions for at least two years, one of which must have been during the two years prior to receiving benefits.<sup>502</sup>

Furthermore, under the ASPI, the level of benefits changed in 2013, providing dismissed workers with 75% of their monthly salary, up to a salary of €1,180.00 (US\$1,538.12) per month.<sup>503</sup> If their salary exceeds that cap, benefits will be 75% of the maximum salary, plus 25% of the difference between the actual salary and the cap.<sup>504</sup> However, total monthly benefits are capped in 2013 at €1,119.00 (US\$1,458.61) and will be adjusted annually based on inflation.<sup>505</sup>

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(last visited Jan. 2, 2014) (giving Italy a score of 4.13 for 2011, the year before the Fornero Reform, which is higher than any other OECD country in this survey other than Mexico's score of 4.38).

498. Art. 38 Costituzione [Cost.], available as translated at [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (“Every citizen unable to work and without the necessary means of subsistence is entitled to welfare support. Workers have the right to be assured adequate means for their needs and necessities in the case of . . . involuntary unemployment.”).

499. See Baker & McKenzie, *supra* note 456.

500. *Towards a Flexible and Fair Labour Market in Italy*, GOVERNO ITALIANO (Apr. 6, 2012), <http://www.governo.it/Presidenza/Comunicati/detttaglio.asp?d=68314> (explaining that the reasoning for taxing fixed-term contracts is the increased likelihood that fixed-term employees will be unemployed and that this practice is typical in other countries).

501. See L. n. 92/2012, art. 2, para. 11.

502. See *id.* art. 2, paras. 4–5. Similar benefits (called “mini-ASPI”) are provided to workers who have worked at least thirteen weeks over the last twelve months. *Id.* art. 2, para. 20.

503. *Id.* art. 2, para. 7.

504. *Id.*

505. See MINISTERO DELL'ECONOMIA E DELLE FINANZE [MINISTRY OF ECON. & FIN.], ITALY'S MAJOR STRUCTURAL REFORMS: PROGRESS REPORT DECEMBER 2011-JANUARY 2013 (2013), available at <http://www.dt.mef.gov.it/export/sites/sitodt/modules>

Currently, benefits will be reduced by 15% after the first six months and by an additional 15% after twelve months.<sup>506</sup> Starting on January 1, 2016, new durational requirements will begin that impose a maximum of twelve months of benefits for workers under fifty-five years old and eighteen months for workers aged fifty-five or over.<sup>507</sup>

#### 4. Enforcement

The Italian judicial system provides for employee-friendly enforcement of employment dismissal laws. Primarily, judges have wide discretion in determining whether a proper justification exists for a termination, and they often exercise that discretion in favor of employees.<sup>508</sup> The employee-friendly judiciary and the provision of legal assistance for dismissal claims makes Italy's unjust dismissal regime fairly robust.<sup>509</sup> It is not surprising, therefore, that a large percentage of civil disputes are employment-related.<sup>510</sup> For instance, in 2006, there were 8,651 initial court proceedings dealing with termination of the employment relationship.<sup>511</sup> The average length of time the courts of first instance took to determine employee claims (not limited to dismissal) was 782 days for cases that began in 2006.<sup>512</sup>

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/documenti\_it/analisi\_progammazione/analisi\_programmazione\_economico/Structural\_reforms\_master\_14\_01\_2013\_LC\_final.pdf (providing information found in the "Reducing segmentation and increasing productivity in the labour market" section).

506. L. n. 92/2012, art. 2, paras. 7, 9.

507. *Id.* art. 2, para. 11.

508. See OECD, EMPLOYMENT OUTLOOK, *supra* note 17, at 68 (noting that workers won "55% of all cases heard by courts" and that a majority of cases were settled out of court).

509. See *Strictness of Employment Protection – Individual and Collective Dismissals (Regular Contracts)*, OECD.STATETRACTS, <http://stats.oecd.org/Index.aspx?QueryId=19465> (last visited Jan. 2, 2014) (giving Italy a score of 2.51 for "strictness of employment protection" in 2013, which, among the OECD countries in this survey, is lower than only Germany's score of 2.81).

510. See Aldo De Matteis, The Resolution of Employment Disputes in Italy 4, available at <http://www.ealcj.org/documents/italiansummary.pdf>. Aldo De Matteis, a former labor law judge on Italy's Supreme Court, the Court of Cassation, stated that in 2004, 43% of all civil disputes in the Italian court system were employment and labor law related with 404,000 such cases being heard in Italy's courts of first instance. *See id.*

511. Instituto Nazionale di Statistica [Nat'l Inst. of Statistics], *Table 10 – Proceedings Concerning Labor, Social Security and Assistance in Dispute: First Instance, District Court of Appeal, 2006*, ISTAT.IT, <http://giustiziaincifre.istat.it/Nemesis/jsp/dawinci.jsp?q=pl10-0010011000&an=2006&ig=2&ct=363&id=1A12A> (last visited Jan. 2, 2014).

512. Instituto Nazionale di Statistica [Nat'l Inst. of Statistics], *Table 1 – Processes and Average Duration (in Days) in the Field of Labor, Social Security and Assistance: First Instance, District Court of Appeal, 2006*, ISTAT.IT, <http://giustiziaincifre.istat.it/Nemesis/jsp/dawinci.jsp?q=pl01-0010011000&an=2006&ig=2&ct=100&id=1A12A> (last visited Jan. 2, 2014) [hereinafter Nat'l Inst. of Statistics, Table 1].

For those same cases, the court of appeals process took an average of 697 days.<sup>513</sup>

Employees who successfully pursue unjust dismissal claims in court are entitled to backpay and possibly reinstatement, or fifteen months' salary in lieu of reinstatement.<sup>514</sup> The OECD has estimated that, as of 2008, the average award for an employee with twenty years of tenure was worth approximately fifteen months' salary.<sup>515</sup> In contrast to many other countries, reinstatement is common in unjust dismissal cases, although this practice may change after the Fornero Reform.<sup>516</sup>

Italy normally imposes a cap on redundancy benefits of a maximum two years' pay, which can be extended up to two more years.<sup>517</sup> One 2003 British-based survey found that the average redundancy payment for a hypothetical forty-year-old Italian white-collar employee earning €30,000 (US\$43,924.64) per year who was laid off after ten years of service with her employer was €26,273.30 (US\$38,486.66).<sup>518</sup>

### I. Japan

Japan's regulation of dismissals has undergone a profound shift over the last fifty years. Previously, Japan was notable for its strong cultural norm of long-term employment with a given employer, despite weak legal protections against dismissals. As the norm of continued employment has weakened, Japan has responded with new case law and legislation—primarily the Labor Standards Act and the Labor Contract Act—that protect against certain types of previously unregulated dismissals. A summary of Japanese termination law and its enforcement is provided in Table 9 of the Appendix.

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513. Instituto Nazionale di Statistica [Nat'l Inst. of Statistics], *Table 2 – Processes and Average Duration (in Days) in the Field of Labor, Social Security and Assistance: Able to Appeal to District Court of Appeals*, 2006, ISTAT.IT, <http://giustiziaincifre.istat.it/Nemesis/jsp/dawinci.jsp?q=pl02-0010011000&an=2006&ig=2&cct=101&id=1A12A> (last visited Jan. 2, 2014) [hereinafter Nat'l Inst. of Statistics, Table 2].

514. L. n. 300/1970, art. 18 (reinstatement); L. n. 604/1966, art. 8 (damages).

515. See OECD, DETAILED DESCRIPTION, *supra* note 91, at 17.

516. See *id.* (giving Italy a score of "2" for reinstatement). A score of "2" is defined as being "fairly often made available." ORG. FOR ECON. CO-OPERATION & DEV., CALCULATING SUMMARY INDICATORS OF EPL STRICTNESS: METHODOLOGY 2 (2013), available at <http://www.oecd.org/els/emp/EPL-Methodology.pdf>.

517. L. n. 223/1991, art. 1, para. 3.

518. See Amble, *supra* note 302. The Amble article provided the amount of compensation in British pounds, which have been converted to Euros for convenience.

### 1. Individual Unjust Dismissal

Over the past half-century, Japan's employment law has changed gradually to provide more protection to employees. Japan's Civil Code long provided the only source of employment contract regulation. Under the Civil Code, employment was terminable at will, save for a mandatory two weeks' notice prior to termination.<sup>519</sup> However, in the mid-1950s, Japanese courts began to impose just-cause protection in certain types of dismissal cases.<sup>520</sup>

These cause limits on dismissals found their origin in Article 1-3 of the Civil Code, which imposes a ban on the abuse of private rights.<sup>521</sup> In the employment context, many courts used this provision to establish a doctrine of abusive dismissal.<sup>522</sup> Ultimately, in 1975, the Supreme Court of Japan defined this doctrine as preventing dismissals that were "not based on reasonable cause or [were] viewed as improper from the general viewpoint of society."<sup>523</sup>

Courts generally held a dismissal to be abusive unless one of the following five situations applied:

(1) a worker [was] incapable of providing service, (2) a worker [was] incompetent or lack[ed] ability to work, (3) a worker violate[d] his or her job duties or [was] engaged in misconduct, (4) there [was] a compelling business necessity such as financial difficulties, or (5) a union shop agreement compel[led] the employer to discharge a worker who [left] or [was] dispelled from the union.<sup>524</sup>

A dismissal that did not meet one of these conditions was unlawful and provided the employee a right to reinstatement.<sup>525</sup>

The fourth justification—the "compelling business necessity"—provided employers with their most significant safe harbor.<sup>526</sup> The courts developed a set of guidelines for determining when a compelling business necessity justified a dismissal, eventually

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519. MINPŌ [MINPŌ] [CIV. C.] art. 627 (Japan), available as translated at <http://www.moj.go.jp/content/000056024.pdf>.

520. See Ryūichi Yamakawa, *From Security to Mobility? Changing Aspects of Japanese Dismissal Law*, in LAW IN JAPAN: A TURNING POINT 483, 485 (Daniel H. Foote ed., 2007).

521. *See id.*

522. *Id.* at 485–86 (citing cases).

523. *Id.* at 486 (quoting Saikō Saibansho [Sup. Ct.] Apr. 25, 1975, 29 SAIK SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 456, available at <http://www.courts.go.jp>).

524. *Id.* at 486–87.

525. *See id.* at 487.

526. *See id.* at 486–88.

establishing a “four requirement” rule.<sup>527</sup> Under this rule, an employer had to prove each of the following to establish a valid economic dismissal: (1) a reduction of the workforce was necessary; (2) the employer made a good-faith effort to avoid dismissals, such as using transfers, temporary closings, and soliciting voluntary early retirements; (3) the employer established and followed a reasonable standard for choosing which workers would be dismissed; and (4) the employer made attempts to explain to the employees or union the reasons for the dismissals and how they would be carried out.<sup>528</sup> Minor or temporary economic difficulties were not considered sufficient,<sup>529</sup> but Japanese courts seemed more willing to interfere with employers’ business autonomy than courts of other nations, such as Germany or Great Britain.<sup>530</sup>

Ultimately, Japan codified part of this unjust dismissal regime under the Labor Standards Act of 1947, as amended (“LSA”),<sup>531</sup> and the Labor Contract Act of 2007 (“LCA”)<sup>532</sup>—both of which apply to all private-sector employers of all sizes.<sup>533</sup> Under Article 16 of the LCA, an unjust dismissal is one that was made without “objectively reasonable grounds” and is not “appropriate in general societal terms.”<sup>534</sup> Although the statute did not explicitly incorporate the pre-

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527. *Id.* at 488.

528. *Id.* at 488; see also BLANPAIN ET AL., *supra* note 9, at 787 (citing Takashi Araki, *Corporate Governance Reforms, Labor Law Developments, and the Future of Japan’s Practice-Dependent Stakeholder Model*, JAPAN LAB. REV., Winter 2005, at 26, 35, available at [http://www.jil.go.jp/english/JLR/documents/2005/JLR05\\_araki.pdf](http://www.jil.go.jp/english/JLR/documents/2005/JLR05_araki.pdf) (listing the same four requirements)).

529. BLANPAIN ET AL., *supra* note 9, at 787.

530. Yamakawa, *supra* note 520, at 489.

531. Rōdō kijunhō [Labor Standards Act], Law No. 49 of 1947 (Japan), available as translated at [http://www.jil.go.jp/english/archives/library/documents/lkj\\_law1-rev.pdf](http://www.jil.go.jp/english/archives/library/documents/lkj_law1-rev.pdf).

532. Rōdō keiyakuho [Labor Contract Act], Law No. 128 of 2007 (Japan), available as translated at [http://www.jil.go.jp/english/archives/library/documents/lkj\\_law17.pdf](http://www.jil.go.jp/english/archives/library/documents/lkj_law17.pdf).

533. See BLANPAIN ET AL., *supra* note 9, at 784; *Employment Protection Legislation Database – EPlex: Japan*, INT’L LAB. ORG., [http://www.ilo.org/dyn/eplex/termmain.showCountry?p\\_lang=en&p\\_country\\_id=JP](http://www.ilo.org/dyn/eplex/termmain.showCountry?p_lang=en&p_country_id=JP) (last visited Jan. 2, 2014) [hereinafter *EPlex: Japan*]. The LSA also prohibits various discriminatory dismissals, such as dismissals based on workplace injuries and absences caused by pregnancy. Labor Standards Act, art. 19. Other types of discrimination, such as labor activities, are prohibited by other Japanese laws. Rōdō kumiainhō [Labor Union Act], Law No. 174 of 1949, art. 7 (Japan), available as translated at [http://www.jil.go.jp/english/laborinfo/library/documents/lkj\\_law2.pdf](http://www.jil.go.jp/english/laborinfo/library/documents/lkj_law2.pdf). Japan’s constitution also prohibits discrimination based on race, creed, sex, social status, or family origin. NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 14 (Japan), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 3 (Rüdiger Wolfrum & Rainer Grote eds., 2005).

534. Labor Contract Act, art. 16. Article 16 of the LCA is identical to the former article 18-2 of the LSA, which was deleted from the LSA due to new the legislation in the LCA. See *id.* at supplementary provision art. 2; BLANPAIN ET AL., *supra* note 9, at 787.

LSA judicial rulings, they are likely incorporated in judicial interpretation of Article 16.<sup>535</sup>

In addition to the prohibition against unjust dismissals, the LSA imposes a notice requirement on nearly all non-cause dismissals. Under Article 20 of the LSA, an employer must provide an employee at least thirty days' notice before a dismissal or pay the employee wages for any time that falls short of the required notice period.<sup>536</sup> Also, if requested by the employee, the employer must give a written explanation of the reasons for the dismissal.<sup>537</sup> Exceptions to the notice requirement exist if the dismissal is based on a reason attributable to the employee or if the company shuts down for some unavoidable reason.<sup>538</sup> Similarly, notice is not required before dismissing employees who are in a probationary period of no more than fourteen days, in seasonal work of less than four months or some other fixed period of less than two months, or are employed on a daily basis for a period of less than one month.<sup>539</sup> More generally, firms with ten or more workers must draw up and inform employees of the dismissal rules—and all other rules—that will apply in the workplace.<sup>540</sup>

The LSA, in combination with the LCA, also makes clear that fixed-term contracts—which normally can last for a maximum of three to five years, depending on the worker<sup>541</sup>—must provide cause for early termination.<sup>542</sup> The LCA explicitly states that it is unlawful

Non-fixed-term employment contracts not covered by the LSA or LCA can be terminated by either party at any time, effective two weeks after notification of the desire to terminate. CIV. C. art. 627. Moreover, the LSA does not expressly provide for a probationary period during which dismissals can occur without cause. See Takashi Araki, *Corporate Governance Reforms, Labor Law Developments, and the Future of Japan's Practice-Dependent Stakeholder Model*, JAPAN LAB. REV., Winter 2005, at 26, 41–42, available at [http://www.jil.go.jp/english/JLR/documents/2005/JLR05\\_araki.pdf](http://www.jil.go.jp/english/JLR/documents/2005/JLR05_araki.pdf).

535. See BLANPAIN ET AL., *supra* note 9, at 788–92 (analyzing recent case law for application of the four requirements after the enactment of Article 16).

536. Labor Standards Act, art. 20. The previous rule, under Article 627 of the Civil Code, required only two weeks' notice. See CIV. C. art. 627.

537. Labor Standards Act, art. 22.

538. *Id.* art. 20.

539. *Id.* art. 21.

540. *Id.* art. 89. Moreover, although there is no requirement for severance pay for workers terminated for redundancy reasons, most Japanese employers agree to provide such pay—usually up to three months depending on a worker's seniority. See OECD, *EMPLOYMENT OUTLOOK*, *supra* note 17, at 67.

541. See Labor Standards Act, art. 14.

542. See Labor Contract Act, art. 17. Japanese employers can also use an informal probationary period in many cases. See 5 DOING BUSINESS IN JAPAN § 12.01(3)(b)(ii) (Matthew Bender ed., rev. ed. 2013). Although courts will often permit this tactic as a means to avoid a formal contract of employment, employers are generally prevented from

for an employer to terminate a fixed-term employment contract prior to its expiration unless there are “unavoidable circumstances.”<sup>543</sup>

Underlying these employment regulations is the concept of long-term employment often identified with the Japanese labor market. Although not as strong as it once was, the cultural norm that workers in core sectors of the economy will be retained by the same employer throughout their careers still prevails, especially among mid- to large-size firms in certain industries such as manufacturing, retail, and finance.<sup>544</sup> This norm has also resulted in a general sense among many Japanese employers that, irrespective of the formal legal regime, dismissals without cause are something to be avoided, if possible.<sup>545</sup>

## 2. Economic Dismissals and Layoffs

Japan does not have a general set of rules covering redundancy dismissals. However, the government will provide subsidies to certain firms—primarily manufacturing—that are facing economic difficulties.<sup>546</sup> The Employment Adjustment Subsidy Program requires that the firms spend this assistance on wage subsidies to workers on temporary leave, to workers temporarily transferred to a different company, or to educate and train dismissed workers.<sup>547</sup> The

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refusing to hire a trial employee unless there were job performance problems. *See id.* A similar issue occurs when employers informally decide to hire workers who are still in school—often long before the employment is to actually commence. *See id.* at § 12.01(3)(b)(i). In contrast to trial employment, courts often hold that the informal decision to hire creates a labor contract, but an employer can still refuse to hire an individual if it has a valid reason that is not considered abusive under the Civil Code. *Id.*

543. Labor Contract Act, art. 17; *see also* CIV. C. art. 628 (“Even in cases where the parties have specified the term of employment, if there are unavoidable reasons, either party may immediately cancel the contract. In such cases, if the reasons arise from the negligence of either one of the parties, that party shall be liable to the other party for damages.”).

544. *See BLANPAIN ET AL., supra* note 9, at 775–76.

545. *See Yamakawa, supra* note 520, at 496; *see also* Kazuo Sugeno, *The Birth of the Labor Tribunal System in Japan: A Synthesis of Labor Law Reform and Judicial Reform*, 25 COMP. LAB. L. & POL’Y J. 519, 523 (2004) (stating that firms remain committed to not dismissing core workers but increasingly use indirect means, such as inducing voluntary retirement, to reduce payrolls).

546. *See Chad Steinberg & Masato Nakane, To Fire or to Hoard? Explaining Japan’s Labor Market Response in the Great Recession* 12 (Int’l Monetary Fund, Working Paper No. 11/15, 2011), *available at* <http://www.imf.org/external/pubs/ft/wp/2011/wp1115.pdf> (noting that employers must show a 5% revenue loss from the previous year).

