

2007

Governance of the Workplace: The Contemporary Regime of Individual Contract

Kenneth G. Dau-Schmidt

Indiana University Maurer School of Law, kdauscm@indiana.edu

Timothy A. Haley

Indiana University Maurer School of Law

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Dau-Schmidt, Kenneth G. and Haley, Timothy A., "Governance of the Workplace: The Contemporary Regime of Individual Contract" (2007). *Articles by Maurer Faculty*. Paper 168.

<http://www.repository.law.indiana.edu/facpub/168>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

GOVERNANCE OF THE WORKPLACE: THE CONTEMPORARY REGIME OF INDIVIDUAL CONTRACT

Kenneth G. Dau-Schmidt† and Timothy A. Haley††

I. INTRODUCTION

In the last three decades, the American labor market has undergone a dramatic transformation that has heralded enormous change in the governance of the workplace. The development of new information technology and the rise of the global economy have decentralized firm decisionmaking and brought the market into the firm in ways that have not previously been experienced.¹ These changes have made possible a new flexibility in many production methods allowing the vertical disintegration of firms, compartmentalization of production, and the outsourcing of work on the global market. Firms can now organize production on a global scale, coordinating parts production with suppliers from across the globe, assembling engines and transmissions in Asia, and doing final assembly in consumer countries, using subcontracted or temporary labor.² As a result, the paradigmatic employment relationship in the United States and other developed countries has moved away from a long-term relationship governed by internal labor market rules within a centralized managerial structure, toward a short-term relationship

† Willard and Margaret Carr Professor of Labor and Employment Law, Indiana University, School of Law-Bloomington. B.A. 1978, University of Wisconsin-Madison; M.A. 1981, University of Michigan-Ann Arbor, J.D. 1981, University of Michigan-Ann Arbor, Ph.D. (Economics) 1984, University of Michigan-Ann Arbor.

†† Associate, Barnes & Thornburg, LLP, B.A. 2002, University of North Carolina-Raleigh; J.D. 2006, Indiana University, School of Law-Bloomington.

1. PETER CAPPELLI, *THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORKFORCE* (1999).

2. Jane Slaughter, *Modular Assembly: The Ultimate in 'Contracting Out' Comes to North American*. LABOR NOTES 8 (May 1999).

governed by international labor markets in a decentralized managerial structure.³

This transformation in the labor market has contributed to the decline of union representation in America. The decline of hierarchical management and the role of internal labor market rules has robbed unions of some of their traditional function of representing employees within this hierarchy. Indeed, the new systems of decentralized management, employee involvement, and subcontracting, combined with some very generous Supreme Court interpretations of the "managerial" and "supervisory" exemptions under the National Labor Relations Act (NLRA)⁴ have left from 31-40% of employees uncovered by the Act.⁵ At the same time, the rise of the global labor market and the movement of manufacturing jobs overseas has undermined unions' bargaining power. American unions are representing less and less people, and bringing less clout to bear at the bargaining table. As a result, more and more American workers find themselves in a system of workplace governance based on individual contract within a context of common law rules and state and federal legislation rather than collective bargaining.

Moreover, the development of the new information technology, the rise of the global economy, and the corresponding decline of unions has led employers to negotiate or impose different terms in individual employment contracts. With the decline of long-term employment, employers have sought to protect their investments in training and intellectual property by requiring covenants not to compete and "follow-on" clauses, while attaining greater flexibility in the employment relationship by reducing expectations of job tenure and deferred benefits. Additionally, as union representation has declined in the private sector, employee litigation has come to loom large in the minds of employers and they have turned to alternative methods of dispute resolution to avoid litigation and communicate with their employees even in the absence of a union. In particular, the practice of arbitration pursuant to individual employment contracts, or "employment arbitration," has grown, encouraged by legislation and court decisions favoring the procedure.

3. Kenneth Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1 (2001).

4. See, e.g., *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

5. Adrienne E. Eaton & Jeffrey H. Keefe, *Introduction and Overview*, in *EMPLOYMENT DISPUTE RESOLUTION AND WORKERS RIGHTS IN THE CHANGING WORKPLACE* 1-26 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999).

Finally, perhaps in response to the decline of employee rights in the new economic regime, in recent years there has been a modest erosion of the traditional common law doctrine of employment at will that undergirds the American system of individual contract. In the last three decades, courts in many jurisdictions have developed common law exceptions to the employment at will doctrine for discharges in violation of public policy, public duty, implied contract, and the implied covenant of good faith and fair dealing. At the same time, many state legislatures have passed statutes protecting employees from discharge in certain cases. These common law and statutory exceptions have circumscribed an outline of basic common law protection against the worst abuses of employer power in the system of individual contract.

In this essay, we will set forth an empirical outline of the contemporary individual contract regime of workplace governance in the United States. Because of the breadth and diversity of the individual contract regime, this description cannot be exhaustive. We focus almost exclusively on what is known about the contents of individual contracts for employment and recent common law and statutory restrictions on the employment at will doctrine. Where appropriate we will make comparisons with the employee rights and procedures that exist under workplace governance through collective bargaining. In this way we hope to provide a brief description of what is currently known about the contours of this regime and how it varies from the regime of collective bargaining in order to provide a basis for further research.

II. TERMS OF THE INDIVIDUAL EMPLOYMENT CONTRACT

Freeman and Medoff (F&M) hypothesized that individual contract negotiations will result in fundamentally different contractual rights in the workplace than the exercise of collective voice in union negotiations.⁶ The formation of a union changes which workers the employer responds to in negotiating the terms and conditions of employment.⁷ In the world of individual bargaining, the employer responds to the interests of the “marginal worker” who is most likely to leave for another employer—a worker who is young and mobile. However, under collective bargaining, the union must satisfy the interests of the majority of its members, and so the employer is asked

6. RICHARD FREEMAN & JAMES MEDOFF, WHAT DO UNIONS DO? 10 (1984).

7. *Id.*

to respond to the interests of the “median worker”—a worker of more average characteristics for the represented workforce. In comparison with the young and mobile marginal workers, the older median worker is more likely to be interested in medical benefits, pension benefits, and job security. Moreover, the exercise of collective voice allows the employees to overcome information imperfections and negotiate efficient contract terms such as job security and greater protections for health and safety. Indeed the existence of an effective union that can exercise effective voice and enforcement mechanisms over an extended period of time can itself affect what rights the employees ask for in collective negotiations. For example, job security, job training, and deferred compensation provisions will all be easier to enforce when the workers protect each other through organization in a union. As a result, F&M⁸ predicted that organized employees would enjoy higher levels of fringe benefits, job security, and seniority protection than employees in nonunion workplaces and presented empirical evidence that this was true.

A. *An Overview of the Terms of Individual Employment Contracts and Collective Bargaining Agreements*

Table 1 reproduces the results of Galle and Koen's national survey⁹ of the individual employment contract terms used by 123 companies in the year 2000. These contracts were generally written for executives, managers, sales people, professional employees, and technical employees who may have very different interests from the employees traditionally protected under collective bargaining agreements. Shop floor production and service employees in nonunion plants generally have no written contract or are governed by employer handbooks that expressly disclaim any legally binding effect.¹⁰ Nevertheless it is interesting to examine Galle and Koen's findings to get an idea of the concerns addressed in these individual contracts for employment, and the solutions.