547. *Id.* (stating that the majority of funds are spent on subsidies for workers on temporary leave).

subsidies can be significant: up to one-half of an employee's salary in a large company and two-thirds in a small or medium company.<sup>548</sup>

Collective dismissals in Japan are defined as those involving at least thirty employees laid off within a one-month period.<sup>549</sup> Before implementing a collective dismissal, an employer must notify a government agency and consult with a relevant union or employee representative over the reason for the layoffs, their timing, the identity of affected employees, and the nature of any re-employment assistance.<sup>550</sup> Moreover, like other terminations, a collective dismissal must satisfy the four requirements rule, including the obligation to consider alternatives to layoffs.<sup>551</sup>

### 3. Unemployment Assistance

Japan's Employment Insurance program is a contribution-based social insurance scheme available to unemployed workers who are younger than sixty-five and who worked for more than six months during the previous twelve months.<sup>552</sup> Beneficiaries must also be available to begin working and looking for work.<sup>553</sup> The waiting period typically lasts for seven days;<sup>554</sup> voluntary unemployment or termination based on good cause will not bar all benefits but will delay them for one to three months.<sup>555</sup> The basic unemployment benefit for workers under age sixty is between 50% to 80% of their average daily wage.<sup>556</sup> For workers aged sixty to sixty-five, the applicable percentage of daily earnings is 45% to 80%.<sup>557</sup> In 2012, the minimum daily benefit was ¥1,864.00 (US\$23.69), and the maximum daily benefit was ¥7,890.00 (US\$100.31).<sup>558</sup> The benefit will be

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548. Masahiro Abe et al., *Worker Displacement in Japan and Canada*, in LOSING WORK, MOVING ON: INTERNATIONAL PERSPECTIVES ON WORKER DISPLACEMENT 195, 213 (Peter J. Kuhn ed., 2002).

549. EPLex: Japan, *supra* note 533.

550. Koyō taisakuhō [Employment Measure Law], Law No. 132 of 1966, art. 24 (Japan), available as translated at [http://www.jil.go.jp/english/laborinfo/library/documents/llj\\_law13.pdf](http://www.jil.go.jp/english/laborinfo/library/documents/llj_law13.pdf); see Yamakawa, *supra* note 520, at 508.

551. See Yamakawa, *supra* note 520, at 488-89.

552. Koyō hokenhō [Employment Insurance Law], Law No. 116 of 1974, arts. 6, 10-2, 13 (Japan), available as translated at [http://www.jil.go.jp/english/archives/library/documents/llj\\_law11.pdf](http://www.jil.go.jp/english/archives/library/documents/llj_law11.pdf).

553. See *id.* art. 15; SSA, ASIA AND THE PACIFIC, *supra* note 77, at 106.

554. Employment Insurance Law, art. 21.

555. *Id.* art. 33.

556. *Id.* art. 16, para. 1 (providing the formula under which an increase in wage-level decreases the percentage multiplier).

557. *Id.* art. 16, para. 2.

558. SSA, ASIA AND THE PACIFIC, *supra* note 77, at 106.

provided for between ninety and 360 days, depending on a worker's age and years of covered employment, as well as the reason for the loss of employment.<sup>559</sup>

#### 4. Enforcement

Japan offers two different arenas for workers to file unjust dismissal claims—the civil court system and the newer Labor Tribunal System, created in 2004 and placed into full effect in 2006.<sup>560</sup> Although the tribunals, which have jurisdiction over all disputes that arise in the employment relationship, are part of the general district court system, they were created to provide an alternative to the traditionally underused courts.<sup>561</sup> The Labor Tribunal System establishes a three-member tribunal to hear a complaint.<sup>562</sup> The members consist of one professional judge, one employee-side labor expert, and one management-side labor expert.<sup>563</sup> The hearings are informal and expected to last no more than three sessions over a four-month period<sup>564</sup>: the average during the new system's first year of operation was 74.2 days.<sup>565</sup> Decisions are to follow either at the end of the last hearing or a few days thereafter.<sup>566</sup> However, either party can reject the tribunal's decision and send the dispute to court,<sup>567</sup> an option exercised in about 60% of cases filed in the Labor Tribunal System from April 2006 to March 2007.<sup>568</sup> Reflecting the nature of the

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559. Employment Insurance Law, arts. 22–23; *see also* SSA, ASIA AND THE PACIFIC, *supra* note 77, at 106 (summarizing Articles 22 and 23 of the Employment Insurance Law).

560. *See Sugeno, supra* note 545, at 529.

561. *See id.* at 529–30; *see also* Takashi Araki, *Establishment of the Labor Tribunal System: Lay Judge Participation in Japanese Labor Proceedings* 7, <http://www.sota.j.u-tokyo.ac.jp/info/Papers/Araki%20Labor%20Tribunal%20final080907.pdf> (last visited Jan. 2, 2014) (noting that in 2004, the number of labor cases filed in Japan was small compared to that of other countries).

562. Sugeno, *supra* note 545, at 530.

563. *Id.*

564. *Id.*

565. Araki, *supra* note 561, at 11 (noting that the Labor Tribunal System began operations in April 2006).

566. Sugeno, *supra* note 545, at 531. One law firm stated that, as of 2009, only 10% of cases were appealed, although it is unclear what information that figure is based upon. *See* Yumiko Ohta & Mark Weeks, *Employment Litigation in Japan*, ASIAN-MENA COUNS., May 2011, at 24, 25, available at <http://www.inhousecommunity.com/article.php?id=932>.

567. Sugeno, *supra* note 545, at 531.

568. *See Araki, supra* note 561, at 11 (showing that 58.6% of 162 cases actually decided by the tribunal in 2006 were appealed, but that 80% of the overall complaints brought to tribunal were resolved—for instance by settlement—before leaving that system).

tribunal as an alternative to traditional litigation, the tribunal actively seeks settlement throughout the process.<sup>569</sup>

The tribunal system appears to have improved matters. In the system's first year (April 2006 to March 2007), 70% of its 877 cases resulted in an accepted mediation agreement.<sup>570</sup> The number of complaints increased significantly the next year, to 1,494, which was still less than the number filed in civil court.<sup>571</sup> Ultimately only about 20% of the cases continued on to the regular civil court procedures; the remaining cases were resolved during the tribunal processes.<sup>572</sup>

In Japan, reinstatement is the usual remedy for an unjust dismissal, with monetary damages, such as backpay and compensatory damages, also available.<sup>573</sup> However, in most cases, the reinstatement is short-lived, as most employees in this situation soon leave their employer.<sup>574</sup> Reinstatement is even less significant given the typical path of employment disputes. Many Japanese employment disputes are resolved through settlement—whether before actual litigation commences or during the often long period of time that cases languish in the court system—and these settlements generally involve only monetary relief rather than reinstatement or backpay.<sup>575</sup> The OECD has estimated that, as of 2008, the average unjust dismissal award for an employee with twenty years of tenure was worth approximately six months' pay.<sup>576</sup>

569. See *Outline of Civil Litigation in Japan*, SUP. CT. OF JAPAN, [http://www.courts.go.jp/english/judicial\\_sys/civil\\_suit\\_index/civil\\_suit/index.html](http://www.courts.go.jp/english/judicial_sys/civil_suit_index/civil_suit/index.html) (last visited Jan. 2, 2014) (discussing "Labor Tribunal Proceedings" in Part III.F).

570. Araki, *supra* note 561, at 11.

571. See *id.* (showing also that there were 2,174 labor cases filed in civil court). In 2012, the number of complaints filed in the tribunal system rose to 3,719. See E-mail from Mariko Morita, Attorney-at-law in Japan, LL.M. Candidate 2014, N.Y. Univ. Sch. of Law, to authors (Nov. 11, 2013) (on file with the North Carolina Law Review) (translating the document found at <http://www.courts.go.jp/sihotokei/nenpo/pdf/B24DMIN1-2.pdf>).

572. See Araki, *supra* note 561, at 11 (stating that almost 80% of cases were solved through the tribunal process).

573. See Yamakawa, *supra* note 520, at 490; see also Kyota Eguchi, *Damages or Reinstatement: Incentives and Remedies for Unjust Dismissal*, 4 REV. L. & ECON. 443, 444 (2008) (listing several countries that typically reinstate employees who have been unjustly dismissed); OECD, DETAILED DESCRIPTION, *supra* note 91, at 17 (giving Japan a score of "3" for reinstatement, which is defined as "frequent orders of reinstatement with back pay").

574. Yamakawa, *supra* note 520, at 487, 490.

575. See BLANPAIN ET AL., *supra* note 9, at 788 (noting, however, that an employee can seek a court order requiring the employer to pay wages and benefits while the case is pending).

576. OECD, DETAILED DESCRIPTION, *supra* note 91, at 17.

### J. Mexico

Mexican dismissal law—on its face—contains substantial protections and an employee-friendly enforcement system. However, Mexico instituted labor law reforms in 2012 that weakened some of these protections. Moreover, in practice, employers have significant opportunities to avoid coverage of the law and actual enforcement is notoriously weak. In addition, Mexico is the only country in the survey that lacks an unemployment insurance system. A summary of Mexican termination law and its enforcement is provided in Table 10 of the Appendix.

#### 1. Individual Unjust Dismissal

Mexican dismissals are governed largely by the Federal Labor Law and, to a lesser extent, the Federal Constitution.<sup>577</sup> The Labor Law, which has no small-employer or probationary-period exception, requires that all employment contracts, even for individual employees, set out their terms in writing.<sup>578</sup> In the absence of an express agreement for a fixed term, employment contracts are presumed to be of indefinite duration.<sup>579</sup> Under the Labor Law, a party may unilaterally terminate the employment relationship without liability as long as there is just cause.<sup>580</sup> However, even where just cause exists, an employee with at least fifteen years of service is entitled to a severance payment.<sup>581</sup>

The Labor Law lists several grounds upon which an employee can unilaterally quit without liability, including employer misrepresentations, failure to pay salary, and grave safety or health

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577. The Mexican Constitution contains additional workplace protections, such as wage and hour laws, safety requirements, profit-sharing, employer-supplied housing, maternity leave, and workers' compensation. See Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 123, pfo. A, fracc. I, III, V–VII, IX, XII, XIV–XVII, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.). See generally Stephen F. Befort & Virginia E. Cornett, *Beyond the Rhetoric of the NAFTA Treaty Debate: A Comparative Analysis of Labor and Employment Law in Mexico and the United States*, 17 COMP. LAB. L.J. 269, 275 (1996) (analyzing the state of labor and employment law in the United States).

578. Ley Federal del Trabajo [LFT] [Federal Labor Law], as amended, arts. 1, 24–25, DO, 17 de Enero de 2006 (Mex.), available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=200305](http://www.wipo.int/wipolex/en/text.jsp?file_id=200305); EP Lex: Mexico, *supra* note 315.

579. See LFT art. 35; see also *id.* arts. 36–37 (specifying instances where contracts for specific projects or specific time periods are permitted).

580. *Id.* art. 46.

581. *Id.* art. 162.

risks.<sup>582</sup> In addition, the Labor Law enumerates certain employee actions that justify a termination by the employer without liability:

- (a) professional incompetence or negligence;
- (b) deliberate damage to company property;
- (c) more than three unjustified absences in a thirty-day period;
- (d) unjustifiable disobedience to superiors;
- (e) intoxication or illegal drug use in the workplace;
- (f) dishonest or violent actions toward the employer and other employees;
- (g) sabotage of the workplace, including serious damage caused by the employee's negligence;
- (h) criminal acts;
- (i) false representation of documents to gain employment (only for first thirty days of employment);
- (j) immoral acts in the workplace;
- (k) revealing confidential information to the detriment of the company;
- (l) failure to follow safety measures in the workplace; and
- (m) other actions of equivalent seriousness.<sup>583</sup>

These justifications are exclusive. No employment contract or collective agreement may set forth additional circumstances that will constitute just cause.<sup>584</sup> Yet the "other actions" catch-all category is intended to provide flexibility to address circumstances not

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582. *Id.* art. 51. An employee has thirty days from any of these events to quit and may receive damages based on the length of the employee's tenure with a firm and whether the employment relationship was for a specific or indefinite period of time. *Id.* arts. 50, 52.

583. *Id.* arts. 46–47. The employer must terminate an employee within one month after occurrence of event that provides just cause; failure to do so renders the termination invalid. *Id.* art. 517. Mass layoffs require permission of the Conciliation and Arbitration Board and are governed by procedures in Articles 427 and 434 of the Labor Law. BLANPAIN ET AL., *supra* note 9, at 295.

584. LFT art. 394.

contemplated by the list.<sup>585</sup> The employer must also notify the employee in writing of the justification for termination and its effective date; failure to provide this notification bars the employer from arguing that there was just cause.<sup>586</sup> If an employer terminates an indefinite-period employment relationship without cause, the employee is owed a payment that consists of three months' salary, twenty days' pay for each year of service, a seniority premium for employees with fifteen or more years of service, and backpay until the payment is made.<sup>587</sup>

## 2. Economic Dismissals and Layoffs

Mexico's protection for employees facing redundancy dismissal is incorporated in the Labor Law's collective-dismissal provisions, which are also broad enough to protect individual employees under certain circumstances. This is because, unlike most countries, the Labor Law does not have a minimum employee threshold before special collective-dismissal rules apply.<sup>588</sup> Instead, rules for collective dismissals are triggered whenever a business closes; when a permanent reduction of work caused by *force majeure*, bankruptcy, or economic hardship makes the employer unable to continue paying for operations; or when there is a depletion of mined resources.<sup>589</sup> Before implementing a collective dismissal, an employer must provide notice to the relevant union and Conciliation and Arbitration Board ("CAB") if the cause is the company's lack of profitability or lack of mined resources.<sup>590</sup> The selection of employees for layoff must take into account employees' seniority; more senior employees have priority for rehire.<sup>591</sup> Affected employees are entitled to three months' salary and a seniority bonus of twelve days' pay for every year of service.<sup>592</sup> This payment can increase to four months' salary

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585. BLANPAIN, ET AL., *supra* note 9, at 295.

586. LFT art. 47.

587. *Id.* art. 50. Termination without cause of a fixed-term employment contract of less than one year replaces the twenty days' pay for each year of service payment with an amount that is equal to one-half of the contracted-for wage; fixed-term contracts of one year or more replace that years of service payment with an amount that is equal to six months' wages plus twenty days' pay for each year of service after the first year. *Id.* Employees with fifteen years' service are also entitled to additional severance benefits of twelve days' pay for every year of service, even if fired for just cause. See *id.* arts. 1, 24–25.

588. *Id.* arts. 434–39.

589. *Id.* arts. 433–34. Similar rules, albeit with lower compensation, apply to temporary suspensions of work. *Id.* arts. 427–32.

590. *Id.* arts. 435, 900–19.

591. *Id.* arts. 437–38.

592. *Id.* arts. 162, 436.

and twenty days' pay for every year of service if a layoff results from new machinery or restructuring.<sup>593</sup> Employees who voluntarily quit will also be entitled to similar payments if they do so because of employer misrepresentations, failure to pay salary, or grave safety or health risks.<sup>594</sup>

### 3. Unemployment Assistance

Mexico is the only country in this survey that lacks a national unemployment insurance program.<sup>595</sup> The closest thing to an unemployment benefit is an option under which an unemployed worker is able to withdraw up to thirty days of her pension savings, but if not repaid, the worker will have a lower pension.<sup>596</sup>

### 4. Enforcement

An employee choosing to contest a dismissal must bring a challenge to the appropriate CAB within two months of the termination date.<sup>597</sup> An employee can challenge a CAB decision by filing an "amparo" lawsuit in civil court.<sup>598</sup> The Mexican legal system tends to be non-adversarial, and its labor regulations focus on protecting workers and redressing the claimed inequality of power that exists between labor and capital.<sup>599</sup> Moreover, the vast majority of dismissal cases are resolved through a consultation process rather

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593. *Id.* art. 439.

594. *Id.* art. 51. An employee has thirty days from any of these events to quit and may receive damages based on the length of the employee's tenure with a firm and whether the employment relationship was for a specific or indefinite period of time. *Id.* arts. 50, 52; see also BAKER & MCKENZIE, WORLDWIDE GUIDE TO TERMINATION, EMPLOYMENT DISCRIMINATION, AND WORKPLACE HARASSMENT LAWS 248–49 (2009), available at [http://www.bakermckenzie.com/files/Uploads/Documents/Supporting%20Your%20Business/Featured%20Services/qr\\_global\\_terminationdiscriminationharassmentguide\\_2009.pdf](http://www.bakermckenzie.com/files/Uploads/Documents/Supporting%20Your%20Business/Featured%20Services/qr_global_terminationdiscriminationharassmentguide_2009.pdf) (explaining the circumstances under which an employee has just cause to terminate an individual labor relationship and receive severance benefits).

595. See Gabriel Martinez, *Unemployment in Mexico: Policy Options* 2 (Inst. Tecnológico Autónomo de Mex., SSRN-id 1619309, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1619309](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619309). However, there has been discussion of Mexico adopting such a program. See Tracy Wilkinson & Cecilia Sanchez, *Mexico Workers Protest Labor Overhaul Bill*, L.A. TIMES (Sept. 12, 2012), <http://articles.latimes.com/2012/sep/27/world/la-fg-mexico-labor-reform-20120927>.

596. *Employment Programmes and Unemployment Benefits*, GLOBAL EXTENSION OF SOC. SECURITY, <http://www.ilo.org/gimi/gess>ShowTheme.do?tid=2667> (last updated Oct. 4, 2012).

597. LFT art. 518.

598. Magdeline R. Esquivel & Leoncio Lara, *The Maquiladora Experience: Employment Law Issues in Mexico*, 5 NAFTA: L. & BUS. REV. AMERICAS 589, 595–96 (1999).

599. Befort & Cornett, *supra* note 577, at 274–75.

than conciliation or litigation.<sup>600</sup> When cases are litigated, CABs and Mexican courts tend to construe employment disputes in favor of employees by placing the burden of proof for showing just cause on the employer.<sup>601</sup> At first blush, this standard—in combination with just-cause protection—appears to make Mexico quite friendly to workers.<sup>602</sup> The reality, however, is not so sanguine.

It is widely believed that Mexico's labor rights face a compliance and enforcement crisis.<sup>603</sup> For instance, employers have many ways to avoid the limits on unjust dismissals. One option is classifying workers as “confidential employees” who are exempt from the dismissal laws; some companies have classified as much as 80% of their workforce as confidential employees.<sup>604</sup> Another strategy is to use civil rather than labor contracts, which makes the worker an independent contractor for a specific project rather than an employee under the Labor Law.<sup>605</sup> The result is that only an estimated 6% of unjustly terminated workers challenge their termination.<sup>606</sup> One study of 1990–1998 cases found that when workers file suit, around 70% of claims settled, 14% went to trial, and 17% were dropped.<sup>607</sup> This study also estimated that of the cases that were tried, workers fully won only 5% of the time and partially won 28% of the time.<sup>608</sup>

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600. Data in 2010 show that 21,935 disputes were “consulted,” 3,532 disputes went through conciliation, and 2,832 disputes went to trial. *Sector Statistics: VI. Labor Law Enforcement*, SECRETARÍA DEL TRABAJO Y PREVISIÓN SOCIAL tbls. VI.3.1, VI.4.1, VI.5.1 (2011), [http://www.stps.gob.mx/bp/secciones/conoce/areas\\_atencion/areas\\_atencion/web/menu\\_infsector.html](http://www.stps.gob.mx/bp/secciones/conoce/areas_atencion/areas_atencion/web/menu_infsector.html).

601. See Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 123, pfo. A, fracc. XXI, XXII, DO, 5 Febrero de 1917; LFT art. 48; see also Esquivel & Lara, *supra* note 598, at 594.

602. Esquivel & Lara, *supra* note 598, at 596; Alvaro Santos, *Labor Flexibility, Legal Reform, and Economic Development*, 50 VA. J. INT'L L. 43, 68 (2009) (citing Mexico's high labor rigidity score in World Bank's Doing Business report).

603. Jenna L. Acuff, Comment, *The Race to the Bottom: The United States' Influence on Mexican Labor Law Enforcement*, 5 SAN DIEGO INT'L LJ. 387, 388–89 (2004) (citing Elizabeth C. Crandall, Comment, *Will NAFTA's North American Agreement on Labor Cooperation Improve Enforcement of Mexican Labor Laws?*, 7 TRANSNAT'L LAW. 165, 176 (1994); Barry LaSala, *NAFTA and Worker Rights: An Analysis of the Labor Side Accord After Five Years of Operation and Suggested Improvements*, 16 LAB. LAW. 319, 334 (2001)).

604. Santos, *supra* note 602, at 69.

605. *Id.*

606. *Id.* at 72.

607. David S. Kaplan, Joyce Sadka & Jorge Luis Silva-Mendez, *Litigation and Settlement: New Evidence from Labor Courts in Mexico* tbl.1 (World Bank, Working Paper No. 4,434, 2007), available at [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2007/12/11/000158349\\_20071211125355/Rendered/PDF/wps4434.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2007/12/11/000158349_20071211125355/Rendered/PDF/wps4434.pdf) (noting that these claims include settlements, which must be ratified by a court).

608. *Id.* at tbl.3.

Some authors attribute this enforcement gap to the alliance between the Mexican government and powerful unions in the country, which may have neutralized union pressure for enforcement of workers' rights.<sup>609</sup> Another possible cause is the desire by the Mexican government to promote and retain foreign investment.<sup>610</sup> Finally, some commentators have argued that both the Constitution and the Labor Law fail to provide adequate mechanisms to enforce their own policies.<sup>611</sup> Likely, all of these factors have contributed to the problem of inadequate enforcement.<sup>612</sup>

The few employees who successfully litigate unjust dismissal cases are entitled to backpay and reinstatement in most cases, although they can abandon their reinstatement rights in exchange for three months of wages.<sup>613</sup> Under the 2012 labor law reforms, backpay is capped at twelve months, even if the court proceedings last for a longer period of time.<sup>614</sup> The OECD has estimated that as of 2008, the average monetary award for an employee with twenty years of tenure was worth approximately sixteen months' pay.<sup>615</sup> Further, one study examined 1990–1998 termination cases in two tribunals of the Mexican labor adjudication system and found that claims that were successful at the trial stage resulted in lower awards than those that were finalized earlier.<sup>616</sup> The average award for all successful termination challenges in the two different tribunals sampled was 23,629 and 56,387 pesos (US\$3,395.96 and US\$8,103.94).<sup>617</sup> Average settlement awards in the two tribunals, were 27,133 pesos and 76,455

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609. Louise D. Williams, *Trade, Labor, Law and Development: Opportunities and Challenges for Mexican Labor Arising from the North American Free Trade Agreement*, 22 BROOK. J. INT'L L. 361, 372 (1996).

610. Acuff, *supra* note 603, at 389.

611. *Id.* at 394–95.

612. See Santos, *supra* note 602, at 70.

613. LFT art. 48.

614. JOHN SANDER & FERNANDO YLLANES ALMANZA, JACKSON LEWIS LLP, LONG-AWAITED LABOR LAW REFORM IN MEXICO 4 (2013), available at <http://www.jacksonlewis.com/media/pnc/0/media.2380.pdf> (describing the law that went into effect on December 1, 2013, and noting that unpaid backpay will accrue interest until paid for up to fifteen months).

615. OECD, DETAILED DESCRIPTION, *supra* note 91, at 18.

616. Kaplan et al., *supra* note 607, at 16 (explaining that one tribunal covered cases in the pharmaceutical, chemical, paper, automotive, and auto parts industries, and the other tribunal covered the textile industry).

617. *Id.* at tbl.1. Much of the difference appears to result from the fact that the higher-award tribunal had a disproportionate number of employees with greater years of service. *Id.* (noting that the lower-award tribunal claimants averaged five years' tenure, with 8% having fifteen or more years; the higher-award tribunal claimants averaged eight years' tenure, with 17% having fifteen or more years).

pesos (US\$3,899.56 and US\$10,988.12), and average court awards were 36,634 pesos and 18,339 pesos (US\$5,265.04 and US\$2,635.68).<sup>618</sup>

Reinstatement is not required for unjustly dismissed employees who have worked for the employer for less than one year, confidential employees, household workers, temporary workers, and where a normal working relationship is no longer possible.<sup>619</sup> In cases where the employer exercises its right not to reinstate an employee because of these circumstances, the employee is entitled to a payment in lieu of reinstatement.<sup>620</sup> Although, overall, workers infrequently obtain reinstatement awards,<sup>621</sup> this “service premium” appears to encourage reinstatement for employees with significant tenure because the payments are based on the employee’s years of service.<sup>622</sup>

### K. United Kingdom

The United Kingdom’s regulation of dismissals largely consists of a typical European system of substantial protections and modest awards. Yet, the United Kingdom also has an added layer of common-law claims, primarily for the manner in which a dismissal occurs. A summary of British termination law and its enforcement is provided in Table 11 of the Appendix.

#### 1. British Statutory Law

##### a. Individual Unjust Dismissal

Dismissals in the United Kingdom are governed primarily by the Employment Rights Act of 1996, which includes both notice and unjust dismissal provisions.<sup>623</sup> The statute no longer has a small-

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618. *Id.* at tb1s.2 & 3.

619. LFT art. 49.

620. *Id.* arts. 48–50.

621. OECD, DETAILED DESCRIPTION, *supra* note 91, at 18 (giving Mexico a score of “1” for reinstatement).

622. The damages range from the equivalent of wages for one-half of the time an employee with less than one year of service worked to the equivalent of six months’ wages for the first year worked and twenty days of wages for every successive year worked. LFT arts. 48, 50. In addition, the employee is entitled to backpay and an award of three months’ wages. *Id.* art. 50; see Roberto E. Berry, *The Art of Terminating an Expat in Latin America*, 2 BUS. L. BRIEF 53, 53 (2005) (noting that Mexican law does “not provide for million dollar recoveries” but does permit substantial recoveries, especially for employees with significant tenure).

623. Employment Rights Act, 1996, c. 18 (Gr. Brit.). Unjust dismissal was first legislated in the Industrial Relations Act of 1971. Paul Lewis, *Ten Years of Unfair Dismissal Legislation in Great Britain*, 121 INT’L LAB. REV. 713, 713 (1982).

employer exception, although there have been recent stirrings about reinstituting it in some form.<sup>624</sup>

Under the Employment Rights Act, any employee with at least one month of service is entitled to notice before termination.<sup>625</sup> The notice period varies from one to twelve weeks depending on the length of service.<sup>626</sup> An employer that fails to provide sufficient notice must pay the employee wages for the noncompliant period.<sup>627</sup> However, an employment contract is terminable without notice “by reason of the conduct of the other party.”<sup>628</sup>

In contrast to the notice provision, employees are usually not entitled to unjust dismissal protection under the Employment Rights Act unless they have worked for at least two continuous years with their employer.<sup>629</sup> Employees who meet that threshold possess the “right not to be unfairly dismissed.”<sup>630</sup> Defining what is a fair or unfair dismissal is a major issue in termination disputes.

An employer that terminates a covered employee must provide a written explanation of the reason for the termination.<sup>631</sup> This requirement fits with the employer’s burden in such cases, which is to show that the reason or principal reason for a dismissal falls under one of the enumerated valid—or “fair”—reasons.<sup>632</sup> A valid reason

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624. Employment Act, 2002, c. 22, § 36 (Gr. Brit.) (removing small-employer exception from Employment Rights Act). Britain’s current government is considering changes that include allowing employers with ten or fewer employees to fire employees at will, as long as they pay some undetermined compensation. *Unfair Dismissal: Vince Cable Ponders New Hire-and-Fire Rules*, BBC (Nov. 23, 2011), <http://www.bbc.co.uk/news/uk-politics-15844614>.

625. Employment Rights Act, c. 18, § 86.

626. *Id.* (mandating one week’s notice for employees with less than two years of continuous service, one week per year of service for employees with two to twelve years of service, and twelve weeks’ notice for employees with more than twelve years of service; the statute also states that notice is waivable or that the employee may accept payment instead of notice). There are special notice requirements for group dismissals. See Trade Union and Labour Relations (Consolidation) Act, 1992, c. 52, § 188 (Gr. Brit.).

627. Employment Rights Act, c. 18, §§ 88–89.

628. *Id.* § 86(6).

629. *Id.* § 108 (noting exceptions). The two-year qualifying period in the Employment Rights Act of 1996 was in effect for only three years before The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999 amended it to a one-year qualifying period. See 1999, S.I. 1999/1436, art. 3 (U.K.). However, as of April 2012, the qualifying period for an unfair dismissal claim was restored to two years. *New Fees for Tribunals from 2013, Says George Osborne*, BBC (Oct. 3, 2011), <http://www.bbc.co.uk/news/business-15154088>.

630. Employment Rights Act, c. 18, §§ 94(1), 108.

631. *Id.* § 92.

632. *Id.* § 98 (specifying fair or unfair dismissals). However, the employer needs to show only that it had a reasonable belief that a valid reason existed, not that the reason existed in fact. *Id.* § 98(4) (stating that determining what is fair “depends on whether in the

may be related to the employee's abilities, the conduct of the employee, lack of productivity, or a catch-all "substantial reason" justifying termination.<sup>633</sup> Once an employer meets this initial burden of providing a valid reason for the dismissal, a court must then determine whether the dismissal was fair or not. This inquiry is based on whether, given all the circumstances, the employer reasonably invoked the stated reason to dismiss the employee.<sup>634</sup> Moreover, this determination of fairness must be made "in accordance with equity and the substantial merits of the case."<sup>635</sup>

An employer must also treat the employee fairly with regard to the manner of a dismissal.<sup>636</sup> This typically involves a three-step procedure prior to disciplining or terminating an employee: (1) an investigation; (2) a hearing that gives the employee an opportunity to respond to the employer's allegations; and (3) a right of appeal.<sup>637</sup> The employer need not prove that the allegation was ultimately true, but it must show that after a full investigation, it has a genuine and reasonable belief that the reason for dismissal actually existed.<sup>638</sup>

### *b. Economic Dismissals and Layoffs*

Special rules exist for redundancy dismissals, which, under the Employment Rights Act, cover dismissals caused by an employer shutting down operations for which the employee was hired, shutting down operations in the employee's location, or eliminating the type

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circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee" and "shall be determined in accordance with equity and the substantial merits of the case").

633. *Id.* § 98(1)–(2). Terminations in retaliation for union activity and various forms of employment discrimination are also prohibited. *See, e.g.*, Disability Discrimination Act, 1995, c. 50, § 4 (U.K.); Trade Union and Labour Relations (Consolidation) Act, 1992, c. 52, § 188 (Gr. Brit.); Sex Discrimination Act, 1975, c. 65, § 6 (Gr. Brit.); Race Relations Act, 1976, c. 74, § 4 (Gr. Brit.).

634. Employment Rights Act, c. 18, § 98(4)(a).

635. *Id.* § 98(4)(b).

636. *Polkey v. A. E. Dayton Services Ltd.*, [1988] A.C. 344 (H.L.) 362 (appeal taken from Eng.). Formal procedures for dismissal and discipline were created in 1996 but repealed in 2009. Employment Act, 2002, c. 22, § 2 (repealing statutory procedures). The Advisory, Conciliation and Arbitration Service subsequently promulgated guidance for handling disciplinary and grievance situations. *See ACAS, CODE OF PRACTICE 1 – DISCIPLINARY AND GRIEVANCE PROCEDURES* (Apr. 2009), available at <http://www.acas.org.uk/index.aspx?articleid=2174> (noting that the Code is "practical guidance" and that a failure to follow "does not, in itself, make a person or organization liable to proceedings").

637. *See HARDY & BUTLER, supra* note 324, at 255–58.

638. *British Home Stores v. Burchell*, [1980] I.C.R. 303 (appeal taken from Eng.), available at [http://www.bailii.org/uk/cases/UKEAT/1978/108\\_78\\_2007.html](http://www.bailii.org/uk/cases/UKEAT/1978/108_78_2007.html) (last visited Jan. 2, 2014).

of work that the employee performs.<sup>639</sup> When there is a question regarding whether an employee is entitled to a redundancy payment, the employee is presumed to have been terminated due to redundancy unless an employer proves otherwise.<sup>640</sup> The presumption also applies to employees who lose more than one-half of their wages because of a reduction in hours.<sup>641</sup> However, employees are not entitled to redundancy pay if they worked with their employer for less than two years or if they were terminated for cause or other breach of the employment contract.<sup>642</sup>

Rules covering collective dismissals are covered by the Trade Union and Labour Relations Act of 1992 (“TULRCA”).<sup>643</sup> Under TULRCA, an employer that wants to dismiss twenty or more employees for redundancy purposes within a ninety-day period must first give at least thirty days’ notice to any relevant union or employee representative and consult with the union or employee representative about whether the layoffs are needed and, if so, how best to implement them in a way that mitigates harm to employees.<sup>644</sup> If an employer fails to meet these requirements, employees can obtain a protective order that protects their jobs for up to ninety days.<sup>645</sup> When an employer intends to lay off 100 or more employees, it must give the Secretary of State at least ninety days’ notice.<sup>646</sup> Failure to properly notify the Secretary of State can result in fines.<sup>647</sup>

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639. Employment Rights Act, c. 18, § 139(1).

640. *Id.* § 163(2).

641. *Id.* § 147(2).

642. *Id.* §§ 140(1) (for cause), 151 (for cause), 155 (two-year minimum); *see also id.* § 135 (requiring an employer to pay redundancy pay if the employee “is dismissed by the employer by reason of redundancy” or “is eligible for a redundancy payment by reason of being laid off or kept on short-time”). Redundancy pay will stop if an employee participates in a strike against the employer after the layoff. *Id.* §§ 140(2), 143.

643. Trade Union and Labour Relations (Consolidation) Act, 1992, c. 52 (Gr. Brit.).

644. *Id.* § 188; *see also id.* § 193 (requiring that the employer provide certain information to the union representative).

645. *Id.* §§ 189–90.

646. *Id.* § 193(1). The current government is considering reducing this notice period to thirty days. *See Unfair Dismissal: Vince Cable Ponders New Hire-and-Fire Rules, supra* note 624.

647. Trade Union and Labour Relations (Consolidation) Act, c. 52, § 194(1) (stating that maximum is level 5 of standard scale). A maximum level 5 is £5,000 (US\$7,608.75) under Section 17 of the Criminal Justice Act of 1991. Criminal Justice Act, 1991, c. 53, § 17(1) (Gr. Brit.).

### c. Unemployment Assistance

The United Kingdom's unemployment system has both contributory and means-tested programs.<sup>648</sup> The contribution-based Jobseeker's Allowance is available to unemployed workers age eighteen or over who have paid the requisite amount into the National Insurance Fund in one of the last two years before receiving benefits and who are available for and actively seeking employment.<sup>649</sup> Workers who voluntarily quit, were terminated for misconduct, or failed to meet jobseeker requirements are not barred from the program but can face periods of between one to twenty-six weeks without benefits.<sup>650</sup> In 2013, the amount of the contribution-based Jobseeker's Allowance—before deductions for earnings and pension payments—was £56.80 (US\$86.44) per week for a single beneficiary between the ages of eighteen and twenty-five and £71.70 (US\$109.11) per week for those over twenty-five.<sup>651</sup> Distribution of benefits occurs after a waiting period of three days for a period of up to twenty-six weeks.<sup>652</sup>

In 2012, the United Kingdom introduced the Universal Credit system, which merged many social welfare programs under one umbrella program starting in 2013 and is due to be completed by 2017.<sup>653</sup> The contribution-based Jobseeker's Allowance continues to be an independent program, but the means-tested unemployment support became part of the Universal Credit system.<sup>654</sup> Although new rules may develop, the means-tested Jobseeker's Allowance program is currently available to workers who are not eligible for the contribution-based program and who do not exceed an income threshold.<sup>655</sup> Once qualified, the requirements and benefit amount are

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648. SSA, EUROPE, *supra* note 286, at 317.

649. Jobseekers Act, 1995, c. 18, §§ 1(2), 2 (Gr. Brit.); SSA, EUROPE, *supra* note 286, at 317 (2012) (noting also that "unemployed" includes working less than sixteen hours a week and that, under specified conditions, benefits may be available to individuals aged sixteen or seventeen).

650. Jobseekers Act, c. 18, § 19.

651. Job Seeker's Allowance Regulations, 2013, S.I. 2013/378, art. 49 (Gr. Brit.); see also Jobseeker's Act, c. 18, § 4(1) (specifying the factors in determining the contribution-based Jobseeker's Allowance); Job Seeker's Allowance Regulations, art. 48 (stating the formula used to calculate the prescribed amount of earnings).

652. SSA, EUROPE, *supra* note 286, at 317.

653. CLARE FEIKERT-AHALT, THE LAW LIBRARY OF CONGRESS, GREAT BRITAIN: WELFARE REFORM ACT 2012, at 2, 6 (2012), available at [http://www.loc.gov/law/help/uk\\_welfare\\_act\\_2012-008032\\_RPT.pdf](http://www.loc.gov/law/help/uk_welfare_act_2012-008032_RPT.pdf).

654. See *id.* at 2.

655. The current means-cap is for a beneficiary and partner to have less than £16,000 (US\$24,348) in savings; even if this limit is not reached, the benefits are lowered by £1

almost identical to the contribution-based program, except for a new cap on benefits that, in 2013, was £350 (US\$532.61) per week for single adults and £500 (US\$760.88) per week for couples and single parent households.<sup>656</sup>

#### *d. Enforcement*

Employees may litigate Employment Rights Act complaints before a government employment tribunal.<sup>657</sup> Jury trials and class actions are not available.<sup>658</sup> The statute of limitations is usually three months from the date of dismissal, although it can be tolled.<sup>659</sup> A successful employee is typically entitled to either monetary damages or reinstatement, although the latter remedy is rarely awarded.<sup>660</sup> If reinstatement is ordered, the employee is still entitled to backpay.<sup>661</sup>

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(US\$1.52) per week for every £250 (US\$380.44) in savings above £6,000 (US\$9,130.50). DEPT FOR WORK & PENSIONS, JOBSEEKER'S ALLOWANCE 3 (2012), *available at* [http://www.direct.gov.uk/prod\\_consum\\_dg/groups/dg\\_digitalassets/@dg/@en/@benefits/documents/digitalasset/dg\\_199994.pdf](http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/@benefits/documents/digitalasset/dg_199994.pdf); *Jobseeker's Allowance: Eligibility*, GOV.UK, <https://www.gov.uk/jobseekers-allowance/eligibility> (last updated Dec. 31, 2013) (noting that a beneficiary must work less than twenty-four hours per week on average).