The results of Table 1 suggest that there is a great diversity in individual contracts for employment, and that they primarily address the employees' concerns about position, pay, and the conditions of termination, and the employers' concerns about non-competition,

8. *Id.* at 20, 61–68, 115.

9. William P. Galle, Jr. & Clifford M. Koen, *Reducing Post-Termination Disputes: A National Survey of Contract Clauses Used in Employment Contracts*, 9 J. INDIVIDUAL EMP. RTS. 227–41 (2000–2001).

10. See notes 117–25 *infra*.

trade secrets, and limitations on liability. Only six terms make it into a majority of the individual contracts: title (60%), salary (60%), bonus (54%), other compensation (55%), termination of contract (55%) and non-competition (55%). If one examines the terms that are included in at least a third of the individual contracts, one would have to add: terms of employment (duties) (42%), description of responsibilities (39%), required notice of termination (34%), payment upon separation (46%), trade secrets/proprietary information protection (49%), and limitations on employer liability (40%). As discussed below, although mandatory arbitration provisions appear in only 20% of the individual employment contracts, this is a far greater percentage than the minuscule percentage of such provisions prior to the 1991 case of *Gilmer v. Interstate/Johnson Lane Corporation*¹¹ discussed below. Galle and Koen's survey results are consistent with the predictions of economic theory in that they show a strong concern with the interests of marginal workers (current responsibilities and pay) and protecting the employer's interests in investment in the new, more transient, labor market (non-competition, trade secrets and employer liability).

The results of the Bureau of National Affairs survey of collective bargaining agreements for the years 1971, 1986, and 1995 are set out in Table 2. This table shows the percent of surveyed collective bargaining agreements that included particular contract terms in each year. Unfortunately the table cannot be extended beyond the examined period because the Bureau of National Affairs ended this useful survey in 1995. However, at least over the period 1971–1995, the BNA survey indicates a remarkable consistency in the basic terms of American collective bargaining agreements and a remarkable stability in the that basic formulae over time.

The BNA survey of collective bargaining agreements shows conformity with respect to the basic provisions of such agreements usually in the high 80s or 90s of percentage. Although there is some variation in the exact terms, almost all collective bargaining agreements have just cause protection (97%), an arbitration procedure (99%), life insurance (99%), a pension (99%), seniority provisions (72%), paid time-off, occupational health and safety provisions (89%), non-discrimination guarantees (89%), a union security clause (99%), and a no-strike clause (94%).

11. 500 U.S. 20 (1991).

Table 1
Percent of Employers Using Various Terms in Individual
Employment Contracts

Contract Term	2000
Dispute Resolution	
Choice of Law	24
Mandatory Arbitration	19
Remedies	20
Severability	32
Wavier of Rights	13
Duties	
Title	60
Terms of Employment	42
Scope/Description of Responsibilities	39
Working Conditions	
Primary Location	30
Overseas Assignments	7
Accommodation for Disabilities	10
Compensation	
Salary	60
Bonus Program	54
Other Compensation	55
Leave	7
Separation	
Required Notice of Termination	34
Termination of Contract	55
Consequences of Termination	31
Payment Upon Separation	46
Non-competition	55
Solicitation of Employees	25
Property Rights	
Intellectual Property Rights	32
Ownership of Company-Supplied Resources	20
Trade Secrets/Proprietary Information	49
Limitation of Employer Liability	49
Acknowledge Sexual Harassment Policy	8
Consensual Relations Between Employees	1
Entire Agreement	40
Limitation of Employee Liability	40
Indemnification	15
Renegotiation or Change in Relationship	15
Alteration of Contract	23
Change of Ownership or Control	32
Conditions of Renewal	25

Source: William P. Galle, Jr. & Clifford M. Koen, *Reducing Post-Termination Disputes: A National Survey of Contract Clauses Used in Employment Contracts*, 9 J. INDIVIDUAL EMP. RTS. 227-41 (2000-2001).

Table 2
Percent of American Collective Bargaining Agreements With Various Contract Terms

Contract Term	1971	1986	1995	Trend
Industrial Jurisprudence				
Just Cause	82	86	92	Up
Just Cause or Specific Offenses	92	94	97	Up
Grievance and Arbitration	94	99	99	Up/Level
Mediation and Conciliation	4	3	4	Level
Industrial Cooperation				
Union/Mgt Cooperation Clause	21	45	60	Up
Joint Committees	14	24	20	Up/Level
Quality of Work Life Comm.	n/a	4	8	Up
Occ. Safety & Health Comm.	31	49	53	Up
Restrictions on Management Rights				
Subcontracting	35	54	55	Up
Supervisory Performance of Work	52	59	58	Level
Technological Change	14	25	26	Up
Plant Shutdown or Relocation	8	26	23	Up
Fringe Benefits				
Life Insurance	70	96	99	Up
Hospitalization	67	79	30	Down
Major Medical	32	74	24	Down
Comprehensive Medical Ins	7	21	70	Up
Dental Insurance	n/a	79	85	Up
Pension	87	99	99	Up/Level
Seniority and Job Security				
Seniority Determine Layoffs	72	78	72	Level
Seniority Determine Promote	41	46	37	Down
Seniority Determine Transfer	21	40	62	Up
Guarantee of Work or Pay	5	13	16	Up
Severance Pay	34	41	39	Up/Level
Time-off (in days)				
Median Num of Vacation Days	20	25	25	Up/Level
Median Number of Holidays	9	11	11	Up/level
Family Leave	31	36	36	Up/Level
Personal Leave	69	72	76	Up
Occupational Health and Safety				
Occupational Health and Safety	65	84	89	Up
Non-Discrimination				
Race, Gender, National Origin	46	88	87	Up/Level
Union Affiliation and Support	40	41	58	Up
Union/Management Power				
Union Security	83	99	99	Up/Level
No Strike	90	94	94	Up/Level
No Lock-out	81	90	89	Up/Level
Right to Recognize Pickets	14	28	25	Up/Level

Sources: BNA, *Basic Patterns in Union Contracts* (1971, 1986 and 1995). The BNA sample consisted of 400 collective bargaining agreements from a cross section of industries, unions, company sizes and geographic areas.

Even the less commonly observed provisions of a union management cooperation clause (60%) and limitations on subcontracting (55%) show consistency generally not found in the individual employment contracts of Table 1. Consistent with the economic theory, these provisions show a primary concern with the interests of average workers in job security and benefits. They also suggest that unions do indeed help workers address public good problems such as health and safety. Issues such as the protection of the employer trade secrets and customer lists through non-competition clauses, which have loomed large in individual employment contracts, do not appear in the BNA survey. In part, the relative absence of these issues from collective bargaining agreements is due to the fact that the managerial, professional, technical, and sales people for which training costs, trade secrets, and customer lists are important are either excluded from coverage of the NLRA (managerial) or have traditionally not been organized. The lower turnover rates among union employees may also ameliorate these problems in union workplaces. It is also probably the case that few self-respecting unions would ever agree to something as draconian as a non-competition clause. However with the recent increases in organizing among professional employees and the increased demand by employers for such protections, it seems likely that, at least for some employees, the problems of training costs and the protection of employer intellectual property will become more important as an issue in collective bargaining.¹²

As previously mentioned, the basic terms of American collective bargaining agreements have remained remarkably stable over the examined period. The biggest changes in the terms of collective bargaining agreements over the period 1971–1995 appear to be that: use of various employer/employee committees has increased, provisions restricting management's right to subcontract or relocate work have increased, unionized employees have switched from hospitalization and major medical coverage to comprehensive medical insurance, seniority plays a less important role in promotion and a more important role in transfers, provisions regarding occupational safety and health have increased, and provisions prohibiting employer and union discrimination have become more common. Except for the rather dramatic increases in the percent of contracts restricting management rights to subcontract, adopt technological changes, and

12. N. Newman, *Trade Secrets and Collective Bargaining: A Solution to Resolving Tensions in the Economics of Innovation*, 6 EMP. RTS. & EMP. POL'Y J. 1 (2002).

shutdown or relocate the plant, there is little evidence in the BNA survey of the turmoil that has existed in the employment relationship in the last three decades. Apart from the BNA survey, there is evidence that unions have begun to address some employee privacy concerns raised by the new technology and changing employment relationship. A Bureau of Labor Statistics study of 614 collective bargaining agreements covering 1000 or more employees found that 380 of them, or 62%, had clauses covering some aspect of employee privacy. The privacy concerns addressed in these clauses included: the use of employment records, the use of medical records, drug testing and the use of test results, workplace surveillance, and employee privacy off of the job. Of the 380 contracts with privacy clauses, 70% had clauses restricting the use of employee records and 25% had clauses restricting drug testing or the use of test results.

In summary, a comparison of Tables 1 and 2 suggest that workplace governance under a regime of individual contract will lead to much more variability in the terms of employment and terms of employment that are much more in tune with the employer's interests in flexibility and the protection of his or her investments than under a regime of collective bargaining. The terms of individual employment contracts specify not only the employee's salary and benefits, but also the employer's rights to terminate the employee, retain intellectual property rights and trade secrets, and be free of the employee's competition after he or she leaves. The terms of collective bargaining agreements show much more uniformity and focus much more on the concerns of the average worker in job security, benefits, seniority, and occupational health and safety. Even the issue of whether the parties reduce their agreement to writing reflects this difference in concern. Although organized employees almost always seek to achieve a written contract, in the unorganized sector employees work without a written contract when that meets the employer's needs, and tend to achieve a written contract only when the employer has something to protect such as investments in training, trade secrets, or intellectual property. Because of the rise of the information technology and the decline of long-term employment, the issue of employers' ability to protect their investments in training, intellectual property, and trade secrets has only grown in the last two decades. We will now examine the available empirical data with respect to several specific and important terms of employment in greater detail.

B. At will Status and Management Discretion

Although comprehensive data is not available for all employees with respect to job security and seniority protection, the data that is currently available also supports F&M's analysis suggesting lower job security for employees under the regime of individual contract. Perhaps the best available data on the employment contract provisions of nonunion employees with respect to job security was obtained by Verkerke in a 1994 nationwide survey of 221 employers.¹³ Verkerke found that, in dealing with their employees on an individual basis, 52% of employers expressly contracted for employment at will, 33% of employers used no documents specifying the standard for discharge, and only 15% of employers expressly contracted for just cause protection. In contrast, the 1995 Bureau of National Affairs national survey of 400 collective bargaining agreements detailed in Table 2 shows that 92% of the agreements expressly contracted for just cause protection for the covered employees.¹⁴ The fact that so many employers never specify the conditions for discharge with respect to their nonunion employees while 97% of all collective bargaining agreements specify just cause and/or specific grounds for discharge¹⁵ is also consistent with F&M's argument that collective voice will bring the formalization of work rules to the workplace in order to limit employer discretion.

As previously discussed, even with the recent boom in nonunion grievance and arbitration procedures, the best estimate is that today only about 19% of nonunion employers contract for such procedures.¹⁶ By contrast, the Bureau of National Affairs survey shows that, in 1995, 99% of American collective bargaining agreements included a grievance and arbitration provision.¹⁷ With respect to the relative importance of seniority in union and nonunion workplaces, Kaufman and Kaufman, found that, given a worker's ability to do the job, seniority became the decisive factor in the determination of promotions in many more unionized than nonunionized plants.¹⁸ Kaufman and Kaufman also found seniority more important for layoff decisions in union plants than nonunion

13. J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 861-9 (1995).

14. BNA, BASIC PATTERNS IN UNION CONTRACTS 7 (1995).

15. *Id.*

16. Galle & Koen, *supra* note 9.

17. BNA, *supra* note 14.

18. Robert S. Kaufman & Roger T. Kaufman, *Union Effects on Productivity, Personnel Practices, and Survival in the American Automotive Parts Industry*, 8 J. LAB. RES. 332-50 (1987).

plants, but the result was not statistically significant. More than 72% of collective bargaining agreements in 1995 provided for seniority as a determinative factor in layoffs, promotion, or transfer.¹⁹ Although reliable figures on employers' use of seniority in making layoff and promotion decisions regarding nonunion employees are not available, it seems doubtful that the adherence to the practice in the nonunion sector compares with that in the union sector.

There is an extensive literature on the impact of employee organization on management practices.²⁰ Although many of these practices are conducted merely by management policy, at least in the union sector, they undoubtedly also have an impact on employee contractual rights. Several authors have found that unions limit employer flexibility, for example in staffing practices²¹ and the assignment of work.²² Union contracts are more likely to contain guarantees that particular work will be done by particular employees in particular numbers. Such guarantees can have a negative impact on firms' ability to adjust to changing technologies and economic conditions. Another robust finding is that union employees enjoy more training opportunities both on and off the job.²³ This result may obtain because union workers have higher wages and longer tenures of employment, and so pose a better opportunity for investment in training.²⁴ However, there is also evidence that unions actively pursue training for their members with success.²⁵ Employee organization has been associated with the use of objective criteria in job evaluation and the formalization promotion processes.²⁶ Although some of this may be achieved through informal means, union contracts are much more likely to specify the means of evaluation and the procedure for transfer or promotion. Union workplaces are less likely to use

19. BNA, *supra* note 14, at 67.

20. Anil Verma, *What Do Unions Do in the Workplace? Union Impact on Management and HRM Policies*, 26 J. LAB. RES. 415 (2005).

21. PAUL N. GOODERHAM & ODD NORDHAUG, FLEXIBILITY IN NORWEGIAN AND BRITISH FIRMS: NEW CHALLENGES FOR EUROPEAN HUMAN RESOURCE MANAGEMENT (2000); Cynthia L. Gramm & John F. Schnell, *The Use of Flexible Staffing Arrangements in Core Production Jobs*, 54 INDUS. & LAB. REL. REV. 245 (2000-2001).

22. Kaufman & Kaufman, *supra* note 18.

23. Sean Kennedy et al., *The Effect of Trade Unions on the Provision of Training: Australian Evidence*, 32 BRIT. J. INDUS. REL. 565-80 (1994); Paul Osterman, *Skill, Training and Work Organization in American Establishments*, 34 INDUS. REL. 125 (1995).

24. Wiji Arulampalam & Alison L. Booth, *Training and Labor Market Flexibility: Is There a Tradeoff?*, 36 BRIT. J. INDUS. REL. 521 (1998).

25. Jason Heyes & Mark Stuart, *Bargaining for Skills: Trade Unions and Training at the Workplace*, 36 BRIT. J. INDUS. REL. 459 (1998).