656. SSA, EUROPE, *supra* note 286, at 317 (comparing contributory and means-tested benefits); *Introducing a Cap on the Amount of Benefits Working Age People Can Receive*, GOV.UK, <https://www.gov.uk/government/policies/simplifying-the-welfare-system-and-making-sure-work-pays/supporting-pages/introducing-a-cap-on-the-amount-of-benefits-working-age-people-can-receive> (last visited Jan. 2, 2014).

657. Employment Rights Act, 1996, c. 18, § 111 (Gr. Brit.). Bringing an unjust dismissal case before a tribunal used to be free; however, as of 2013, employees bringing unjust dismissals claims must pay £600 (US\$913.05) to obtain mediation from a judge and £1,200 (US\$1,826.10) to receive a full hearing. Press Release, Justice Minister Jonathan Djanogly, Employment Tribunal Fees Set To Encourage Mediation and Arbitration (July 13, 2012), <https://www.gov.uk/government/news/employment-tribunal-fees-set-to-encourage-mediation-and-arbitration>.

658. E-mail from Lisa Mayhew, Partner, Emp't Section, Berwin Leighton Paisner LLP, to authors (Sept. 21, 2010) (on file with the North Carolina Law Review).

659. Employment Rights Act, c. 18, § 111(2) (allowing exceptions if "it was not reasonably practicable for the complaint to be presented before the end of ... three months").

660. *Id.* §§ 112-17; *see also* OECD, DETAILED DESCRIPTION, *supra* note 91, at 19 (giving the U.K. a score of "1" on a scale of 0-3 for reinstatement); ASTRA EMIR, SELWYN'S LAW OF EMPLOYMENT 433 (17th ed. 2012); EUROPEAN COMM'N, *supra* note 462, at 71-73 (describing the reluctance of tribunals to order reinstatement). A tribunal bases its decision whether to order reinstatement on whether the employee wants to be reinstated, whether the employer can practically reinstate the employee, and whether the employee was partially at fault for the termination. Employment Rights Act, c. 18, § 116.

661. Employment Rights Act, c. 18, § 114 (mandating the tribunal ordering reinstatement to specify "any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement").

The amount of monetary damages available to successful unjust dismissal claimants consists of a basic award and an additional compensatory award.<sup>662</sup> The basic award is based on an employee's age, length of service, and weekly pay.<sup>663</sup> As of 2012, there is a minimum basic award of £5,500 (US\$8,369.63) and a maximum weekly pay of £450 (US\$684.79) before any suitable deductions—such as a redundancy award—are applied.<sup>664</sup> The compensatory award is currently capped at £74,200 (US\$112,914).<sup>665</sup> Punitive damages or recovery for emotional losses are not available, and each side, no matter who wins, typically pays its own costs (this rule is different for cases initiated in the civil courts, where the losing party will often pay a majority of the winner's attorney's fees and other costs).<sup>666</sup>

In redundancy cases, employees are entitled to an award that is based on the same formula as the basic unjust dismissal award with a weekly pay cap of £450 (US\$684.79).<sup>667</sup> Because redundancy pay is tied to the employee's salary in the preceding twelve weeks, employers can reduce their exposure by reducing employees to part-time work prior to a redundancy dismissal.<sup>668</sup> Should an employer become insolvent, the government may fund redundancy awards.<sup>669</sup>

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662. *Id.* § 118; *see also id.* § 123 (describing the compensatory award as being an amount "the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer").

663. The amount equals one-half week's pay for every year worked before age twenty-two, one week's pay for every year worked between ages twenty-two and forty, and a one-and-one-half week's pay for every year worked over forty-one. *Id.* § 119. Only the previous twenty years of work are used for this formula. *Id.*

664. *Id.* § 227; Employment Rights (Increase of Limits) Order, 2012, S.I. 2012/3007, art. 3 (Gr. Brit.) (increasing the limits provided in the Employment Rights Act of 1996); *see also* Employment Rights Act, c. 18, §§ 119–22. Deductions may occur because the employee refused to accept the employer's offer of reinstatement, the tribunal believed a deduction is equitable because of the employee's conduct, or the employee received a redundancy award from the tribunal. *Id.* § 122.

665. Employment Rights (Increase of Limits) Order, art. 3 (increasing the limits provided in the Employment Rights Act of 1996); *see also* Employment Rights Act, c. 18, § 124.

666. E-mail from Lisa Mayhew, *supra* note 658.

667. *See supra* notes 663–64; Employment Rights Act, c. 18, §§ 162, 227; *see also* Redundancy Pay, CITIZENS ADVICE BUREAU, [http://www.adviceguide.org.uk/index/your-money/employment/redundancy\\_an\\_introduction/redundancy\\_pay.htm](http://www.adviceguide.org.uk/index/your-money/employment/redundancy_an_introduction/redundancy_pay.htm) (last visited Jan. 2, 2014).

668. *See Redundancy Pay, supra* note 667.

669. Employment Rights Act, c. 18, § 166.

In the 2012 fiscal year, 46,300 unjust dismissal claims and 22,700 redundancy claims were filed with employment tribunals.<sup>670</sup> Employee-claimants prevailed in approximately 8% of unjust dismissal claims before the tribunal, 13% of claims were dismissed or ruled unsuccessful at a hearing, 24% were withdrawn, and 42% were settled.<sup>671</sup> For the same period, approximately 22% of redundancy claims were successful before the tribunal, 7% were dismissed or ruled unsuccessful at a hearing, 21% were withdrawn, and 18% were settled.<sup>672</sup> Among the claims that succeeded at a hearing, tribunals ordered reinstatement in only 0.098% of cases,<sup>673</sup> compensation in 45% of cases, no award in 51% of cases, and left the remedy for the parties to determine in 2.4% of cases.<sup>674</sup> For cases in which compensation was awarded, the mean award was £9,133 (US\$14,403.96), and the median award was around £4,560 (US\$7,267.37); approximately 50% of all awards ranged from £500 (US\$796.86) to £6,000 (US\$9,562.33).<sup>675</sup>

According to a 2003 study, the United Kingdom's redundancy awards are among the lowest in the EU.<sup>676</sup> The study found that the average redundancy payment for a hypothetical forty-year-old white-collar employee earning €30,000 (US\$43,924.64) per year who was laid off after ten years of work was £5,128 (US\$10,798.82)—less than one-half of the £11,163 (US\$23,507.67) average payment to similarly situated employees in the E.U. as a whole.<sup>677</sup> Specific comparisons include the relatively high amount provided to a similar employee in Spain (£25,464/US\$53,623.48) and Italy (£18,726/US\$39,434.26),<sup>678</sup> as well as a similarly low amount (£5,000/US\$10,529.27) in France and the Netherlands.<sup>679</sup>

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670. MIN. OF JUSTICE, *supra* note 11, tbl.1 (noting 57,400 unjust dismissal claims in 2009–2010 and 47,900 claims in 2010–2011; 26,500 redundancy claims in 2009–2010 and 23,400 claims in 2010–2011).

671. *Id.* at tbl.2 (other dispositions not included).

672. *Id.*

673. The report states that 5,100 cases were upheld at tribunal, but it lists the disposition of only 5,025 cases. *Id.* The former number is used to provide a percentage comparison of the types of awards granted. *Id.* at tbl.3.

674. *Id.*

675. *Id.* at tbl.5.

676. Amble, *supra* note 302; see also Minimum Redundancy Pay ‘Lower in UK’, THE GUARDIAN (June 2, 2003), <http://www.guardian.co.uk/money/2003/jun/02/redundancy.pay#history-link-box>.

677. See Amble, *supra* note 302.

678. *Id.*

679. *Id.*

## 2. British Common Law

The Employment Rights Act and its tribunal system is the exclusive avenue for challenging the decision to dismiss and whether it was unfair.<sup>680</sup> However, employees may have common-law claims available to challenge the manner in which a dismissal was carried out.<sup>681</sup>

One possible common-law claim involves notice. British common law traditionally assumed that employment relationships were based on a period of one year.<sup>682</sup> As the law began moving away from that presumption by permitting employers more leeway to terminate employees, a new presumption arose: employment relationships were of an unspecified, yet continuous duration and could be terminated only with reasonable notice.<sup>683</sup>

Parties may contract for periods of notice that exceed the one- to twelve-week statutory minimum,<sup>684</sup> but even employment contracts that are silent on the issue may require longer periods of notice depending on the employee's seniority and position at the firm, industry customs, the nature of work, and other factors.<sup>685</sup> Yet, employers may still dismiss employees without notice under extreme conditions such as gross misconduct, gross negligence, willful refusal to obey reasonable orders, and dishonesty.<sup>686</sup>

Other common-law claims are often couched in terms of a breach of the duty of mutual trust and confidence.<sup>687</sup> But the termination itself does not give rise to a claim; an employer is liable for unfair treatment under common law only for actions that occurred while the employee was still employed.<sup>688</sup> For instance, employers are expected

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680. *Johnson v. Unisys Ltd.*, [2001] 1 A.C. 518 (H.L.) 518 (appeal taken from Eng.).

681. *Id.* at 518–19.

682. Mark Freedland, *Developing the European Comparative Law of Personal Work Contracts*, 28 COMP. LAB. L. & POL'Y J. 487, 493 (2007).

683. *Id.* at 493–94 (noting that white-collar workers did better under “reasonable” analysis than did blue-collar workers).

684. See *supra* note 626 and accompanying text.

685. See *Hill v. C.A. Parsons & Co.*, [1972] Ch. 305, 306 (Eng.); *Clark v. Fahrenheit 451 (Communications) Ltd.*, [2000] W.L. 824100 (Eng.), at \*1–2.

686. EMIR, *supra* note 660, at 391.

687. See *Malik v. Bank of Credit & Commerce Int'l S.A.*, [1997] 3 W.L.R. 95 (H.L.) 95 (appeal taken from Eng.) (permitting damages for future losses due to former employees’ inability to gain employment because of the employer’s fraudulent business practices); *Fudge, supra* note 180, at 540.

688. *Eastwood v. Magnox Elec. Plc*, [2004] 35 UKHL 991 (H.L.) [29] (appeal taken from Wales).

to follow their own dismissal procedures, and failure to do so may result in a breach-of-contract claim.<sup>689</sup>

Unlike in Canada, an employee cannot typically collect damages for harms caused by the manner of the dismissal, such as psychological harm, reputational damages, or difficulties in finding a new job.<sup>690</sup> Common-law contract claims may be made in a civil court, where the losing party often has to pay the majority of the winning party's costs and attorney's fees. Contractual claims that do not exceed £25,000 (US\$38,043.80), however, may go before an employment tribunal.<sup>691</sup>

#### *L. United States*

As noted in the introduction to this Part, the United States lacks any national unjust dismissal protection. One state, Montana, has an unjust dismissal statute; every other state uses the at-will default rule.<sup>692</sup> The United States also lacks any mandated severance or redundancy requirement, leaving such benefits to the parties' agreement or the employer's discretion.<sup>693</sup> A summary of U.S. termination law and its enforcement is provided in Table 12 of the Appendix.

The United States does provide protection, albeit limited, for employees subject to collective dismissals. The federal WARN Act requires employers with over 100 employees to provide at least sixty days' notice to employees, unions that represent affected employees, and government officials before certain plant closings and mass layoffs.<sup>694</sup> A qualified plant closing is limited to situations in which at

689. See *Shook v. London Borough of Ealing*, [1986] I.C.R. 314. Damages for such claims are generally limited to the amount of time the employee would have worked had the proper procedures been followed. *Gunton v. Richmond upon Thames LBC*, [1980] I.C.R. 755; EMIR, *supra* note 660, at 433 (noting that actions may be brought "for damages based on a failure by the employer to follow contractual disciplinary procedures").

690. *Dunnachie v Kingston-upon-Hull City Council*, [2004] 36 UKHL 1011 (H.L.) 1011 (appeal taken from Eng.); *Johnson v. Unisys Ltd.*, [2003] 1 A.C. 518 (H.L.) 518 (appeal taken from Eng.); *Addis v. Gramophone Co.*, [1909] A.C. 488 (H.L.) 488 (appeal taken from Eng.).

691. The Industrial Tribunals Extension of Jurisdiction (England and Wales) Order, 1994, S.I. 1994/1623, art. 10 (Eng. & Wales).

692. See *supra* note 3; *infra* notes 799–801 and accompanying text.

693. See *supra* note 29 and accompanying text.

694. 29 U.S.C. § 2102(a) (2012). Moreover, almost one-half of union-negotiated collective-bargaining agreements contain some form of notice provision. BNA, BASIC PATTERNS IN UNION CONTRACTS 68 (14th ed. 1995) (reporting that 49% of sampled collective-bargaining agreements provided for notice of layoff to the affected workers, their union, or both).

least fifty employees will lose their jobs over a thirty-day period, and a qualified mass layoff requires job losses for either five-hundred employees or one-third of employees over a thirty-day period.<sup>695</sup> However, unlike many other countries, the WARN Act does not require employers to consult with employees or their representatives prior to implementing collective dismissals.<sup>696</sup>

The United States also has national unemployment protection, but the level of benefits can vary considerably among the states. This is because when the unemployment system was created in 1935, it established a joint federal-state scheme that encourages states to form their own programs.<sup>697</sup> Under this scheme, the federal government provides funding to states that maintain their own programs, which every state does.<sup>698</sup> Yet, the eligibility for the unemployment insurance program, as well as the amount and duration of benefits, are not the same in every state. In most states, individuals who just entered the workforce, worked only part-time, voluntarily left their jobs, were terminated for misconduct, or are not actively looking for new work will not be eligible.<sup>699</sup> In a typical state, workers must wait one week before receiving benefits that normally last for twenty-six weeks.<sup>700</sup> However, Congress can extend the duration, as it does frequently during economic recessions. The amount of benefits usually equals one-half of the recipient's previous weekly wage, up to a benefit cap that varies significantly among states. In 2012, the lowest weekly cap was \$235 (Mississippi) and the highest was \$653 (Massachusetts).<sup>701</sup> In 2010, beneficiaries received a weekly national average of \$304 (\$324.93 in 2013 dollars) for an average of 19.4 weeks.<sup>702</sup>

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695. 29 U.S.C. § 2101(a)(2)–(3).

696. See *infra* notes 724–25 and accompanying text.

697. Social Security Act of 1935, 42 U.S.C. §§ 501–504, 1101–1108 (2006).

698. HIRSCH ET AL., *supra* note 25, at 181 (describing funding and incentive scheme).

699. EMP'T & TRAINING ADMIN., U.S. DEPT OF LABOR, COMPARISON OF STATE UNEMPLOYMENT LAWS, ch. 5, available at <http://workforcesecurity.dol.gov/unemploy/pdf/uilawcompar/2011/nonmonetary.pdf>.

700. STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS 642 (5th ed. 2012).

701. In general, the benefit cap is from one-half to two-thirds of the state's average weekly wage. *Id.* Because of the maximum benefit caps, the effective rate of wage replacement for employees receiving unemployment benefits is about one-third of their former salary. *Id.* During the recent recession, the federal government implemented several emergency measures that extended eligibility for benefits by up to fifty-three weeks—for a total of up to ninety-nine weeks. *Id.* at 644. For maximums, see *Unemployment Benefits Comparison by State*, FILE UNEMPLOYMENT, <http://fileunemployment.org/unemployment-benefits-comparison-by-state> (last visited Jan. 2, 2014).

702. WILLBORN ET AL., *supra* note 700, at 643.

It is impossible to directly compare unjust dismissal enforcement schemes given the lack of a statutory unjust dismissal regime in the United States. Yet, in the next Part, the Article describes the legal regime for employment-related claims in the United States as a means to compare the American system of employment enforcement to other countries.<sup>703</sup> The award data in Table 12 are based on that examination.

## II. SUMMARY OF UNJUST DISMISSAL REGIME COMPARISONS

An examination of the unjust dismissal regimes of the countries in this survey reveals several observations. As many commentators note, the United States is unique in its lack of broad protection against dismissals without cause. However, because of the many exceptions to the U.S. at-will default and the limits on other countries' unjust dismissal protections, the differences between the United States and other countries are fewer than many commentators give credit for. The area in which the United States truly is exceptional is its enforcement system, which is characterized by a low probability of employees winning employment cases but often provides high awards when such victories occur. Employees are usually far more successful when litigating cases in the other countries, but damage awards are substantially lower than in the United States. Table 13 in the Appendix briefly summarizes each surveyed country's termination law.

### A. Individual Unjust Dismissal

The strongest support for the U.S. exceptionalism claim is found in the study's survey of unjust dismissal legislation. The United States and Canada are the only surveyed countries lacking national unjust dismissal legislation.<sup>704</sup> However, because Canada's common law provides a remedy for most unjust dismissals,<sup>705</sup> the United States is exceptional at this basic level.

The surveyed countries with national, statutory just-cause provisions typically have either general just-cause provisions<sup>706</sup> or

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703. See *infra* Part II.

704. See *supra* Part I.C.1.a (discussing Canada's federal unjust dismissal regime).

705. See *supra* Part I.C.3.

706. See, e.g., C.c. arts. 2118–19 (It.), translated in THE ITALIAN CIVIL CODE, *supra* note 457, at 450 (requiring just cause for early termination of a fixed-term contract, if the employer wants to avoid paying for the remainder of the term, and requiring just cause or sufficient notice for termination of an indefinite contract, if the employer wants to avoid paying the employee a sum equivalent to the amount the employee would have been

enumerated lists of lawful or unlawful reasons for dismissal.<sup>707</sup> Despite this difference, most unjust dismissal statutes appear to permit a similar set of circumstances to trigger dismissal, such as financial concerns, misconduct, and poor work performance.<sup>708</sup>

More contrast is apparent in the unjust dismissal laws' peripheral rules. Most countries have probationary periods during which the unjust dismissal protections do not apply, but those periods can vary from ninety days to two years.<sup>709</sup> Some countries also have small-employer exceptions that exclude employers with fewer than ten to fifteen employees, but the majority of the surveyed countries' unjust dismissal laws apply to employers of all sizes.<sup>710</sup>

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entitled to during the forgone period of advance notice); *see also Fair Work Act 2009* (Cth) s 387 (Austl.) (providing a general provision that requires consideration of a detailed list of factors); C. TRAV. art. L1232-1 (Fr.); Labor Contract Act, art. 16 (Japan). Moreover, Nova Scotia's and Quebec's just-cause protections are generally interpreted with reference to the term "good and sufficient cause" as used in union-negotiated collective-bargaining agreements. *See supra* note 166 and accompanying text.

707. C.L.T. art. 482 (Braz.); Labor Contract Law, arts. 14, 39 (China); KSchG § 1(2) (Ger.) (providing general lawful reasons, such as misconduct or serious business reasons); Unfair Dismissals Act 1977 (Act No. 10/1977), § 6(6) (Ir.), available at <http://www.irishstatutebook.ie/1977/en/act/pub/0010/print.html> (including a general catch-all justification); LFT arts. 46–47 (Mex.) (including a general catch-all justification of "reasonable cause"); Employment Rights Act, 1996, c. 18, § 98 (Gr. Brit.) (specifying fair and unfair dismissals, including a "substantial reason" catch-all provision).