26. Ignace Ng & Dennis Maki, *Trade Union Influence on Human Resource Management Practices*, 33 INDUS. REL. 121 (1994).

variable pay plans.²⁷ Although unions are more likely to accept gain-sharing programs based on objective criteria and group performance, they seem to resist individual incentive plans based on employer evaluations.²⁸ Finally, although union opposition can sometimes interfere with the employer's communication of firm goals,²⁹ the presence of a union in the workplace is associated with a higher incidence of employee communication through participation programs and committees.³⁰

C. *Fringe Benefits*

Bureau of Labor Statistics data on the level of participation in fringe benefits for private sector nonunion employees under individual contract, and private sector union employees under collective agreements, are presented in Table 3. These data show that employees under the regime of individual contract achieve significantly lower participation rates than union employees for all benefits, except for long-term disability insurance and defined contribution pension plans. In the year 2004, nonunion employees had less coverage for life insurance, short-term disability insurance, medical insurance, dental insurance, and vision insurance than their union counterparts. The Bureau's statistics also show that nonunion employees pay a higher percent of their insurance premiums than union employees (20% to 11% in 2004 for medical insurance). Although nonunion employees enjoyed the same participation rate with respect to defined contribution pension plans as union employees, this parity is swamped by union employees' greater participation in defined benefit plans. In the year 2004, only 47% of nonunion employees participated in pension plans while 81% of union employees participated in such plans. The fact that the majority of nonunion employees who have pension plans are in defined contribution plans while the majority of union employees who have pension plans are in defined benefit plans is consistent with F&M's analysis. The defined contribution plans prevalent among nonunion employees are more portable, reflecting the employers' catering to the needs of mobile marginal workers in individual bargaining. The

27. GORDON BETCHERMAN ET AL., *THE CANADIAN WORKPLACE IN TRANSITION* (1994).

28. Kaufman & Kaufman, *supra* note 18.

29. EDWARD COHEN-ROSENTHAL & CYNTHIA BURTON, *MUTUAL GAINS: A GUIDE TO UNION-MANAGEMENT COOPERATION* (2d ed. 1993).

30. Irene Goll, *Environment, Corporate Ideology, and Employee Involvement Programs*, 30 *INDUS. REL.* 138 (1991); John Benson, *Employee Voice in Union and Nonunion Australian Workplaces*, 38 *BRIT. J. INDUS. REL.* 453 (2000).

defined benefit plans favored by union employees place the risk of investment on the employer, reflecting union employees' greater bargaining power.

Table 3
Percent of Nonunion and Union Employees in the Private Sector
Participating in Various Fringe Benefits 1999, 2000, 2004

Fringe Benefit	Nonunion Employees			Union Employees		
	1999	2000	2004	1999	2000	2004
Insurance						
Life Insurance	53	51	47	78	82	62
Short-term Disability Ins.	33	30	35	66	69	66
Long-term Disability Ins.	25	25	28	32	28	28
Medical Insurance	52	49	50	73	75	81
Dental Insurance	30	27	33	52	53	68
Vision Insurance	15	15	19	39	41	50
Pension						
All Plans	44	44	47	79	83	81
Defined Benefit	16	13	15	70	69	69
Defined Contribution	35	36	42	39	38	42

Sources: Bureau of Labor Statistics, Employee Benefits in Private Industry, 1999; Bureau of Labor Statistics, Employee Benefits in Private Industry, 2000; Bureau of Labor Statistics, National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2004. Note that the percentages for "Defined Benefit" and "Defined Contribution" plans do not add up to the percentages for "All Plans" because some employees participate in more than one type of pension plan.

D. Covenants Not-to-Compete and Intellectual Property

Although the decline of long-term employment has given employers new flexibility and cost savings by shifting risk to employees, it has also created a number of problems for employers. Higher employee turnover raises evaluation, training, trade secret enforcement, and monitoring costs. This problem has been exacerbated by the recent decline in the number of employers who are

willing to give informative references on former employees.³¹ Employer background checks and company records raise issues of employee privacy. Short-term employees are also a poor investment for job training because they often move on to the next job before the employer can recoup his or her investment. Some employers have begun to contract for the repayment of training costs if the employee leaves within a certain period, or to ask for a non-competition agreement, in order to minimize this problem.³² Other investments that can be problematic for employers with high turnover are customer lists or trade secret information. Employees who leave an employer can take valuable information to a competitor, or perhaps set up a competing firm themselves. Although it is not well documented, there is a current trend in the American workplace for employers to impose non-competition clauses on almost any managerial, professional, technical, or sales employees who may have firm information, to prevent them from working for competitors after they leave the firm and potentially sharing what they know about the employer's business.³³ Finally, short-term employees need more monitoring than long-term employees. Of necessity, they are paid on the basis of current productivity without deferred compensation, and because they know the relationship is short-term, they have less disincentive to act opportunistically and shirk. The new information technology has provided many new ways of monitoring employee productivity, but surveillance and monitoring of communications once again raises privacy concerns for employees.

E. Individual Agreements to Arbitrate

The Supreme Court's recent interpretations of the Federal Arbitration Act (FAA) have fostered, or even encouraged, the adoption of individual grievance and arbitration procedures. Prior to

31. Kenneth Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 15-16 (2001).

32. *Id.* at 18-19.

33. A study by Peter Whitmore provides some indirect evidence of growing employer reliance on non-compete agreements. In his study, Whitmore analyzes trends in the enforcement of non-compete agreements in appellate courts between 1960 and 1980. In doing so, he notices that the number of cases that appear before appellate courts in the 1980s is significantly higher than the number of cases in the 1960s. Since "reported appellate decisions are only the tip of the iceberg," Whitmore reasons that there is at least circumstantial evidence that Americans have been increasingly utilizing non-competition agreements in employment contracts. Whitmore's reasoning has been largely accepted as supporting the widely held belief that the use of non-compete agreements and other employer protections have increased. Peter Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483, 484-485 n.2, 7-8.

the enactment of the FAA, agreements to submit a dispute to arbitration were revocable by either party any time before a final arbitration decision was rendered.³⁴ Under this common law “revocability doctrine,” neither side could effectively compel arbitration or stay litigation and at most only nominal damages in the amount of the costs of preparing for arbitration were available for breach. Courts reasoned that the parties could not knowledgeably waive their right to litigate in advance of knowing what was at issue. Even with the enactment of the pro-arbitration provisions of the FAA in 1925, it was not clear that individual pre-dispute employment arbitration agreements would be enforceable because it was not clear that, in the FAA, Congress had intended to allow parties to submit disputes over statutory rights to arbitration and section 1 of the FAA seemed to exempt “contracts of employment.” However, in the 1991 case of *Gilmer v. Interstate/Johnson Lane Corporation (Gilmer)*,³⁵ the Supreme Court held that, unless a party could show that Congress had intended to preclude waiver of a judicial forum for a statutory claim, pre-dispute agreements to arbitrate those statutory claims were enforceable under the FAA. In 2001, in the case of *Circuit City Stores, Inc. v. Adams (Circuit City)*,³⁶ the Supreme Court narrowly interpreted the “contracts of employment” exception in section 1 of the FAA to exempt only contracts by seamen, railroad men, and other employees similarly employed “in interstate commerce.” As a result of *Gilmer* and *Circuit City*, the general rule is that the pre-dispute arbitration agreements of today’s nonunion grievance and arbitration procedures are enforceable.

1. The Rise of Employer-Sponsored Grievance and Arbitration Procedures Under Individual Contract

Employer-sponsored grievance and arbitration procedures did not take off until the Supreme Court’s decision in *Gilmer*. One estimate suggests that at the time of the *Gilmer* decision less than 2% of the nonunion workforce had access to a grievance procedure that resulted in arbitration.³⁷ Since that time, nonunion employers have taken much greater interest in participatory systems for resolving

34. Katherine Van Wetzel Stone, *Employment Arbitration Under the Federal Arbitration Act*, in EMPLOYMENT DISPUTE RESOLUTION AND WORKERS RIGHTS 27, 37 (Adrienne E. Eaton & Jeffery H. Keefe eds., 1999).

35. 500 U.S. 20 (1991).

36. 532 U.S. 105 (2001).

37. Peter Feuille & Denise R. Chachere, *Looking Fair or Being Fair: Remedial Voice Procedure in Nonunion Workplaces*, 21 J. MGMT. 27 (1995).

workplace disputes including employee committees, mediation, ombudsmen, grievance procedures, and even grievance procedures that result in neutral arbitration. Although no comprehensive survey of the growth in the use of these systems exist, reliable estimates suggest that the percent of nonunion workplaces that employ grievance procedures that result in arbitration grew to about 10% in 1995, 16% in 1998,³⁸ and currently is approximately 19%.³⁹ Moreover, it has been estimated that over 50% of the nonunion workforce currently has access to some form of dispute resolution procedure.⁴⁰

There are several reasons for employers' increased interest in individual grievance procedures in the last twenty years. The consensus seems to be that the primary reason for their assent has been employer concern about the costs of litigation.⁴¹ In particular Stone⁴² has identified the increased number and costliness of discrimination suits in the 1990s as the driving factor, while Wheeler, Klass, and Mahoney⁴³ would also cite employer concern over potential liability for wrongful discharge or breach of contract suits under exceptions to the employment at will doctrine. Abraham and Voos found that, in the securities industry, the decision by a firm to adopt a grievance and arbitration system in the setting of individual employment contracts increased profits on average by 3%.⁴⁴ The desire of employers to avoid employee organization by aping union communication and procedures also plays a role. In a national survey of 36 employers with nonunion grievance and arbitration procedures, Bickner, Ver Ploeg, and Feigenbaum⁴⁵ found that 75% had adopted the procedures due to concerns over litigation costs, while only 10% cited union avoidance as a motivating factor. Colvin⁴⁶ examined the results of a survey of 3002 firms and found that both institutional factors, such as litigation costs and the expanded deferral of courts to

38. Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Procedures*, 16 OHIO ST. J. DISP. RES. 643 (2001).

39. Galle & Koen, *supra* note 9.

40. David Lewin, *Grievance Procedures in Nonunion Workplaces: Empirical Analysis of Usage, Dynamics, and Outcomes*, 66 CHI.-KENT L. REV. 823 (1990); HOYT N. WHEELER, BRIAN S. KLAAS & DOUGLAS M. MAHONY, *WORKPLACE JUSTICE WITHOUT UNIONS* 16-17 (2004).

41. WHEELER, KLAAS & MAHONY, *supra* note 40, at 17-20.

42. Van Wetzel Stone, *supra* note 34.

43. WHEELER, KLAAS & MAHONY, *supra* note 40, at 19.

44. Steven E. Abraham & Paula B. Voos, *Empirical Data on Employer Gains from Compulsory Arbitration of Employment Disputes*, 4 EMP. RTS. & EMP. POL'Y J. 341 (2000).

45. Mei L. Bickner, Christine Ver Ploeg & Charles Feigenbaum, *Developments in Employment Arbitration*, 52 DISP. RES. J. 8, 78-83 (1997).

46. Colvin, *supra* note 38; Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 INDUS. & LAB. REL. REV. 375 (2003).

nonunion arbitration, as well as human resource strategies, such as union avoidance, commonly contribute to employer decisions to adopt nonunion grievance and arbitration procedures.

2. Concerns About Employer-Sponsored Grievance and Arbitration Procedures

The growth of individual grievance procedures resulting in binding arbitration has been a matter of some controversy in the legal literature. Critics have set forth a number of important criticisms particularly as it relates to arbitration of issues of individual rights under general law.⁴⁷ First, arbitration often limits or eliminates important procedural protections. Arbitrators may not be expert in the area of law in question and generally do not follow the federal rules of evidence or procedure. Discovery rights may be cursory or non-existent, leaving the employee with no effective way to build his case. Second, arbitration procedures may not afford employees all of the remedies they would have had at law. Arbitrators cannot grant injunctions and may not be able to hear class actions or grant attorneys' fees or costs. Third, arbitration may limit or interfere with our ability to develop a precedential body of law. Arbitrators may not issue a written opinion or give reasons for their decisions. For this reason, the EEOC, Department of Labor, and the NLRB have all, at various times, taken positions against pre-dispute agreements to arbitrate individual legal controversies. Fourth, employees are often asked to share in the costs of employing an arbitrator, and it is feared that this will unjustly discourage employee grievances. In union arbitration the union pays the employee's share while in administrative and court proceedings the taxpayer foots the bill.

More generally, it is argued that, because of the asymmetry of the employment relationship, employers may have unfair advantages in individual arbitrations that they don't enjoy in union arbitrations. As Malin has pointed out, the reality of the situation is that individual agreements to arbitrate don't come from bargained for exchange, but instead are unilaterally imposed by the employer.⁴⁸ It is feared that the employer will use her unilateral power to impose arbitration procedures that are unfair and favorable to her or to select a biased arbitrator⁴⁹ and that fear has borne fruit in more than a few cases.⁵⁰

47. WHEELER, KLAAS & MAHONY, *supra* note 40, at 37-44.

48. Martin H. Malin, *Privatizing Justice—But By How Much? Questions that Gilmer Did Not Answer*, 16 OHIO ST. J. DISP. RES. 589 (2001).

49. Van Wezel Stone, *supra* note 34.

The unilateral nature of the agreement also raises serious questions about the effectiveness of the employee's waiver of the right to a jury trial, which, at least under Title VII, must be "knowingly, voluntary and intelligent." Even in the absence of express bias, it is worried that arbitrators may cater to employer interests in order to secure future business. As well intentioned as they might be, arbitrators will know that their being selected for future work will more likely depend on the employers satisfaction in the case than on the satisfaction of an employee they will likely never see again. Bingham has also argued that the employer has the advantage of experience and the incentive of precedent as a "repeat player" in individual arbitration.⁵¹ Under union arbitration, both sides to the dispute are repeat players with experience and interest in precedent. It has long been known in the legal literature that, when one side to a controversy is a repeat player and the other side is a "one-shot player," the law evolves to inefficient rules that favor the repeat player.⁵²

Supporters of nonunion arbitration counter with arguments of their own.⁵³ Proponents contend that nonunion arbitration enjoys many of the same advantages as union arbitration. It is faster, less

50. See, e.g., *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) in which the Fourth Circuit found that the employer sponsored arbitration plan was a "sham system" "utterly lacking in the rudiments of even-handedness." *Id.* at 940.

51. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 187 (1997) [hereinafter Bingham, *Employment Arbitration*]. Bingham has also pointed out that employers will have advantages in nonunion grievance arbitration procedures because of the "repeat player" effect. *Id.*; Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998) [hereinafter Bingham, *On Repeat Players*]. In arbitration or litigation, repeat players have advantages not only because they have experience with the process, but also because they take into account the value of precedent in deciding whether or not to adjudicate the matter and how much to spend to win the case. In arbitration between an employer and a union, both sides have experience and can reasonably expect to be dealing with the same or similar controversies in the future. Thus, in union arbitration, there are repeat players on both sides. However, in arbitration between an employer and an individual employee, the individual employee probably has no experience and would reasonably believe that it is unlikely he or she will arbitrate with the employer again in the future. Thus, in nonunion arbitration, only the employer enjoys the repeat player advantages. In a sample of 270 arbitration cases under AAA arbitration rules that included both repeat player employers and one-shot employers, Bingham found that employees did significantly worse against the repeat player employers winning only 16% of the time and collecting only 11% of what they demanded, as opposed to winning in excess of 63% of the time and collecting 48% of what they demanded against one-shot employers. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 187 (1997).

52. Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974); Paul Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51-63 (1977).

53. WHEELER, KLAAS & MAHONY, *supra* note 40, at 33-37.

divisive and cheaper than litigation.⁵⁴ Why shouldn't nonunion employees have the advantages of arbitration enjoyed by union employees? The ease of arbitration makes grievance adjustment more accessible to employees. As a result, workers will be able to address more of their grievances than if they were left merely to litigate their disputes.⁵⁵ Greater access will leave less conflicts to fester engendering a greater feeling of fairness and justice in the workplace. Supporters contend that nonunion arbitration can be fair if it complies with certain minimal procedural safeguards. Because nonunion grievance agreements generally are contracts of adhesion (that is they are offered on a take-it-or-leave-it basis) they can be struck down as "unconscionable" if the contract is the result of coercive bargaining between two parties of unequal bargaining power and the contract unfairly advantages the stronger party.⁵⁶ Indeed, in *Cole v. Burns International Security Services (Cole)*⁵⁷ the Court of Appeals for the D.C. Circuit interpreted *Gilmer* to require five safeguards for any pre-dispute employment arbitration clause to be enforceable: a neutral arbitrator, opportunity for discovery, a written award, the availability of all remedies available at law, and no arbitrators' fee for the employee. Other courts and professional organizations have followed suit.⁵⁸ The loss of a jury trial is not considered too serious because in practice few employees ever get to

54. RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* 9 (1997).

55. Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997).

56. LAURA J. COOPER, DENNIS R. NOLAN & RICHARD A. BALES, *ADR IN THE WORKPLACE* 560 (2000).

57. 105 F.3d 1465 (D.C. Cir 1997).

58. Several courts have followed this decision. See, e.g., *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 86 (C.A. S. Ct. 2000); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Civ. 2003). Moreover, in 1995, the National Academy of Arbitrators, American Arbitration Association, American Civil Liberties Union, Federal Mediation and Conciliation Service, National Employment Lawyers Association, and Society of Professionals in Dispute Resolution all agreed to a "Due Process Protocol" that set minimum standards for arbitration proceedings. The Due Process Protocol requires: that the parties jointly pick a neutral arbitrator versed in the relevant law, discovery provisions allowing a reasonable number of depositions, a right for the employee to be represented, a written decision consistent with the law, a remedy consistent with the law, and limited judicial review. The American Arbitration Association and JAMS/Endispute, two of the primary associations responsible for administering nonunion arbitration proceedings, have determined that they will handle such arbitrations only if the procedure complies with the Protocol. Employers can still avoid these minimal procedural safe guards in their arbitration process if they are located in a circuit that doesn't follow *Cole* and they use an arbitrator who is not bound by the Due Process Protocol, but the trend in the law seems to be that minimal due process requirements must be met for an arbitration agreement to be enforceable. See WHEELER, KLAAS & MAHONEY, *supra* note 40, at 23-28.

bring their claims before a jury.⁵⁹ Some also contest whether employers really enjoy advantages in nonunion arbitration.⁶⁰ They point out that employers generally do better in litigation than in nonunion arbitration. Finally, supporters of nonunion arbitration pose a public policy argument stating that nonunion arbitration will ease the caseload of our over-worked courts.⁶¹

3. Empirical Tests of the Efficacy and Fairness of Employer Sponsored Grievance and Arbitration Procedures Relative to Labor Arbitration or Litigation

To empirically assess the efficacy and fairness of individual grievance arbitration relative to union arbitration or individual litigation is more difficult than one might initially suppose. With a few exceptions, empirical analyses have found that individual employees win individual grievances in greater proportion than they lose them (52–62%) and in about the same proportion as they win under union arbitration or state court adjudication and in greater proportion than they win in federal court.⁶² Unfortunately it is hard to infer much

59. Estreicher, *supra* note 55.

60. Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration in Discrimination Claims*, 31 RUTGERS L.J. 399 (2000).

61. BALES, *supra* note 54, at 9.

62. There is a fair amount of empirical work assessing employee win rates in nonunion arbitration, union arbitration and state and federal court. One of the first systematic studies of nonunion employment arbitration done by Howard found that employees won 68% of the examined cases. William M. Howard, *Arbitrating Claims of Employment Discrimination*, 50 DIS. RESOL. J. 40 (1995). Bingham examined 20 nonunion AAA arbitration cases from the years 1993–1994 and found that employees enjoyed a 63% win rate. Lisa B. Bingham, *Employment Arbitration*, *supra* note 51. In a later study of including earlier AAA cases, Bingham found that employees in nonunion arbitration experienced a 52% win rate, but that employees won 69% of the cases involving individual employment contracts and only 21% of the cases involving employment manuals. This same study by Bingham is where she found that employers enjoyed a repeat player effect in nonunion employment arbitration. A widely cited study of nonunion AAA cases from the years 1993–1995 by Maltby found that the employees won 63% of the time. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998). The most pessimistic results on nonunion arbitration were obtained by Leroy and Feuille. Based on a sample of individual employment arbitration cases over the period 1990–2001, they found that the employee won only 21% of the cases, achieved a split award in 18% and out right lost in 62% of the cases. Michael H. Leroy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. DISP. RES. 19 (2001).

The results of union arbitration procedures have been a subject of study for quite some time. Researchers have examined the impact of grievant characteristics (work history, job category, gender, resources, represented by counsel), employer characteristics (antiunion animus, resources, represented by counsel), arbitrator characteristics (age, gender, experience) and grievance characteristics (type of claim, existence of statutory criteria) on the outcome of arbitrations. Robert J. Thornton & Perry A. Zerkel, *The Consistency and Predictability of Grievance Arbitration Awards*, 43 INDUS & LAB. REL. REV. 294 (1990); Harsh K. Luthar & Joseph Bonnici, *The Arbitration of Discrimination Complaints: A New Look at the Issues*, 11

about the equity of an adjudicative process just by looking at won/loss rates. The employee win rate using a given procedure or forum will accurately reflect the fraction of employee winners among all possible claimants only if the arbitrated or tried cases are a random sample of all claimants. However, an employee's decision to take a claim to arbitration or trial, or even to file a grievance or suit, undoubtedly depends on the employee's assessment of the fairness of that procedure and his or her chances of winning. If the employee knows a process is unfair, he or she will grieve and arbitrate or file and try only the disputes where the employee's case is so strong that he or she has a reasonable chance of prevailing even under the biased procedure.