708. *See, e.g., Fair Work Act 2009* (Cth) s 387 (Austl.); C.L.T. art. 482 (Braz.); Labor Contract Law, art. 39 (China); KSchG § 1(2) (Ger.); Unfair Dismissals Act 1977 § 6(4) (Ir.); Labor Contract Act, art. 16 (Japan); LFT art. 47 (Mex.); Employment Rights Act, c. 18, § 98 (Gr. Brit.).

709. *See, e.g., Fair Work Act 2009* (Cth) ss 382–83 (Austl.) (setting a probationary period of one year for a "small business employer" and six months for all other employers); C.L.T. art. 445 (Braz.) (stating that the parties can set a probationary period of up to a maximum of ninety days); Labor Contract Law, arts. 19, 39 (China) (one to six months); C. TRAV. art. L1234-1 (Fr.) (setting the probationary period at six months, although under local law or custom notice may still be required for employees with fewer than six months experience); KSchG § 1(1) (Ger.) (six months); Unfair Dismissals Act 1977 § 2(1)(a) (Ir.) (one year); L. n. 604/1966, art. 10 (It.) (maximum of six months); *New Fees for Tribunals from 2013, Says George Osborne*, *supra* note 629 (describing the new two-year rule for the U.K. that started in April 2012; the old one-year rule is codified in Section 108 of the Employment Rights Act); *see also EPlex: Japan*, *supra* note 533 (noting that there is no limitation on the length of a probationary period but that probationary periods are seldom used in practice); *EPlex: Mexico*, *supra* note 315 (noting that there is no limitation on the probationary period). Canada's Labour Code does not have a probationary period, but Quebec's probationary period is two years, Respecting Labour Standards, R.S.Q. 1979, c. N-1.1, § 124 (Supp. 2013), while Nova Scotia has an extraordinary ten-year period, *see Labour Standards Code*, R.S.N.S. 1989, c. 246, § 71(1).

710. For instance, Australia's Fair Work Act applies only to employers with fifteen or more employees. *Fair Work Act 2009* (Cth) s 23(1) (Austl.) (defining a small business employer as one that employs less than fifteen employees). Employees of smaller firms are covered by a weaker unjust dismissal statute. *See id.* s 385 (noting that consistency with the

Differences exist, but are less apparent with regard to countries' notice and explanation requirements. Almost every surveyed country requires employers to provide some type of notice before making an unjust dismissal,<sup>711</sup> and most countries also require a written explanation for the dismissal, at least at the employee's request.<sup>712</sup> The United States lacks such requirements, save for a federal notice requirement for large collective dismissals<sup>713</sup> and a few state laws mandating termination explanations.<sup>714</sup>

Notice requirements exist in every country except the United States and largely operate in a similar fashion, although the details of each notice regime vary significantly among the countries. For example, most countries have probationary periods during which notice of dismissal is not required,<sup>715</sup> but there are exceptions.<sup>716</sup> The

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"Small Business Fair Dismissal Code" is one consideration in determining whether an employee was unfairly dismissed); *Small Business Fair Dismissal Code 2009* (Cth) (Austl.). Germany and Italy also have small-employer exceptions. See KSchG § 23 (Ger.) (under ten employees); L. n. 108/1990, art. 2 (It.) (fifteen employees or less). Countries without this exception include Ireland, Mexico, the United Kingdom, France, Brazil, China, and Japan. See Unfair Dismissals Act 1977 §§ 1–2 (Ir.); LFT art. 1 (Mex.); Employment Act, 2002, c. 22, § 36 (Gr. Brit.); see also Voize-Valayre, *supra* note 260, at 544 (describing the lack of a small-employer exception in France); EPLex: Brazil, *supra* note 98 (no small-employer exception); EPLex: China, *supra* note 196 (same); EPLex: Japan, *supra* note 533 (same). The U.K. currently lacks a small-employer exception, *Employment Protection Legislation Database – EPLex: United Kingdom*, INT'L LAB. ORG., [http://www.ilo.org/dyn/eplex/termmain.showCountry?p\\_lang=en&p\\_country\\_id=22](http://www.ilo.org/dyn/eplex/termmain.showCountry?p_lang=en&p_country_id=22) (last visited Jan. 2, 2014), but Britain's government is considering new legislation that would allow employers with ten or fewer employees to fire employees without cause as long as they pay some undetermined compensation. See *Unfair Dismissal: Vince Cable Ponders New Hire-and-Fire Rules*, *supra* note 624.

711. In Canada, in addition to the federal statute, see Canada Labour Code, R.S.C. 1985, c. L-2, § 230 (Supp. 2013), most provinces mandate procedural protections. See OECD, DETAILED DESCRIPTION, *supra* note 91, at 12.

712. See Canada Labour Code, c. L-2, § 241(1) (upon request); C. TRAV. art. L1232-2 (Fr.); BGB § 626(2) (Ger.) (upon request); Unfair Dismissals Act 1977 § 14(4) (Ir.); L. n. 604/1966, art. 2 (It.); Labor Standards Act, art. 22 (Japan) (upon request); LFT art. 47(XV) (Mex.); Employment Rights Act, c. 18, § 92 (Gr. Brit.). Some countries further require some opportunity for the employee to respond to the stated reason for dismissal. See C. TRAV. art. L1232-2 (Fr.); BetrVG § 82 (Ger.) (describing also the right to respond for employees represented by a works council); *Termination of Employment*, *supra* note 464 (describing the procedure in Italy); *supra* note 183 and accompanying text (describing Canadian common law).

713. See *supra* notes 694–96 and accompanying text.

714. Several U.S. states have "service letter" laws that typically require an employer to provide an employee with a letter that describes the reasons for a termination. See, e.g., MO. ANN. STAT. § 290.140(1) (West 2005); MONT. CODE ANN. § 39-2-801(1) (2011).

715. See C.L.T. art. 445 (Braz.) (ninety days); Canada Labour Code, c. L-2, § 230 (three months); OECD, DETAILED DESCRIPTION, *supra* note 91, at 12 (noting that most Canadian provinces have three-month periods, except for Manitoba (thirty days) and New Brunswick, Prince Edward Island, and Yukon (six months each)); Labor Contract Law,

length of the notice period is usually keyed to employees' years of service; however, the minimum length of the notice period differs considerably, with periods ranging from no minimum period to as high as seven months.<sup>717</sup> The general range of notice periods also varies among countries, although the median country seems to have a typical notice period that is close to one month.<sup>718</sup>

The notice requirement can also act as a supplemental severance payment requirement. In most countries, wage payments can be made in lieu of notice.<sup>719</sup> Moreover, virtually all of the surveyed countries suspend the notice requirement if the dismissal is based on a specified level of cause, which is usually harder for the employer to show than that required by a country's substantive just-cause provision.<sup>720</sup>

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arts. 19, 39 (China) (one to six months); C. TRAV. art. L1234-1 (Fr.) (setting the probationary period at six months, although under local law or custom, notice may still be required for employees with fewer than six months' experience); Minimum Notice and Terms of Employment Act 1973 (Act No. 4/1973), § 4(1) (Ir.), *available at* <http://www.irishstatutebook.ie/1973/en/act/pub/0004/print.html> (thirteen weeks); L. n. 604/1966, art. 10 (It.) (six months); Labor Standards Act, art. 21 (Japan) (fourteen days).

716. See *EPLex: Australia*, *supra* note 52 (explaining that the FWA does not explicitly provide for a probationary period); *EPLex: Mexico*, *supra* note 315 (noting that there is no limitation on the probationary period).

717. See *Fair Work Act 2009* (Cth) s 117(3) (Austl.) (one to five weeks); C.L.T. art. 487 (Braz.) (eight to thirty days); Canada Labour Code, c. L-2, § 230(a) (two weeks); Labor Contract Law, arts. 37, 40 (China) (thirty days); C. TRAV. art. L1234-1 (Fr.) (one to two months); BGB § 622(2)–(3) (Ger.) (two weeks to seven months); Minimum Notice and Terms of Employment Act 1973 (Act No. 4/1973), § 4(2) (Ir.), *available at* <http://www.irishstatutebook.ie/1973/en/act/pub/0004/print.html> (one to eight weeks); Labor Standards Act, art. 20 (Japan) (thirty days); LFT art. 47 (Mex.) (no minimum period); Employment Rights Act, c. 18, § 86 (Gr. Brit.) (one to twelve weeks); *see also* OECD, DETAILED DESCRIPTION, *supra* note 91, at 6 (noting that the Canadian provinces' notice periods vary from one to eight weeks). Instead of setting a specific notice period, Italy determines notice on a case-by-case basis that relies on factors such as custom and the employee's seniority and position within the firm. See *supra* notes 466–68 and accompanying text.

718. See *supra* note 717.

719. See *Fair Work Act 2009* (Cth) s 117(2)(b) (Austl.); C.L.T. art. 487 (Braz.); Canada Labour Code, c. L-2, § 230(b); Labor Contract Law, art. 40 (China) (providing payment in lieu of notice if dismissal is based on certain reasons); C. TRAV. art. L1234-5 (Fr.); Minimum Notice and Terms of Employment Act 1973, § 12(1) (Ir.); C.c. art. 2118 (It.), *translated in* THE ITALIAN CIVIL CODE, *supra* note 457, at 450; Labor Standards Act, art. 20 (Japan); Employment Rights Act, c. 18, § 86 (Gr. Brit.). But see *EPLex: Germany*, *supra* note 316 (no payment in lieu of notice); *EPLex: Mexico*, *supra* note 315 (same). There is very little data on average notice-related payments, as most data come from litigated cases, of which notice disputes are a very small part. However, a 1990 study in Italy estimated that the average amount of notice compensation was equivalent to forty-five weeks' pay. See INT'L LABOR ORG., *supra* note 467, at 18 & n.83, 19 (noting that E.U. average was twenty-two weeks' pay).

720. See *Fair Work Act 2009* (Cth) s 123 (Austl.) (serious misconduct; same standard for small employers under Small Business Fair Dismissal Code); C.L.T. art. 487 (Braz.) (lawful cause); Canada Labour Code, c. L-2, § 230 (just cause); Labor Contract Law, art.

### B. Economic Dismissals and Layoff

All of the countries in this study, save for Canada, Japan, and the United States, provide general redundancy or severance benefits for economic layoffs or dismissals.<sup>721</sup> The redundancy or severance laws usually cover the same employees and situations as each country's respective unjust dismissal law, although there are exceptions.<sup>722</sup> The countries vary in how they define redundancy or other conditions required for severance pay, but these definitions usually require some type of claimed economic need for the dismissal.<sup>723</sup>

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39 (China) (list of serious reasons); C. TRAV. art. L1234-1 (Fr.) (serious cause); BGB § 626(1) (Ger.) (compelling reasons); Minimum Notice and Terms of Employment Act 1973, § 8 (Ir.) (misconduct); C.c. art. 2119 (It.), *translated in THE ITALIAN CIVIL CODE, supra* note 457, at 450 (for cause); Labor Standards Act, art. 20 (Japan) (cause). *But see* LFT art. 47 (Mex.) (stating that a failure to provide written notice prevents an employer from arguing that there was just cause).

721. See Steinberg & Nakane, *supra* note 546, at 12 (noting that, in Japan, the government can provide subsidies to certain firms, such as those in manufacturing, that are facing economic difficulties and to programs that provide wage subsidies to workers on temporary leave, to workers temporarily transferred to different company, or to educate and train laid-off workers).

722. *Fair Work Act 2009* (Cth) ss 23, 121 (Austl.) (employees must have worked for an employer with at least fifteen employees for over one year); Canada Labour Code, c. L-2, § 235(1) (covering employees who worked continuously for the previous twelve months); Redundancy Payments Act 1967 (Act No. 21/1967), § 7(5) (Ir.), available at <http://www.irishstatutebook.ie/1967/en/act/pub/0021/index.html> (stating that employees must have worked 208 continuous weeks for the employer while over sixteen years old); Employment Rights Act, c. 18, §§ 86(1) (one month for unjust dismissal), 155 (two years for redundancy) (Gr. Brit.).

723. See *Fair Work Act 2009* (Cth) s 119(1) (Austl.) (defining redundancy as being caused by an employer no longer in need of the type of work provided by an employee or caused by the employer's insolvency or bankruptcy); SSA, THE AMERICAS, *supra* note 113, at 65–66 (Braz.); Canada Labour Code, c. L-2, § 235 (stating that severance covers redundancy and other dismissals without cause); Labor Contract Law, arts. 40(3), 46(3) (China) (providing no specific redundancy definition but providing similar compensation if an objective circumstance on which a labor contract is based has been altered significantly and made performance of the contract impossible); C. TRAV. arts. L1233-2, -3 (Fr.) (stating that redundancy applies to "real" and "serious" economic reasons); *id.* arts. L1234-1, -5 (stating that severance applies to anything short of serious misconduct by an employee); KSchG § 1(2) (Ger.) (redundancy caused by "urgent operational conditions"); Redundancy Payments Act 1967 § 7(2) (Ir.) (defining redundancy as when an employer ceases doing business or when an employee's work has or is expected to cease or diminish; also establishes rebuttable presumption that dismissal is redundancy); C.c. art. 2120 (It.), *translated in THE ITALIAN CIVIL CODE, supra* note 457, at 451 (providing severance pay for any loss of employment); Employment Rights Act, c. 18, §§ 139(1), 163(2) (Gr. Brit.) (stating that redundancy is tied to any shutting down of operations for which an employee was hired, shutting down of operations in an employee's location, or eliminating an employee's type of work); *see also* Minimum Notice and Terms of Employment Act 1973 § 4(2) (Ir.) (mandating notice of intent to declare redundancy that varies from one to eight weeks, depending on an affected employee's tenure); LFT art. 434 (Mex.) (failing to

All surveyed countries except Brazil mandate special rules for collective dismissals. However, there is far more variance in how these countries define covered collective dismissals, with thresholds ranging from five to fifty laid-off employees—generally lower than the U.S. threshold.<sup>724</sup>

Once the special rules are triggered, advance notice of the collective dismissal is required, which ranges from “as soon as practicable” to sixteen weeks.<sup>725</sup> Finally, every surveyed country but

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specifically define redundancy, but providing similar compensation if dismissal results from certain economic situations).

724. *Fair Work Act 2009* (Cth) s 530(1) (Austl.) (fifteen or more employees because of an economic, technological, structural, or other similar reason); Canada Labour Code, c. L-2, § 212 (fifty or more employees over a four-week period); Labor Contract Law, art. 41 (China) (twenty employees or 10% of the workforce because of bankruptcy, serious problems with production or business operations, change in products, significant technical or operational change, or significant change in an objective economic circumstance upon which a contract is based that makes performance impossible); C. TRAV. arts. L1233-15, -39 (Fr.) (ten or more employees over thirty days); KSchG § 17(1) (Ger.) (dismissal of at least five employees in firms with twenty-one to fifty-nine employees; dismissal of twenty-five employees or 10% of the workforce in firms with sixty to 499 employees, and dismissal of thirty employees in firms with 500 or more employees); Protection of Employment Act 1977 (Act No. 20/1977), § 6(1) (Ir.), available at <http://www.irishstatutebook.ie/1977/en/act/pub/0007/index.html> (dismissal of at least five employees in firms with more than twenty and less than fifty employees; ten dismissals in firms with fifty to 100 employees; dismissal of 10% of employees in firms with between 100 and 300 employees; and thirty dismissals in firms with 300 or more employees); L. n. 223/1991, art. 24 (It.) (dismissal of five or more employees within 120 days in firms with fifteen or more employees); LFT art. 433 (Mex.) (dismissals because the business closes or because there is a permanent reduction in work caused by *force majeure*, bankruptcy, economic hardships that makes employer unable to continue paying for operations, or depletion of mined resources; no minimum employee threshold); Trade Union and Labour Relations (Consolidation) Act, 1992, c. 52, §§ 188, 193 (Gr. Brit.) (dismissal of twenty or more employees within ninety days or less); 29 U.S.C. § 2102(a)(2), (a)(3) (2012) (requiring, for employers with over 100 employees, notice of a plant closing leading to at least fifty layoffs over a thirty-day period or mass layoff of either 500 employees or one-third of employees over a thirty-day period); *see also* OECD, DETAILED DESCRIPTION, *supra* note 91, at 30 (Canadian provincial rules vary from ten to fifty employees, with only one province lacking collective-dismissal rules); *EPLex: Japan*, *supra* note 533 (requiring thirty employees to be laid off within a one-month period; employer must show that reasonable efforts were made to avoid the dismissals).

725. *Fair Work Act 2009* (Cth) ss 530(2), 530(4), 531 (Austl.) (requiring notice “as soon as practicable” to the employee representative and also requiring the specified government official to provide the reasons for dismissals, number and category of employees, and timing of dismissals); Canada Labour Code, c. L-2, § 212 (requiring sixteen weeks’ notice to employees and the Minister of Labour); Labor Contract Law, art. 41 (China) (requiring thirty days’ notice to employees or a union and, after soliciting input, requiring notice to the appropriate state official); C. TRAV. arts. L1233-15, -39 (Fr.) (requiring written notice of thirty days for economic dismissals in companies with fewer than fifty employees; requiring, after consultation with a works council and other relevant administrative officials, the same notice in companies of fifty or more employees that plan

Brazil, China, and the United States requires pre-layoff consultation that seeks to minimize the number of layoffs, create fair procedures for the layoffs, and assist affected employees.<sup>726</sup> Failure to provide the required notice or consultation will often mean that the collective dismissal was unlawful and that the employer must pay the affected employees' salaries until the requirements are satisfied.<sup>727</sup>

a dismissal of ten or more employees within a thirty-day period; for dismissal of fewer than ten employees within a thirty-day period, the notice period is seven days before the date of interview unless the employee is managerial, in which case the period is fifteen days); KSchG § 17(2), (3) (Ger.) (requiring thirty days' notice to the relevant works council and notice to employees with a report that gives information about the reasons for the dismissals, the number and categories of employees to be dismissed, and how any severance payments will be calculated); Protection of Employment Act 1977 §§ 9–10, 14(1) (Ir.) (requiring thirty days' notice to the Minister of Labor); L. n. 223/1991, art. 24 (It.) (requiring notice to employees, the labor authorities, and any relevant union; the amount of time depends on negotiations between parties but could be over eighty-two days); Employment Measure Law, arts. 24(2), 27(1) (Japan) (requiring notice to a government agency); LFT arts. 435, 900–19 (Mex.) (requiring notice to any relevant union and the Conciliation and Arbitration Board if cause is claimed to be the company's lack of profitability or lack of mined resources); Trade Union and Labour Relations (Consolidation) Act, c. 52, §§ 188, 193 (Gr. Brit.) (requiring thirty days' notice to any relevant union or employee representative).

726. *Fair Work Act 2009* (Cth) s 531 (Austl.) (requiring consultation with an employee representative to avoid or mitigate layoffs); Canada Labour Code, c. L-2, §§ 215, 216, 221(1) (requiring consultations with employees to minimize layoffs and assist laid-off employees); Labor Contract Law, art. 41 (China); C. TRAV. arts. L1233-10, -15 to -16, -61, -64 (Fr.) (providing information to and consulting with employees or a relevant representative over rehiring priority and the employer's strategy for implementing any layoffs; large employers—over fifty employees—must give the relevant labor authorities and the union a job preservation plan that attempts to limit layoffs and reclassify dismissed workers); KSchG § 1(3) (Ger.) (requiring, generally, an agreement with a works council regarding if and how and layoffs are to occur and regarding attempts to minimize impact on employees); Protection of Employment Act 1977 §§ 9–10, 14(1) (Ir.) (providing information to and consulting with employee representatives regarding any options to avoid layoffs and a process of identifying employees for layoffs); *Collective Dismissal/Redundancy: Italy*, *supra* note 494 (allowing for employees or unions to examine an employer's plans; seek out job security agreements; and, if no agreement can be reached, participate in conciliation); Employment Measure Law, arts. 24(2), 27(1) (Japan) (requiring consultation with any relevant union or employee representative over the reason for the layoffs, their timing, the affected employees, and re-employment assistance; the employer must also follow a reasonable standard for choosing employees); LFT art. 436 (Mex.) (requiring no formal consultation but requiring the consideration of an employee's seniority); Trade Union and Labour Relations (Consolidation) Act, c. 52, §§ 188, 193 (Gr. Brit.) (requiring consultation to mitigate the need for layoffs and harm to employees if layoffs occur).