Indeed, Priest and Klein have demonstrated that, given symmetrical stakes and information between the parties, the plaintiff win rate in any process, no matter how unfair, will tend toward 50%.⁶³ However, if one side has higher stakes, perhaps because that side is a repeat player and takes account of the value of precedent, the Priest-Klein model predicts that the party with greater stakes will win less of

EMP. RESP. & RTS. J. 159 (1998); Lisa B. Bingham & Denise R. Chachere, *Dispute Resolution in Employment: The Need for Research*, in EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 111 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999). Because union employees enjoy written contracts with greater contractual protections, union arbitrations are much more likely to involve contractual claims, as opposed to statutory claims, than nonunion arbitrations. Accordingly union arbitrations are likely to involve different questions of law and fact than nonunion arbitrations. Nevertheless, the empirical literature seems to suggest that employees win slightly over half of union arbitrations. In a 1987 study of 1042 union discharge arbitration cases, Block and Stieber found that the employee was reinstated in 57% of the examined cases. Richard N. Block & Jack Stieber, *The Impact of Attornies and Arbitrators on Arbitration Awards*, 40 INDUS. & LAB. REL. REV. 543 (1987).

Employees' success rate in litigation apparently depends on whether the cause of action is tried in state or federal court. Two studies of wrongful discharge cases in California determined that the employees were winning between 68% and 70% of the cases. JAMES N. DERTOUZOS, ELAINE HOWARD & PATRICIA EBENER, *THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION* (1988); David J. Jung & Richard Harkness, *The Facts of Wrongful Discharge*, 4 LAB. LAW. 257 (1988). More recently, Estreicher has found in a sample of state civil court filings from 1991-1992, employees won 64% of the termination cases. Estreicher, *supra* note 55. With respect to federal court cases, Howard reported that employees won only 28% of the cases that went to trial, although they won 38% of the cases tried by a jury. William M. Howard, *Arbitrating Claims of Employment Discrimination*, 50 DISP. RESOL. J. 40 (1995). Maltby found that employees won only 15% of the cases in his 1994 federal court sample. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998). In a nation-wide sample of employment discrimination cases, Litras found that employee won 24% of trial verdicts in 1990 and 36% in 1998. Marika F.X. Litras, *Bureau of Justice Statistics Report on Civil Rights Complaints Filed in U.S. District Courts*, DAILY LABOR REPORT, Jan. 10, 2000, at E-5-E-7. The Equal Employment Opportunity Commission (EEOC) seems to have more success with the discrimination case they prosecute. A study of 1,963 suits filed by the EEOC between 1997 and 2001 found that the agency won 60% of its trials and obtained successful settlements or verdicts in 91% of its cases. EEOC. *A Study of the Litigation Program Fiscal Years 1997-2001*, <http://www.eeoc.gov/litigaion/study/study.htm> (2002).

63. George Priest & B. Klein, *The Selection of Dispute for Litigation*, 13 J. LEG. STUD. 1 (1984).

the disputes because it will pay for that party to litigate worse cases.⁶⁴ Bebachuk has also shown that, if the parties have asymmetric information about their chances of winning, the win rate will be higher for the better informed party.⁶⁵ Since in individual arbitration, the employer is both a repeat player, and generally has superior information, these two effects will work against each other and it is an empirical question which effect will dominate. Regardless of the outcome of this empirical question, there is strong evidence in the legal literature that the cases that go to trial are not a random sample of all possible disputes,⁶⁶ and it seems doubtful that under either individual or union grievance arbitration that the cases that go to arbitration are a random sample of all possible grievances. Accordingly, in comparing the two procedures we cannot just compare won/loss rates.

It does seem that employee claims are subject to significantly different attrition and settlement rates prior to adjudication when comparing arbitration and litigation. Howard has estimated that only about 5% of employee job claims that are brought to lawyers are accepted by those lawyers.⁶⁷ There is no available estimate as to how many meritorious employee claims simply don't yield enough damages to merit the costs of litigation. Surveys show that from 79–84% of court cases that are brought are settled before final adjudication.⁶⁸ Settlements in arbitration cases are less common and have been estimated at between 31–44%.⁶⁹ There is no good data on these settlements, so no authoritative statement can be made about the percent of settlements that are favorable to employees in either individual or union arbitration.

It also seems clear that the different methods of adjudication of workplace disputes have different costs and different rewards. As previously discussed, the different costs to the employee of access to individual and union grievance arbitration depending on whether the employee is required to share in the costs of the arbitrator in the nonunion proceeding is a matter of some concern as to the equity of the process relative to union arbitration or litigation. Arbitrators charge about \$2,000 a day for their services while judges' salaries are

64. *Id.*

65. Lucian A. Bebachuk, *Litigation and Settlement under Imperfect Information*, 15 RAND J. ECON. 404 (1984).

66. Joel Waldfoegel, *The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory*, 103 J. POL. ECON. 229 (1995).

67. Howard, *supra* note 62.

68. *Id.*

69. WHEELER, KLAAS & MAHONY, *supra* note 40, at 51.

paid by the taxpayers. Filing fees can also be higher for arbitrators at about \$500 plus \$150 per day of hearing for the AAA. Court filing fees are generally between \$100 to \$200. However, with respect to attorney's fees, either nonunion or union arbitration appear to enjoy an advantage over litigation. In 1995, Howard estimated that the average cost of defending an arbitration was \$20,000, while the average cost of defending an employment claim in court was \$96,000.⁷⁰ Claimants' costs for representation are probably proportional, but less, and of course claimants' enjoy the advantage of contingent fees. The employee in a union grievance procedure also enjoys the advantage that the union generally pays for the employee's representation. Arbitration also seems to enjoy an advantage in the time necessary for determination of a case, taking on average half the time⁷¹ of litigation's average 12–18 months.⁷² However, litigation seems to enjoy a distinct advantage with respect to the amounts that aggrieved employees recover upon final adjudication. The median nonunion arbitration award during the 1990s has been estimated at between \$34,733 and \$52,737⁷³ while the median award for successful employment discrimination suits during the same time has been estimated at between \$611,756 and \$2,134,751.⁷⁴ A study of wrongful discharge cases in California for the years 1978–1987 found that employees won a median award of \$124,150.⁷⁵

Short of sampling all possible disputes as a comprehensive method of comparing the different methods of adjudication, there are a few ways scholars could attempt to deal with the problem of different filing and settlement rates due to differences in perceptions of fairness. One is to directly assess parties' perceptions of whether an adjudicative process is fair. Although this process would be subject to criticisms of subjectivity and self-selection bias, perceptions of fairness are undoubtedly important to the integrity of any adjudication procedure.⁷⁶ In perhaps the best study to date utilizing this methodology Wheeler, Klaas, and Mahoney found that arbitrators perceive that individual arbitration serves employer interests better than employee interests with respect to all of the examined types of

70. Howard, *supra* note 62.

71. Maltby, *supra* note 62.

72. WHEELER, KLAAS & MAHONY, *supra* note 40, at 60; Litras, *supra* note 62; *see contra* Green, *supra* note 60 (arguing that arbitration saves employers neither money nor time).