727. *Fair Work Act 2009* (Cth) s 532 (Austl.) (failure to comply can lead to make-whole relief, but no reinstatement, pay in lieu of reinstatement, or severance pay); Protection of Employment Act 1977 §§ 11, 13, 14(2) (Ir.) (failure to comply with notice requirement can result in fines up to US\$806 (£500) and starting layoffs before thirty-day waiting period can result in fines up to US\$4,834 (£3,000)). Averager of the minimums described *supra* note 224 and accompanying text.

### C. Unemployment Assistance

With the exception of Mexico, every surveyed country provides unemployment benefits. Yet, the amount of benefits provided varies considerably. The countries with minimum monthly benefits range from as low as US\$92.97 per month (China)<sup>728</sup> to as high as US\$1,103.10 per month (France);<sup>729</sup> however, most minimums are in the US\$300–\$800 per month range.

When it comes to maximum benefits, France is the extreme outlier with a US\$9,235.80 monthly maximum;<sup>730</sup> other countries with relatively high maximum caps are Japan (US\$3,009.30 per month),<sup>731</sup> Germany (US\$2,346.66 per month),<sup>732</sup> and Canada (US\$1,906.40 per month).<sup>733</sup> Australia,<sup>734</sup> Ireland,<sup>735</sup> and Italy<sup>736</sup> occupy a middle ground with monthly caps in the US\$900–\$1,500 per month range, while other countries have lower caps such as Brazil (US\$672.56 per month)<sup>737</sup> and the United Kingdom (US\$436.44 per month).<sup>738</sup> Finally, China has a low cap of US\$108.75 per month.<sup>739</sup> Because of state variations, the United States lacks any one set of maximum or minimum benefits, but the range of maximum benefits is between US\$940 and US\$2,612 per month—approximately in the middle of the surveyed countries.<sup>740</sup> The United States' \$1,299.72 monthly average unemployment benefits also appear to occupy a middle ground.<sup>741</sup> That average is in the same range as Canada, which

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728. Average of the minimums described *supra* note 224 and accompanying text.

729. Based on the average daily minimum (US\$36.77), multiplied by thirty days, described *supra* note 291 and accompanying text.

730. Based on the average daily maximum (US\$307.86), multiplied by thirty days, described *supra* note 292 and accompanying text.

731. Based on the average daily maximum (US\$100.31), multiplied by thirty days, described *supra* note 558 and accompanying text.

732. See *supra* note 344 and accompanying text.

733. See *supra* note 150 and accompanying text (citing Canada's maximum weekly benefit of C\$501.00, or US\$476.60).

734. See *supra* note 79 and accompanying text (stating that Australia's weekly maximum is US\$230.14).

735. See *supra* note 417 and accompanying text (stating that Ireland's weekly maximum is US\$245.06).

736. See *supra* note 505 and accompanying text (stating that Italy's maximum is US\$1,458.61 per month).

737. See *supra* notes 114–15 and accompanying text (explaining the means-tested calculation used to determine the amount of unemployment assistance in Brazil).

738. See *supra* note 651 and accompanying text (explaining that the United Kingdom's weekly maximum is US\$109.11).

739. Average of maximums described *supra* note 224 and accompanying text.

740. See *supra* note 701 and accompanying text (describing ranges of weekly maximums).

741. See *supra* note 702 and accompanying text (describing weekly average benefit).

averages US\$1,185.92 per month in benefits for low-wage workers and US\$2,012.88 per month for high-wage workers.<sup>742</sup> The only other country with data on average benefits is China, in which one of its highest paying provinces had an average of US\$169.15 per month, but China's maximum awards were the lowest in the survey.<sup>743</sup>

#### D. Enforcement

The biggest difference in unjust dismissal systems between the United States and the rest of the world is found in their enforcement of the laws. It is a difference that is generally not limited to dismissal law, but within this area, its effects result in a counter-intuitive twist: the United States' enforcement exceptionalism reverses the thrust of the usual exceptionalism claim. The United States' high-stakes enforcement system, in which employees have a low probability of winning a very high award, represents an extreme departure from the high probability/lower payout pattern of other countries. From the standpoint of optimal enforcement of employment law norms, however, it is unclear whether the U.S. system offers less risk of sanction for employers than other countries. In these other countries, the economic cost of unjust dismissal is more predictable than it is in the United States, but the ultimate costs for the wayward American employer may be higher.

##### 1. Adjudication Systems

Most countries use specialized employment courts or adjudicators to resolve dismissal claims,<sup>744</sup> although a few countries, including the United States, use general courts or adjudicators.<sup>745</sup> These specialized enforcement systems, in contrast to expensive U.S.

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742. See *supra* note 152 and accompanying text (describing weekly average benefits).

743. See *supra* note 223 and accompanying text (describing Shenzhen average).

744. *Fair Work Act 2009* (Cth) s 390 (Austl.); C.L.T. arts. 644, 647 (Braz.); Canada Labour Code, R.S.C. 1985, c. L-2, §§ 241–42 (Supp. 2013); C. TRAV. arts. L1454-2, R1454-19 to -23 (Fr.); GKG § 42 (Ger.); Unfair Dismissals Act 1977 (Act No. 10/1977), § 8 (Ir.), available at <http://www.irishstatutebook.ie/1977/en/act/pub/0010/print.html>; L. n. 604/1966, art. 6 (It.) (employment division of general civil courts); Sugeno, *supra* note 545, at 530 (Japan); Employment Rights Act, 1996, c. 18, § 111 (Gr. Brit.); EMIR, *supra* note 660, at 386 (Gr. Brit.). Also, both Nova Scotia and Quebec use administrative adjudicators. Labour Standards Code, R.S.N.S. 1989, c. 246, §§ 17, 20–21; Respecting Labour Standards, R.S.Q. 1979, c. N-1.1, §§ 124–30 (Supp. 2013).

745. See Labor Dispute Mediation and Arbitration Law, arts. 40, 49 (China) (stating that, after the initial labor arbitration, a party can appeal an adverse decision to a generalized court); LFT arts. 688, 698 (Mex.) (providing general administrative and judicial adjudicators); see also Sugeno, *supra* note 545, at 530–31 (stating that parties can use general or specialized courts in Japan).

courts, also typically try to keep litigation costs low so that employees have the ability to enforce their dismissal rights.<sup>746</sup>

One important reason for the establishment of labor courts or employment tribunals in countries other than Canada and the United States is that the general civil courts in those countries are, for all practical purposes, inaccessible to nearly all workers. This is because in those countries the risk of losing a lawsuit involves not only paying for one's attorney and winning nothing, but also having to pay the costs and attorney's fees of the other side.<sup>747</sup> Except for very high-level employees with substantial financial resources or employees who clearly have a winning case, employees will stay away from the general courts. In contrast, the "loser pays" rule for attorney's fees does not apply in labor courts or employment tribunals—thus encouraging workers to bring forth more claims for unjust dismissal. The tribunals also provide a relatively informal process where employees may be able to present their claims without the assistance of counsel.

The U.S. litigation system relies on the general civil courts, although employers are increasingly requiring their employees to enter into predispute arbitration agreements that divert cases into private arbitration tribunals.<sup>748</sup> The U.S. court litigation system is expensive and formal, and it is difficult for employees without

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746. See, e.g., Labor Dispute Mediation and Arbitration Law, art. 53 (China) (amendments made arbitration free and lowered court costs; claims have since doubled, see *China's Labour Dispute Resolution System*, *supra* note 244); De Matteis, *supra* note 510, at 5 (stating that 43% of civil cases in Italy were labor- and employment-related); Goerke & Pannenberg, *supra* note 334, at 7 (highlighting the impact of the Protection Against Dismissals Act on court costs and the likelihood of receiving remedy in Germany). But see Santos, *supra* note 602, at 72 (stating that barriers to enforcement lead only 6% of unjustly terminated Mexican employees to sue); Vause & De Holanda Palhano, *supra* note 99, at 613 (noting that most Brazilian employees do not sue because of the expense and an alternate payment scheme); Yamakawa, *supra* note 520, at 490 (noting that Japanese courts are not readily accessible to most employees); *New Fees for Tribunals from 2013, Says George Osborne*, *supra* note 629 (noting that bringing an unjust dismissal case before a U.K. tribunal used to be free, but a yet-to-be-determined fee was slated to be imposed in 2013).

747. See generally THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE (Christopher Hedges, Stefan Vogenauer & Magdalena Tulibacka eds., 2010) (comparing the costs of civil litigation in countries around the world).

748. See Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 562–64 (2001) (examining the potential benefits of arbitration in employment cases in the United States); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1579 (2005) (asserting that many "employers facing a high volume of low-value claims . . . opt for employment arbitration").

attorneys to function effectively within it.<sup>749</sup> On the other hand, employees in U.S. courts do not risk everything in bringing a lawsuit because losers do not pay the winners' attorney's fees.<sup>750</sup> Moreover, the availability of contingency-fee arrangements (prohibited in most of the other countries surveyed<sup>751</sup>), one-way shifting rules in favor of prevailing employees, and class actions (unavailable in the other surveyed countries, except for Canada<sup>752</sup>) promote a level of access to the civil courts that makes the United States an outlier. The impact of civil juries—available only in the United States for employment and other cases—raises the monetary stakes and uncertainty of outcome for employers.

## 2. Statutes of Limitations

Other aspects of the enforcement mechanisms of the surveyed unjust dismissal regimes include the considerable variation in statutes of limitations, which range from as low as fourteen days to as high as two years.<sup>753</sup> The time to litigate an average case is highly variable as well; some countries are able to fully litigate cases—including appeals—in as little as eighty-seven days while others take as long as

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749. See Estreicher, *supra* note 748, at 564; Laura Beth Nielsen, *Paying Workers or Paying Lawyers: Employee Termination Practices in the United States and Canada*, 21 LAW & POL'Y 247, 271–78 (1999) (comparing and contrasting one company's prospective costs of termination in the United States and in Canada).

750. See Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 328–29 (2013).

751. THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE, *supra* note 747, at 132.

752. The idea is gaining attention among academics, but it has not resulted in legal acceptance of representative litigation. See Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 6 (2009); Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269, 269–71 (2001).

753. *Fair Work Act 2009* (Cth) s 394(2)(a) (Austl.) (twenty-one days from dismissal); C.L.T. art. 11 (Braz.) (two years); Labor Dispute Mediation and Arbitration Law, art. 27 (China) (one year); C. TRAV. art. L1235-7 (Fr.) (twelve months from notice); KSchG §§ 4, 7 (Ger.) (three weeks from notice); Redundancy Payments Act 1967 (Act No. 21/1967), § 24 (Ir.), available at <http://www.irishstatutebook.ie/1967/en/act/pub/0021/index.html> (one year for redundancy pay); Unfair Dismissals Act 1977 (Act No. 10/1977), § 8(2) (Ir.), available at <http://www.irishstatutebook.ie/1977/en/act/pub/0010/print.html> (six months for unfair dismissal claim); L. n. 604/1966, art. 6 (It.) (sixty days from notice); Employment Rights Act, 1996, c. 18, § 111(2) (Gr. Brit.) (three months). Also, the statute of limitations is six months from the date of dismissal in Nova Scotia and forty-five days in Quebec. Labour Standards Code, R.S.N.S. 1989, c. 246, § 23(4); Respecting Labour Standards, R.S.Q. 1979, c. N-1.1, § 123 (Supp. 2013).

almost 1,500 days.<sup>754</sup> The United States' processing of employment cases appears to fall somewhere in between these two numbers. For instance, one study of U.S. employment cases found that the median time required to adjudicate the initial phase of a case was 613 days for federal employment discrimination trials, 708 days for state employment discrimination trials, 630 days for state non-discrimination trials, and between 215 and 350 days for employment arbitrations.<sup>755</sup>

### 3. Remedies

The variation in remedies, especially with regard to countries' actual practices, is also considerable. In the United States, employment-related claims, usually arising under federal and state employment discrimination laws, are often eligible for a wide range of remedies, including backpay, compensatory damages, punitive damages, reinstatement, and other equitable forms of relief.<sup>756</sup> Some of these claims have caps on compensatory and punitive damages<sup>757</sup>—or lack some of these damage elements altogether<sup>758</sup>—but backpay and “frontpay” in lieu of reinstatement are limited only by the

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754. As detailed below, the average time of resolving claims in some fashion is as follows: Australia (eighty-seven days); Brazil (1,277 days); France (343 days); Germany (436 days); Japan (74.2 days for initial hearing only). See FWA, ANNUAL REPORT, *supra* note 85, at 12 (Austl.) (stating that in 2009–2010, 93% of claims finalized at or before conciliation, taking average of eighty-seven days); PROSKAUER, *supra* note 120, at 26 (Braz.) (three to four years); Fraisse et al., *supra* note 308, at 15 (Fr.) (343 days); *EPLex: Germany*, *supra* note 316 (14.2 months); Araki, *supra* note 561, at 11 (Japan) (74.2 days for hearing); *see also* Labor Dispute Mediation and Arbitration Law, art. 43 (China) (mandating forty-five days for arbitration decisions in most cases). In Italy, the process can take up to a total of 1,479 days. See Nat'l Inst. of Statistics, Table 1, *supra* note 512 (It.) (782 days for trial); Nat'l Inst. of Statistics, Table 2, *supra* note 513 (It.) (697 days for appeals).

755. See Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Jan. 2004, at 44, 51 tbl.3 (finding, in survey of 1999–2000 employment cases (using 1996 data for state court cases), 246 days for high-wage-earner non-discrimination arbitrations, 349 days for high-wage-earner discrimination arbitrations, 216 for low-wage-earner non-discrimination arbitrations, and 236 days for low-wage-earner discrimination arbitrations).

756. See, e.g., 42 U.S.C. § 2000e-5(g) (2006).

757. See, e.g., *id.* § 1981a(b)(3) (mandating graduated caps for combined compensatory and punitive damage awards under Title VII of between \$50,000 and \$300,000, depending on the size of employer). For most state discrimination and other employment laws, recoverable damages are not capped. Plaintiffs often sue under both federal and state laws to receive the benefit of favorable federal law and the uncapped recovery possible under the state-law claim.

758. See National Labor Relations Act, 29 U.S.C. § 160(c) (2012); Hirsch, *supra* note 15, at 146.

mitigation of damages principle.<sup>759</sup> As discussed below, the result is a system in which employees, particularly those with high wages, can earn substantial awards.

The unfair dismissal relief available in the U.S. system sharply contrasts with the recoveries available in other countries. Although most countries allow for backpay economic damages,<sup>760</sup> and a few permit compensatory damages,<sup>761</sup> punitive damages are nonexistent. Further, when damages are available, they are typically limited by maximum allowable caps.<sup>762</sup> Thus, the damages available to dismissed employees in these countries do not approach the potentially large awards of American high-wage employees. On the other hand, they provide a more equitable system in which lower and more predictable awards are available to a larger number of employees.<sup>763</sup>

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759. See *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 854 (2001); RESTATEMENT (THIRD) OF EMP'T LAW § 9.05(c) (Tentative Draft No. 6, 2009).

760. *Fair Work Act 2009* (Cth) ss 391–92 (Austl.); C.L.T. arts. 477–78 (Braz.) (backpay only: one month's salary for every year of service); Canada Labour Code, R.S.C. 1985, c. L-2, § 242(4) (Supp. 2013); Labor Contract Law, arts. 48, 87 (China) (including double severance pay in lieu of reinstatement); C. TRAV. art. L1235-3 (Fr.); KSchG §§ 10–12 (Ger.); L. n. 300/1970, art. 18 (It.) (reinstatement or fifteen months' salary in lieu of reinstatement); L. n. 604/1966, art. 8 (damages); Unfair Dismissals Act 1977 (Act No. 10/1977), § 7(1) (Ir.), available at <http://www.irishstatutebook.ie/1977/en/act/pub/0010/print.html>; Yamakawa, *supra* note 520, at 490 (Japan); LFT art. 48 (Mex.) (allowing three months' pay in lieu of reinstatement); Employment Rights Act, 1996, c. 18, § 113–17 (Gr. Brit.). Also, both Nova Scotia and Quebec permit those remedies. Labour Standards Code, R.S.N.S. 1989, c. 246 § 21(3) (Can. N.S.); Respecting Labour Standards, R.S.Q. 1979, c. N-1.1, § 128 (Supp. 2013) (Can. Que.).

761. Labor Contract Law, arts. 80, 87 (China) (permitting double damages); Unfair Dismissals Act 1977 § 7(1)(c) (Ir.); Eguchi, *supra* note 573, at 451 n.10 (Japan); Employment Rights Act, c. 18, § 123 (Gr. Brit.).

762. KSchG § 10 (Ger.) (one-year salary cap); Unfair Dismissals Act 1977 § 7(1)(c) (Ir.) (stating that unjust dismissal damages are capped at 104 weeks' pay); L. n. 223/1991, art. 1(3) (It.) (stating that redundancy benefits are capped at a maximum of two years' pay but can be extended up to two more years); Employment Rights Act, c. 18, § 111 (Gr. Brit.); Employment Rights (Increase of Limits) Order, 2012, S.I. 2012/3007, art. 3 (Gr. Brit.) (increasing the maximum award for unjust dismissal and redundancy under the Employment Rights Act); see also *Fair Work Act 2009* (Cth) s 392(6) (Austl.) (capping payment in lieu of reinstatement at twenty-six weeks' pay).

763. Montana's Wrongful Discharge from Employment Act ("WDEA") is an isolated example of this model in the United States. Prompted by employers' dislike of Montana's willingness to provide tort damages to successful employment law plaintiffs, the WDEA and its new just-cause provision were enacted in part to provide more certain and limited liability. MONT. CODE ANN. § 39-2-905 (2011) (permitting punitive damages, but not pain and suffering, emotional distress, compensatory damages, or reinstatement); see also Hirsch, *supra* note 15, at 101–02.

Differences exist for non-monetary relief as well. For instance, many countries allow for reinstatement awards,<sup>764</sup> but most of these countries rarely order reinstatement in practice.<sup>765</sup> In the United States, outside of the union-represented sector, reinstatement is also not typically ordered. However, in the United States, reinstatement is a presumptive entitlement for prevailing employees in discrimination and other cases; courts also may order significant frontpay awards in lieu of reinstatement.<sup>766</sup>

#### 4. Success Rates

This divergence between dismissal law on paper versus in practice illustrates the limitations of the American exceptionalism argument as it is usually cast. The failure to account for differences in countries' enforcement schemes—particularly access to civil courts, limits on monetary damages, and reinstatement—undermines proponents' attempts to compare the U.S. experience with that of other countries.<sup>767</sup> Although the available data on unjust dismissal enforcement are often spotty, they underscore the wide variances between the U.S. employment litigation system and the rest of the world. One example of this contrast is the success rate of dismissal claimants.

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764. See, e.g., *Fair Work Act 2009* (Cth) ss 391–92 (Austl.); Canada Labour Code, c. L-2, § 242(4); C. TRAV. art. L1235-3 (Fr.) (providing reinstatement as an option); Unfair Dismissals Act 1977 § 7(1) (Ir.); L. n. 300/1970, art. 18 (It.) (reinstatement); Yamakawa, *supra* note 520, at 490 (Japan); LFT art. 48 (Mex.); Employment Rights Act, c. 18, §§ 112–17 (Gr. Brit.); 29 U.S.C. § 160(c) (2012); 42 U.S.C. § 2000e-5(g) (2006) (Title VII).

765. Among the countries with available remedial information, those that rarely order reinstatement are: Australia, Brazil, Canada, France, Ireland, Mexico, and the United Kingdom. OECD, DETAILED DESCRIPTION, *supra* note 91, at 16 (Austl.) (“rarely or sometimes made available”); EAT, ANNUAL REPORT 2011, *supra* note 427, at 12–13 (Ir.) (showing only six orders for reinstatement out of the 2,107 claims referred to the Employment Appeals Tribunal in 2011). *But see* OECD DETAILED DESCRIPTION, *supra* note 91, at 17 (stating that China received a maximum score of three for reinstatement, although it is unclear whether this is still true given the new employment laws; Italy awarded reinstatement “fairly often”; Japan’s reinstatement orders were described as “frequent”). Germany’s experience is less clear as some sources suggest that reinstatement is common, while others do not. *Compare* Weiss, *supra* note 314, at 334 (“normal remedy” is reinstatement), *with* OECD, DETAILED DESCRIPTION, *supra* note 91, at 17 (“possible” but rare).

766. Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers’ Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607, 624 n.118 (1993–94).

767. OECD, DETAILED DESCRIPTION, *supra* note 91, at 17 (stating that reinstatement orders are normal for U.S. NLRA and civil rights cases, but “almost never made available” in breach of contract cases).

According to existing studies, employees' chances of achieving an unjust dismissal award or settlement of some kind ranges from 44% to 80% in the studied countries.<sup>768</sup> However, among the countries with relevant data, most had employee success rates of 70% or more while the United Kingdom and Ireland had rates at the lower end of this spectrum.<sup>769</sup> The success rates for U.S. employees are even lower. A recent study of federal employment discrimination litigation by Kevin Clermont and Stewart Schwab found that claimants that manage to get a case to trial have win rates of almost 28.5% at the district court level.<sup>770</sup> Yet getting to trial is not an easy matter, and, as a result, employees have a success rate of only 15% for all cases filed in federal district courts.<sup>771</sup> This rate falls further once appeals are considered, with employment discrimination plaintiffs winning less than 11% of all cases brought to federal district and appellate courts.<sup>772</sup> Another study by Theodore Eisenberg and Elizabeth Hill, which examined state court non-discrimination claims that went to trial, found a win rate of almost 57%.<sup>773</sup> But that study excluded cases that did not go to trial; if those cases were included and were consistent with the Clermont and Schwab findings, the overall win rate would likely be halved.<sup>774</sup>

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768. See *China's Labour Dispute Resolution System*, *supra* note 244 (showing in one province that employees at least partially won 58.6% of arbitration cases and 80.6% of court cases); Fraisse et al., *supra* note 308, at 15 (finding that employees win 75% of cases that go to trial in France); EAT, ANNUAL REPORT 2011, *supra* note 427, at 15, 17 (finding that employees win 44% of decided unjust dismissal claims and 75% of redundancy claims in Ireland; most claims settle prior to decision); Araki, *supra* note 561, at 11 (showing that 70% of cases brought to Japanese tribunals settled); Kaplan et al., *supra* note 607, tbl.1 (finding in a 1990–1998 study that approximately 70% of claims in Mexico settled, 14% went to trial, and 17% were dropped); MIN. OF JUSTICE, *supra* note 11, at tbl.2 (noting that from April 2011 through March 2012, 45% of claims in the United Kingdom were settled or successful in court).

769. See *supra* note 768.

770. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 129 (2009) (examining data on employment civil rights cases from 1979 to 2006); see also Eisenberg & Hill, *supra* note 755, at 48 tbl.1 (finding that 36.4% of employment discrimination plaintiffs won at trial in federal court, and 43.8% of same type of plaintiffs won in state trial court from 1999 to 2000).

771. Clermont & Schwab, *supra* note 770, at 127–28 (finding that employees win less than 4% of pretrial adjudications).

772. *Id.* at 110, 117 (showing that 10.9% of employment discrimination cases brought in federal district courts were successful and that 30% of employee pretrial wins and 41% of trial wins were reversed at the appellate level).

773. Eisenberg & Hill, *supra* note 755, at 48 tbl.1.

774. See *supra* note 771 and accompanying text.

The Eisenberg and Hill study provides additional insights into the U.S. system. First is the growing importance of arbitration in the United States, which, in theory, could approximate the administrative or specialized enforcement found in many countries.<sup>775</sup> The study also demonstrates the importance of claimants' wages as a predictor of likely outcomes. The study suggests that employees' wages are a far more important factor in claimants' chances of success than the choice of forum. For example, the study found that high-wage employees won approximately 65% of employment arbitrations involving non-discrimination claims and 40% of arbitrations involving discrimination claims—higher than the overall findings for court claims.<sup>776</sup> However, low-wage employees won only 40% of non-discrimination arbitrations and 24% of discrimination arbitrations.<sup>777</sup> These findings suggest that arbitration may lead to a higher chance of success—even low-wage employees have success rates on par with the overall rates in court—but that being a high-wage employee is a much stronger indicator of success.

### 5. Award Sizes

In addition to the effect on success rates, the capped remedies found in other countries result in much lower monetary awards than those seen in the United States. For instance, one study examined unjust dismissal awards for employees with at least twenty years of service and, in nine of the countries surveyed here, found averages that varied from six to twenty-four months' salary.<sup>778</sup> An average of those awards amounts to just over twelve-and-one-half months' salary.<sup>779</sup> Yet, these averages were based solely on the most senior employees, overstating likely recoveries for most other employees.<sup>780</sup>

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775. Sherwyn et al., *supra* note 748, at 1579 (noting growing number of larger companies using arbitration).

776. Eisenberg & Hill, *supra* note 755, at 48 tbl.1. The study defined high-wage as earning \$60,000 (\$81,208.71 in 2013 dollars, indexed from 2000) or more per year. *See id.* at 46.

777. *Id.* at 48 tbl.1.

778. OECD, DETAILED DESCRIPTION, *supra* note 91, at 16-17 (finding the following approximate average awards for an employee with twenty years of service: six months' pay in Australia; 7.7 months' pay in Brazil; sixteen months' pay in France; eighteen months' pay in Germany; twenty-four months' pay in Ireland; fifteen months' pay in Italy; six months' pay in Japan; sixteen months' pay in Mexico; eight months' pay in the U.K.; information for China excluded because under old law).

779. This average weighted each country equally. *See id.* As of 2010, the median annual wage in the U.S. was \$39,959 (\$42,710.34 in 2013 dollars), and the median was \$26,364 (\$28,179.27 in 2013 dollars). *See Measures of Central Tendency for Wage Data*, SOC.

Available data confirm the modesty of overall unjust dismissal awards outside the United States. Among the six countries with relevant data, the average awards for unjust dismissal claims in 2013 U.S. dollars varied from \$5,749.95<sup>781</sup> to \$27,119.39.<sup>782</sup> China and Mexico were at the low end of that range, while European countries typically had higher awards that varied from \$10,000 to \$40,000.<sup>783</sup>

Awards were similar for redundancy and severance claims, even though they generally involve special limitations or formulas.<sup>784</sup> A 2003 study of redundancy claims by a hypothetical forty-year-old white-collar employee estimated awards in the US\$10,000 range for

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SECURITY ADMIN., <http://www.ssa.gov/OACT/COLA/central.html> (last visited Jan. 2, 2014).

780. OECD, DETAILED DESCRIPTION, *supra* note 91, at 16–17 (using data from employees with at least twenty years' experience).

781. This figure was based on an average of the two Mexican provinces' tribunal awards. *See infra* note 782.

782. *See MIN. OF JUSTICE, supra* note 11, at tbl.5 (U.K. mean £9,133 (US\$14,403.96)); Ho, *supra* note 193, at 51–52 (describing Chinese awards as being very modest and noting that in 2007, the average award in Shenzhen was only ¥30,000 (US\$4,423.48 in 2013 dollars)); EAT, ANNUAL REPORT 2011, *supra* note 427, at 13 (noting that Irish unjust dismissal awards ranged from €0 to over €25,000 (US\$37,565.89), with an average of €18,047.85 (US\$27,119.39)); Kaplan et al., *supra* note 607, at tbls.1–2 (finding in a 1990–1998 study of Mexican awards that the average termination awards in two tribunals were 23,629 and 56,387 pesos (US\$3,395.96 and US\$8,103.94), and settlement awards were 27,133 pesos and 76,455 pesos (US\$3,899.56 and US\$10,988.12)); *see also* Lei No. 8.036, de 11 de Maio de 1990, art. 18 § 1 (creating Brazil's FGTS system).

783. *See supra* notes 250 (China), 617 (Mexico) and accompanying text.

784. *See Fair Work Act 2009* (Cth) s 121 (Austl.) (redundancy pay varies from four to twelve weeks' salary based on employees' tenure); Lei No. 8.036, de 11 de Maio de 1990, art. 18 § 1 (Braz.) (FGTS system provides funds tied to each employee if dismissal is without just cause); Canada Labour Code, R.S.C. 1985, c. L-2, § 235(1) (Supp. 2013) (severance payment is worth the greater of five days' pay or two days' pay for every year of work); Labor Contract Law, arts. 46–47 (China) (employer must pay one month's salary for every year of work with caps for highly paid employees); C. TRAV. art. R1234-2 (Fr.) (severance pay is one-fifth of employee's monthly pay for each year of service, with additional two-fifteenths monthly pay for each year of service beyond ten years); KSchG §§ 1(a), 10 (Ger.) (one-half month's salary for every year worked if redundancy is uncontested; cap of one year's salary for all redundancy awards); DEP'T OF ENTER., TRADE & INNOVATION, *supra* note 426, ¶ 3 (Ir.) (redundancy pay is two weeks' pay, capped at €600 (US\$782.09) per week, for every year of service, plus one extra week's pay); C.c. art. 2120 (It.), *translated in THE ITALIAN CIVIL CODE, supra* note 457, at 451 (severance formula equals one year's salary divided by 13.5 plus an additional 1.5% for each year of service and an adjustment for inflation); LFT arts. 162, 426, 436 (Mex.) (stating that the employer must pay three months' salary plus a premium of twelve days' pay for every year of service; if new machinery or restructuring caused the layoffs, pay is four months' salary and twenty days' pay for every year of service; if collective dismissal, employees receive three months' salary and a premium of twelve days' pay for every year of service). There is little data on the success rates of these claims. *But see* Goerke & Pannenberg, *supra* note 334, at 7 (finding that one-fourth of all dismissed employees in Germany receive redundancy payments).

France and the U.K.<sup>785</sup> Another study found an average award of approximately US\$17,000 in Germany.<sup>786</sup> In the 2003 study, Italy was notable for its estimated award of US\$38,486.66, which was significantly higher than the US\$23,507.67 E.U. average.<sup>787</sup> Yet even Italy's redundancy awards are far lower than the typical awards in U.S. employment cases.<sup>788</sup>

Comparisons of U.S. employment awards with other countries are by necessity imperfect given the absence of a nominal unjust dismissal claim in the United States. That said, the available data on U.S. employment claims leave little doubt that average American monetary damages far exceed those of other countries. The Eisenberg-Hill study provides examples from several different types of employment claims. For example, employees who won state non-discrimination employment trials received a median award of \$93,034 and a mean award of \$625,722; awards were even higher for discrimination cases, with a median of \$280,137 and a mean of \$647,623.<sup>789</sup> The study found similar amounts for federal employment discrimination trial awards, which had a median of \$203,699 and a mean of \$455,163.<sup>790</sup> The study also examined arbitration awards based on employees' incomes. Successful high-wage employees were awarded a median of \$128,559 and a mean of \$286,558 in non-discrimination cases, but low-wage employees received only a median of \$18,204 and a mean of \$41,595.<sup>791</sup>

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785. See *Minimum Redundancy Pay 'Lower in UK'*, *supra* note 676 (stating that the mean is £5,128 (US\$10,798.82) in the U.K. and £5,000 (US\$10,529.27) in France).

786. See Goerke & Pannenberg, *supra* note 358, at 73 (finding a mean German redundancy award of €11,100 (US\$16,982.10) and median of €6,500 (US\$9,944.46)).

787. See Amble, *supra* note 302; see also *Australians Earn Less Severance Pay*, *supra* note 66 (stating that Australian employees receive average of 2.79 weeks' pay for every year worked, which is less than 3.6 weeks per year worldwide average).

788. See *infra* notes 789–92 and accompanying text.

789. See Eisenberg & Hill, *supra* note 755, at 50 tbl.2. The study reported awards in 2000 dollars, which have been converted to 2013 dollars. All of the data on employment discrimination cases in this and other studies cited probably understates the size of discrimination termination awards, as they include claims that do not involve terminations, such as a failure to give a raise, and are therefore usually worth less money. The same may be true of non-discrimination cases, although probably to a lesser extent given that most non-discrimination state claims are for breach of contract, which typically involve termination.

790. See *id.* These figures have been converted to 2013 dollars.

791. See *id.* The study also examined discrimination arbitration cases but had only a sample of two high-wage employee awards and six low-wage employee awards. *Id.* (finding that successful high-income discrimination claimants were awarded a median of \$43,988 and a mean of \$43,988, while low-wage discrimination claimants received a median of \$75,925 and a mean of \$351,627). All figures have been converted to 2013 dollars.

A different study examined 2004–2010 U.S. jury awards and found the following, as converted into 2013 dollars: in wrongful termination cases, the median award was \$292,233 and the mean award was \$887,106; in employment discrimination cases, the median award was \$222,930 and the mean was \$675,224.<sup>792</sup> The substantial difference between the median and mean awards illustrates the high degree of variability and lack of predictability of U.S. employment awards.

### III. LESSONS FROM ABROAD

This Article demonstrates that, on many levels, the U.S. approach to employment protection is quite different than most of the world. The United States is the only country, except Canada, that lacks national statutory protection against unjust dismissals (and Canada has fairly robust common-law protection for dismissed workers).<sup>793</sup> Legal procedural requirements such as notice and an explanation for dismissal are also far weaker in the United States than in many other countries. These disparities have led to the widely held view that the United States' protection against unjust dismissals lags far behind the rest of the world—that is, the American exceptionalism argument. Yet, this superficial analysis is not the whole story.

As an initial matter, the United States does provide considerable recourse for some types of dismissal claims—such as discrimination or state common-law claims—which might provide de facto protection for what would otherwise be an unjust dismissal claim in other countries.<sup>794</sup> Moreover, although most other countries have national

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792. See *Client Advisory: Wage and Hour Litigation Update – May 2012*, AMWINS GROUP (May 2012), <http://www.amwins.com/Pages/Client%20Advisories/wage-and-hour-litigation2-5.2012.aspx> (reporting a wrongful termination median award of \$259,975 and a mean of \$789,184; an employment discrimination median of \$198,322 and a mean of \$600,690). The awards were converted to 2013 dollars, based on the assumption that the study's figures occurred in 2007, the middle of the study. This finding is consistent with a Bureau of Justice Statistics study of federal trial outcomes from 1990 to 2006, where successful employment discrimination claims resulted in a median award of \$158,460 (\$226,577 in 2013 dollars, indexed from 1998). See TRACEY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990–2006, at 7 (2008), available at <http://citeseerx.ist.psu.edu/viewdoc/download?jsessionid=4895969E355AFB36920496C88B697C3B?doi=10.1.1.160.4286&rep=rep1&type=pdf> (noting also that the twenty-fifth and seventy-fifth percentile ranges were \$52,065 (\$74,446) and \$374,265 (\$535,151)).

793. See *supra* Part I.C.3.

794. Additionally, some U.S. employers may voluntarily provide some form of protection against at-will dismissals; previous attempts at making such estimates suggest

unjust dismissal laws, their coverage can vary significantly; even where unjust dismissal laws seem strong on paper, it may be difficult to bring or win claims.<sup>795</sup> Most importantly, in other countries the likelihood of receiving an award and the size of that award varies considerably and, in nearly all cases, the average monetary award for unfair dismissal is well below what successful employment claimants typically receive in the United States.

All of these factors, particularly the limited remedies, mean that the laws in other countries are in practical effect often far different from what an American reader might assume when noting another country's formal prohibition against unjust dismissal. The assumption that such protection triggers the same sort of institutional arrangements that accompany substantive employment claims in the United States has led, in part, to widespread endorsement among U.S. academics of the American exceptionalism critique.<sup>796</sup> The critique places a great amount of normative weight on the presence *vel non* of national unjust dismissal legislation and proposes that enacting an unjust dismissal statute is all that is needed to make the United States fall in line with the rest of the world.

This Article suggests that the reality is more complex. Although the United States (and Canada) stand out for not explicitly providing general statutory protection against unjust dismissal, the actual protection against unfair treatment by employers may be quite comparable to the level of protection in unfair dismissal regimes. The irony is that the one area in which the United States is truly unique—its low-probability/high-award enforcement system—appears to represent the biggest threat to the exceptionalism argument. This is because the U.S. enforcement system may in fact impose higher costs on employers for noncompliance with employment laws than previously acknowledged. Although substantial data are required for any firm conclusion, the expected costs of an unlawful dismissal in the United States may exceed the expected costs of an unlawful dismissal in most of the other countries examined.<sup>797</sup> Thus, simply adding an

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that the number is not inconsequential. *See supra* note 6 and accompanying text (estimating that 150,000 workers were terminated without cause in the United States in 1983).

795. *See supra* notes 747–53 and accompanying text.

796. *See supra* note 7 and accompanying text.

797. This Article's comparison of unjust dismissal regimes focuses on the overall firing costs associated with each regime. In most of the surveyed countries, the expected cost of an unjust dismissal is relatively fixed because of the certain nature of the remedies permitted for unjust dismissal claims. In contrast, the extent of liability for an unlawful dismissal in the United States is far less certain. Expected costs of an unlawful dismissal

unjust dismissal statute to the United States may not result in a system that looks like the rest of the world; instead, it could result in a system that is arguably more protective of employee rights and serves as more of an impediment to employer discretion than do the systems of most other countries.<sup>798</sup>

When weighing the possibility of reform, it is also important to consider the likelihood that cultural differences may be driving many of the differences between the United States and the rest of the world. Currently, the expensive and low-success/high-award model of American employment law is reflected in most other areas of law in the United States. Therefore, it is possible that there exists a cultural bias for this system, fueled, the authors suspect, by the availability of civil juries—a situation that would be difficult or impossible to overcome. If true, this casts doubt on the political feasibility of moving to a formal cause regime in this country.

As of this writing, there appears to be no consensus to change the background rule for employment dismissal in the United States. The case of the Montana Wrongful Discharge from Employment Act (“WDEA”) is instructive. Montana enacted a law coupling just-cause protection with an enforcement system that encourages arbitration and caps damages.<sup>799</sup> Employers were the principal backers of the law

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for a U.S. employer will be based on the often substantial costs of litigation, the probability that a challenge will be successful, and the likely recovery associated with a successful challenge. Given the limited quality and quantity of data available, this Article can only roughly estimate the relative differences of these costs in various countries. The authors hope this Article will help spur more detailed research in the future, so that meaningful comparisons can be drawn.

798. This Article is not arguing here for (or against) the flexibility of U.S. arrangements. *See supra* notes 7–8 and accompanying text. It may be that more flexible regulation of unjust dismissal will increase employers’ incentives to hire workers—one of the premises for Italy’s Fornero Reform. *See supra* note 456 and accompanying text. The data presently available appear too limited to make such a claim conclusively, although if true this would be an additional advantage of the U.S. system.

799. For example, under the WDEA, a party that rejects the other party’s valid offer of arbitration (requiring certain procedural steps) and subsequently loses the litigation may be required to pay attorney’s fees incurred after the offer. MONT. CODE ANN. § 39-2-915 (2011). The WDEA also permits up to four years of backpay, *id.* § 39-2-905(1), but does not permit awards for pain and suffering, emotional distress, compensatory damages, or reinstatement, *id.* § 39-2-905(3). The WDEA does permit punitive damages, but only where there is “clear and convincing evidence” of “actual fraud or actual malice” by an employer. *Id.* § 39-2-905(2). In addition, the National Conference of Commissioners on Uniform State Laws’ proposed Model Employment Termination Act (“META”) has not been enacted anywhere, although it does have limits on typical remedies as well. MODEL EMPLOYMENT TERMINATION ACT § 7 (1999); *see* Hirsch, *supra* note 15, at 114–16 (describing the substantive provisions of META). *See generally* Theodore J. St. Antoine,

because they disliked the tort recoveries available under the state's common-law rulings.<sup>800</sup> The plaintiffs' bar was adamantly opposed to the WDEA and brought an unsuccessful constitutional challenge in the Montana Supreme Court, arguing that the law reduced access to the courts by replacing the employee-generous common-law rule with a statutorily capped recovery.<sup>801</sup>

The controversy attending the enactment of the WDEA example highlights the political economy story that explains in good part the absence of wrongful dismissal legislation in the United States. In addition to other claimed benefits of such legislation,<sup>802</sup> most employees in the United States would likely prefer an unjust dismissal statute with capped recoveries administered by a United Kingdom-style employment tribunal, even with no juries or class actions, to the U.S. court-based system and its signature low probability of success and very high recoveries for successful claimants. This is because most employees do not have access to competent counsel, which is necessary as a practical matter to navigate the court system.<sup>803</sup> In contrast, most U.S. attorneys who represent employees prefer the current system to an employment tribunal system like that of the United Kingdom. This is because attorneys pick the cases they take and prefer the leverage they gain from the threat of high awards in

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*The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361 (1994) (discussing META).

800. Like most states, Montana had several common-law claims available to dismissed employees, but what was unusual was its provision for a tort, rather than contract, claim for breach of the doctrine of good faith and fair dealing. *See Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063, 1066–67 (Mont. 1980). However, Montana did not permit other claims commonly available to dismissed employees in most states, such as a claim for breach of an implied contractual provision. *See Reiter v. Yellowstone Cty.*, 627 P.2d 845, 849 (Mont. 1981).

801. *See Meech v. Hillhaven W., Inc.*, 776 P.2d 488, 489–91 (Mont. 1989).

802. It is claimed, for example, that a cause regime providing broad termination protection for all employees could mitigate some of the backlash observed against employment discrimination claims. *See, e.g.*, Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1490 (1996) (stating that backlash “influenc[es] federal judges to limit the protections of antidiscrimination statutes” and “is partially responsible for both the curtailment of federal statutory civil rights and the growth of state common law exceptions to the employment at will doctrine”); *see also* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1679–82 (1996) (describing resentment among members of unprotected classes); David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 948 (1996) (citing 1987 survey results showing that 34% of white respondents objected to federal enforcement of antidiscrimination laws protecting black workers and 33% of white respondents had no interest in the issue).

803. *See* Estreicher, *supra* note 748, at 564; Nielsen, *supra* note 749, at 271–78.

the jury-based court system.<sup>804</sup> Employee representatives in the United States would certainly welcome the addition of a wrongful dismissal statute on top of the causes of action available under the current system. Employers, on the other hand, might agree to wrongful termination legislation based on the U.K. model, but only if it provided the exclusive remedy in employment termination cases.<sup>805</sup> The inability to cross these divides has led to the current lack of national unjust dismissal legislation in the United States.

### CONCLUSION

Our purpose in this Article is to change the terms of the debate over the absence of national just-cause protection in the United States. In a survey of eleven other countries that the United States trades with, the American system is indeed singular. The U.S. employment relationship remains stubbornly terminable at will. However, there are numerous statutory and common-law exceptions to the at-will default rule. These exceptions, coupled with the opportunity for claimants to access the civil courts without fear of losing all of their resources and the chance to recover outsized awards (at several multiples of annual pay), suggest that the United States has an alternative system of employment termination regulation—a system in which employers internalize the substantial costs of noncompliance with employment law by creating a *de facto* cause regime.

This is ultimately an empirical claim, but one that can be answered only with a more in-depth description, including better data, on how the U.S. system and the cause regimes of other countries operate at the practical level. It cannot be answered by simple comparisons of the law on the books of the various countries. Accordingly, students of comparative employment law and advocates for change in U.S. employment law must take account of the law on the ground as well as the law on the books, both here and in other countries.

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804. See Nielsen, *supra* note 749, at 271–78.

805. See Samuel Estreicher & Zev J. Eigen, *The Forum for Adjudication of Employment Disputes*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 409, 419–20 (Cynthia L. Estlund & Michael L. Wachter eds., 2012).

**APPENDIX: SUMMARY TABLES<sup>806</sup>**

<i>Table 1: Australia</i>					
<b>Employment Protection Measures</b>					
Just Cause	Explanation	Severance/ Redundancy	Notice	Collective Dismissals	Unemployment Benefits
Yes	Yes	Yes	Yes	Yes	Yes
<b>Outcomes</b>					
Minimum & Maximum Awards			Average Awards		
Unjust Dismissal	Redundancy	Unemployment	Unjust Dismissal	Severance/ Redundancy	
<u>Maximum of the lesser of:</u> Twenty- six weeks' pay or \$59,396	Varies from four to sixteen weeks' salary depending on employee's tenure	<u>Minimum:</u> \$0/week  <u>Maximum:</u> \$230.14/week	For an employee with twenty years' tenure, approximately six months' pay (2008 estimate)	2.79 weeks' pay for every year worked (2009 estimate)	

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806. All dollar values in the Appendix are provided in 2013 U.S. dollars.

<i>Table 2: Brazil</i>					
<b>Employment Protection Measures</b>					
Just Cause	Explanation	Severance/ Redundancy	Notice	Collective Dismissals	Unemployment Benefits
Yes	No	Yes	Yes	No	Yes
<b>Outcomes</b>					
Minimum & Maximum Awards			Average Awards		
Unjust Dismissal	Severance/ Redundancy	Unemployment	Unjust Dismissal	Severance/ Redundancy	
8.5% of employee's monthly salary for each month worked, adjusted for inflation; if the dismissal or layoff is determined to be without just cause, the employer pays the employee an additional penalty equivalent to 40% of the above amount		<u>Minimum:</u> \$359.46/month  <u>Maximum:</u> \$672.56/month	7.7 months' pay for an employee with twenty years' tenure (2008 estimate)		

<i>Table 3: Canada, Federal Statutory Law</i>					
<b>Employment Protection Measures</b>					
Just Cause	Explanation	Severance/ Redundancy	Notice	Collective Dismissals	Unemployment Benefits
No	No	Yes	Yes	Yes	Yes
<b>Outcomes</b>					
Minimum & Maximum Awards			Average Awards		
Severance		Unemployment	Unemployment		
<u>Formula is greater of either:</u> five days' pay or two days' pay for every year of service		<b>Minimum:</b> 55% of average weekly earnings  <b>Maximum:</b> \$476.60/week	<b>High Wage:</b> \$503.22/week  <b>Low Wage:</b> \$296.48/week  (2011 figures, reported in 2013 dollars)		

*Table 4: China*

<b>Employment Protection Measures</b>					
Just Cause	Explanation	Severance/ Redundancy	Notice	Collective Dismissals	Unemployment Benefits
Yes	Yes	Yes (limited to change in “objective conditions”)	Yes	Yes	Yes
<b>Outcomes</b>					
Minimum & Maximum Awards			Average Awards		
Unjust Dismissal	Severance/ Redundancy	Unemployment	Unjust Dismissal	Severance /Redund.	Unemploy.
Double the severance award	One month's salary for every year of work; the monthly salary is limited to three times the local average wage and years of service are limited to twelve	<u>Minimum:</u> \$92.97/month  <u>Maximum:</u> \$108.75/month  (2011 figures reported in 2013 dollars)	\$4,423.48 for an urban area; \$442.35 in a manufacturing district (2007 estimate, reported in 2013 dollars)		Shenzhen: \$169.15/ month (2012 figure, reported in 2013 dollars)
<b>Employee Success Rates</b>					
Unjust Dismissal					
58.6% for arbitration cases (2005 data) 80.6% for court cases (2005 data)					

*Table 5: France*

Employment Protection Measures					
Just Cause	Explanation	Severance/ Redundancy	Notice	Collective Dismissals	Unemployment Benefits
Yes	Yes	Yes	Yes	Yes	Yes
Outcomes					
Minimum & Maximum Awards			Average Awards		
Unjust Dismissal	Severance/ Redundancy	Unemployment	Unjust Dismissal	Severance/ Redundancy	
<u>Minimum:</u> Six months' wages for employees with two years of service; no minimum for newer employees or those of employers with fewer than eleven employees	Minimum: One-fifth of monthly pay for each year of service, with additional two-fifteenths of monthly pay for each year of service beyond ten years	<u>Minimum:</u> \$36.77/day <u>Maximum:</u> \$307.86/day	Sixteen months' pay for employee with twenty years' tenure (2008 estimate)	\$10,529.27 for forty-year-old employee earning \$43,924.64 per year (2003 figures, reported in 2013 dollars)	
Employee Success Rates					
Unjust Dismissal					
Labor Court Cases: 63.1% settle or result in at least partial win for employees (2007 data) 75% win rate after trial (2007 data)					

*Table 6: Germany*

<b>Employment Protection Measures</b>					
Just Cause	Exploitation	Severance/ Redundancy	Notice	Collective Dismissals	Unemployment Benefits
Yes	Yes	Yes	Yes	Yes	Yes
<b>Outcomes</b>					
Minimum & Maximum Awards			Average Awards		
Unjust Dismissal	Severance/ Redundancy	Unemployment	Unjust Dismissal	Severance/ Redundancy	
<u>Maximum:</u> One year's salary  Employees between fifty and fifty-four years old and employed for at least fifteen years may receive up to fifteen months' pay; Employees fifty-five years old and older with at least twenty years of service may receive up to eighteen months' pay	One-half monthly salary for every year of work if the employer offers severance in the notice letter and redundancy is uncontested	<u>Maximum, for ALG I Benefits:</u> \$2,364.66/month	Eighteen months' pay for an employee with twenty years' tenure (2008 estimate)	<u>Median:</u> \$9,944.46  <u>Mean:</u> \$16,982.10  (figures based on 2005, 2006, and 2009 studies, reported in 2013 dollars)	

<i>Table 7: Ireland</i>					
<b>Employment Protection Measures</b>					
Just Cause	Explanation	Severance/ Redundancy	Notice	Collective Dismissals	Unemployment Benefits
Yes	Yes	Yes	Yes	Yes	Yes
<b>Outcomes</b>					
Minimum & Maximum Awards			Average Awards		
Unjust Dismissal	Severance	Unemployment	Unjust Dismissal		
<u>Maximum:</u> 104 weeks' pay	Formula is two weeks' pay (max. of \$782.09/ week) for every year of service, plus one extra week's pay	Jobseeker's Benefit  <u>Minimum:</u> \$110.15/week  <u>Maximum:</u> \$245.06/week	\$27,119.39 (2011 figures, reported in 2013 dollars)		
<b>Employee Success Rates</b>					
Unjust Dismissal			Redundancy		
Employment Tribunal Cases: 46% (decided cases)			Employment Tribunal Cases: 46.4% (decided cases)		

*Table 8: Italy*

<b>Employment Protection Measures</b>					
Just Cause	Explanation	Severance/ Redundancy	Notice	Collective Dismissals	Unemployment Benefits
Yes	Yes	Yes	Yes	Yes	Yes
<b>Outcomes</b>					
Minimum & Maximum Awards			Average Awards		
Unjust Dismissal	Severance	Unemployment	Unjust Dismissal	Severance	
<u>Minimum:</u> If the employee is reinstated: backpay from time of dismissal to time of reinstatement; if employer forgoes reinstatement: two-and-one-half months' salary at firms with fewer than fifteen employees and twelve months' salary at larger firms  <u>Maximum:</u> If employee is reinstated: backpay from time of dismissal to time of reinstatement capped at twelve months' salary; if employer foregoes reinstatement: six months' salary at firms with fewer than fifteen employees and twenty-four months' salary at larger firms	Formula is one year's salary divided by 13.5 plus 1.5% for each year of service, adjusted for inflation, capped at twenty-four months' salary	<b>Maximum:</b> \$1,458.61/month	Fifteen months' pay for an employee with twenty years' tenure (2008 estimate)	\$38,486.66 for an employee with twenty years' tenure (2003 figure, reported in 2013 dollars)	

*Table 9: Japan*

<b>Employment Protection Measures</b>								
Just Cause	Explanation	Severance/Redundancy	Notice	Collective Dismissals	Unemployment Benefits			
Yes	Yes	No	Yes	Yes	Yes			
<b>Incomes</b>								
Minimum & Maximum Awards			Average Awards					
Unjust Dismissal		Unemployment	Unjust Dismissal					
No minimum or maximum		<u>Minimum:</u> \$23.69/day  <u>Maximum:</u> \$100.31/day  (2012 figures reported in 2013 dollars)	Six months' pay for an employee with twenty years' tenure; reinstatement frequent (2008 estimate)					
<b>Employee Success Rates</b>								
Unjust Dismissal								
70% settle during initial tribunal stage (Apr. 2006 to Mar. 2007 data)								

*Table 10: Mexico*

<b>Employment Protection Measures</b>								
Just Cause	Explanation	Severance/ Redundancy	Notice	Collective Dismissals	Unemployment Benefits			
Yes	Yes	Yes	Yes	Yes	No			
<b>Outcomes</b>								
Minimum & Maximum Awards			Average Awards					
Unjust Dismissal		Severance/ Redundancy	Unjust Dismissal					
No minimum or maximum except for twelve-month cap on backpay		Generally, the formula is three months' salary plus twelve days' pay for every year of service	<u>Total:</u> \$5,749.95 <u>Settlements:</u> \$7,443.84 <u>Court Decisions:</u> \$3,950.36 (1990–1998 data, reported in 2013 dollars)					
<b>Employee Success Rates</b>								
Unjust Dismissal								
70% of claims settle 5% of tried cases fully won by employee 28% of tried cases partially won by employee (1990–1998 data from two tribunals)								

*Table 11: United Kingdom*

<b>Employment Protection Measures</b>					
Just Cause	Explanation	Severance/ Redundancy	Notice	Collective Dismissals	Unemployment Benefits
Yes	Yes	Yes	Yes	Yes	Yes
<b>Outcomes</b>					
Minimum & Maximum Awards			Average Awards		
Unjust Dismissal	Redundancy	Unemployment	Unjust Dismissal	Redundancy	
<u>Minimum:</u> \$8,369.63  <u>Maximum:</u> \$684.79/week (basic award)  \$112,914 (compensatory award)	<u>Maximum:</u> \$684.79/ week	<u>Maximum:</u> \$86.44/week for single individuals ages eighteen to twenty-four  \$109.11/week for single individuals age twenty-five or older	<u>Median:</u> \$7,267.37  <u>Mean:</u> \$14,403.96 (2012 fiscal year figures, reported in 2013 dollars)		\$10,798.82 (2003 figure, reported in 2013 dollars)
<b>Employee Success Rates</b>					
Unjust Dismissal			Redundancy		
Employment Tribunal Cases: 8% won 42% settled (2012 fiscal year data)			Employment Tribunal Cases: 22% won 18% settled (2012 fiscal year data)		

<i>Table 12: United States</i>						
<b>Employment Protection Measures</b>						
Just Cause	Explanation	Severance/ Redundancy	Notice	Collective Dismissals	Unemployment Benefits	
No (one state has just cause)	No (a few states require it)	No	No	Yes	Yes	
<b>Outcomes</b>						
Maximum Awards		Average Awards				
Federal Discrim.	Unemp. Benefits	State	Fed. Disc.	Jury	Non-Discrim. Arbitration	
\$300,000 cap for compensatory and punitive damages under Title VII (no cap under most state claims)	\$235–\$653/week	<u>Non-Discrim:</u> <u>Median:</u> \$203,699  <u>Median:</u> \$93,034  <u>Mean:</u> \$625,722  <u>Discrim:</u> <u>Median:</u> \$280,137  <u>Mean:</u> \$647,623  (1996 data, reported in 2013 dollars)	<u>Median:</u> \$203,699  <u>Mean:</u> \$455,163  (1999–2000 data, reported in 2013 dollars)	<u>Non-Discrim:</u> <u>Median:</u> \$292,233  <u>Mean:</u> \$887,106  <u>Discrim:</u> <u>Median:</u> \$222,930  <u>Mean:</u> \$675,224  (2004–2010 data, reported in 2013 dollars)	<u>High-Wage Employees:</u> <u>Median:</u> \$128,559  <u>Mean:</u> \$286,558  <u>Low-Wage Employees:</u> <u>Median:</u> \$18,204  <u>Mean:</u> \$41,595  (1999–2000 data, reported in 2013 dollars)	\$324.93/week
<b>Employee Success Rates</b>						
State Employment			Federal Discrimination			
57%, trial court only 65% for high-wage employee arbitration 40% for low-wage employee arbitration			11%, including appeals 40% for high-wage employee arbitration 24% for low-wage employee arbitration			

*Table 13: Country Summary*

Country	Just Cause	Explan.	Severance/Redundancy	Notice	Collective Dismissals	Unemp. Benefits
Australia	Yes	Yes	Yes	Yes	Yes	Yes
Brazil	Yes	No	Yes	Yes	No	Yes
Canada	Yes (federal common law)	No	Yes (federal & one province has severance)	Yes (federal & provincial)	Yes (federal & provincial)	Yes
China	Yes	Yes	Yes (limited scope)	Yes	Yes	Yes
France	Yes	Yes	Yes	Yes	Yes	Yes
Germany	Yes	Yes	Yes	Yes	Yes	Yes
Ireland	Yes	Yes	Yes	Yes	Yes	Yes
Italy	Yes	Yes	Yes	Yes	Yes	Yes
Japan	Yes	Yes	No	Yes	Yes	Yes
Mexico	Yes	Yes	Yes	Yes	Yes	No
United Kingdom	Yes	Yes	Yes	Yes	Yes	Yes
United States	No (one state has just cause)	No (a few states require)	No	No	Yes	Yes