73. Estreicher, *supra* note 55.

74. WHEELER, KLAAS & MAHONY, *supra* note 40, at 57.

75. Jung & Harkness, *supra* note 62.

76. Donna Blancero, *Non-Union Grievance Systems: System Characteristics and Fairness Perceptions*, 1995 ACADEMY OF MANAGEMENT PROCEEDINGS 84–88 (1995).

cases.⁷⁷ Another method that could be used to address the problem would be to try to control for other variables and examine just the decisionmaking processes of arbitrators and judges by posing hypothetical cases to them and comparing the results. Bingham and Mesch have conducted just such a study of 743 subjects including traditional labor arbitrators, arbitrators for individual employment arbitration agreements, and law students. Bingham and Mesch found that "employment arbitrators" for individual agreements to arbitrate were less likely to find for reinstatement than either traditional labor arbitrators or law students, although when the analysis controlled for variables such as the profession of the arbitrator, no significant difference was observed.⁷⁸ More recently, Wheeler, Klaas, and Mahoney conducted a survey of arbitrators and found that in comparison with arbitrators under collective bargaining agreements, arbitrators under individual arbitration were agreements more likely to place the burden of proof on the employee, less likely to overturn discharges pursuant to clearly unreasonable rules, and less likely to overturn discharges where the employer acted in mistaken good faith.⁷⁹

III. LEGAL LIMITS ON EMPLOYER POWER UNDER THE REGIME OF INDIVIDUAL CONTRACT: EXCEPTIONS TO THE EMPLOYMENT AT WILL DOCTRINE

The employment at will rule has been a central tenet of the regime of individual contract in the United States for over 100 years. Under this rule, unless otherwise bargained for, an employee can be discharged "for good cause, no cause, or even for cause morally wrong."⁸⁰ This rule was rigidly applied in all American jurisdictions for well over fifty years, but beginning in 1959 with *Petermann v. International Brotherhood of Teamsters (Petermann)*⁸¹ the courts and legislatures of the various jurisdictions began to develop exceptions to the employment at will rule to address the worst employer abuses of the doctrine. In *Petermann*, a California District Court of Appeals held that it would be against public policy to discharge an employee

77. WHEELER, KLAAS & MAHONY, *supra* note 40, at 65.

78. Lisa B. Bingham & Debra J. Mesch, *Decision Making in Employment and Labor Arbitration*, 39 INDUS. REL. 671 (2000).

79. WHEELER, KLAAS & MAHONY, *supra* note 40, at 68.

80. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884) *overruled on other grounds*.

81. 174 Cal. App. 2d 184, 344 P. 2d 25 (1959).

who refused to commit perjury for his employer's benefit.⁸² As a result, the court gave the employee a tort cause of action against his employer to uphold the public's interest in truthful sworn testimony. Over the next forty years, courts in other jurisdictions developed exceptions to the at will rule. Between 1979 and 1988, the number of states adopting the public policy exception exploded, with one commentator estimating that nearly five states adopted the exception each year between 1984–1986.⁸³ Over this same period, a number of American courts relaxed their rigid application of the at will rule and adopted “exceptions” in implied contract.⁸⁴ Some jurisdictions also found in individual employment contracts an “implied covenant of good faith and fair dealing” that limited employer discretion even under the at will rule. Although the phenomenon has been less discussed by legal commentators over the last fifty years, many states have also adopted specific statutory limitations on the application of the at will doctrine, for example prohibiting discharge for performing public duties or engaging in lawful off-duty activities. In 1982 alone, a majority of states passed laws regulating the terms and conditions of employment.⁸⁵ Based on these trends, a host of commentators predicted the at will rule would eventually die.⁸⁶

Despite the growth of the exceptions to employment at will, it is clear today that the at will rule is alive and well in America, albeit in a somewhat attenuated form. As stated above, 52% of all individual employment contracts specifically contract for at will status. Another 33% of individual contracts are silent as to the discharge status, and thus at will under the American rule. Given that about 85% of nonunion employees are employed at will,⁸⁷ the legal parameters of the at will rule and its exceptions are essential elements of the regime of workplace governance under individual contract. To create a contract for at will employment necessarily requires that employers are bound by all the exceptions to the at will rule now adopted, and later acquired, within each particular jurisdiction. As the courts and legislatures carve exceptions to the at will rule in order to ease the

82. Robert Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 520 (2004–2005).

83. *Id.* at 521.

84. Bird cites the number of states recognizing an implied contract exception to the at will rule rising from 10 to “nearly 40” in that time period. *Id.* at 521–22 nn.19–21.

85. Joseph DeGuiseppe, Jr., *Recognition of Public Policy Exceptions to the At will Rule: A Legislative Function*, 11 FORD. URB. L. REV. 721 (1982–1983).

86. *See, e.g.*, Frank J. Cavico, *Employment at Will and Public Policy*, 25 AKRON L. REV. 497 (1992).

87. Verkerke, *supra* note 13.

harshness of its application, the resulting erosion of the at will rule fundamentally alters the individual employment relationship.

Although employment at will is still the American default rule with respect to the standard for discharge from employment, there is no uniform application of the employment at will principles across all jurisdictions. In essence, there are 51 different at will rules in effect in the United States,⁸⁸ one for each state and the District of Columbia. Despite this variation among jurisdictions, there are key similarities that allow for empirical comparison. Many jurisdictions recognize similar exceptions to the at will rule, including the prohibition for termination in violation of public policy, implied contract terms, and the implied covenant of good faith and fair dealing. Even where an exception has been expressly rejected by the courts of a jurisdiction, later enacted state statutes have often protected employees from precisely the same discharge. The legislature has also been active in circumstances of pressing public concern, for example drafting protections for employees who are fired for performing public services such as jury duty or disaster relief or for reporting the illegal acts of their employers. In this section we present an empirical summary of the judicial and legislative exceptions to the employment at will rule across the 51 American jurisdictions. A comparison of our work with earlier summaries on this subject suggests that, although the courts and legislatures have developed an impressive array of exceptions to the employment at will doctrine, in recent years the development of such exceptions has slowed and the state law exceptions to the at will rule have remained largely consistent over the last decade.

A. *Public Policy Exceptions*

By either common law doctrine or legislation, all American jurisdictions recognize some public policy exceptions to the employment at will doctrine. Ten years ago, 43 states courts had recognized a public policy exception.⁸⁹ Today, courts in 44 of the 51 jurisdictions have adopted a judicially recognized public policy exception. Courts in six of the seven jurisdictions that have declined to accept a public policy exception have done so on the grounds that public policy should be left to the legislature.⁹⁰ State legislation in five

88. Fifty states and the District of Columbia.

89. Gabriel Rosenthal, *Crafting a New Means of Analysis of Wrongful Discharge Claims based on Promises in Employee Handbooks*, 71 WASH L. REV. 1157, 1162 n. 34 (1996).

90. In Georgia, *Borden v. Johnson*, 395 S. E.2d 628 (Ga. Ct. App. 1990), in Rhode Island, *Pacheoco v. Raytheon Company*, 623 A.2d 464 (R.I. 1993); in New York, *Horn v. New York*

of the seven, Florida, Louisiana, Maine, New York, and Rhode Island, protect virtually all the activities normally contained within a judicially-created public policy exception,⁹¹ while legislation in Alabama and Georgia protects employees for performing various public duties.⁹²

Under this exception, an employer does not have the power to terminate an employee where the reason behind the termination contravenes “public policy.” Different jurisdictions may define “public policy” more or less broadly, but generally the courts are looking for a clear statement by the legislature or the courts that the public has an interest in the employee either abstaining from a particular act or performing a duty, that will be undermined if we allow employers to discipline employees for acting consistently with that public interest. There seems a straightforward economic rationale for this exception since, if the problem were left merely to individual contract, the employee would have inadequate incentive to uphold the public interest in negotiating the conditions for discharge. The courts have used this public policy rationale to give employees causes of action against some of the most abusive employer behavior under the employment at will rule including discharges for: failing to perform an illegal act on behalf of an employer,⁹³ reporting an employer’s illegal act,⁹⁴ serving on a jury,⁹⁵ and filing a worker’s

Times, 790 N.E.2d 753 (N.Y. 2003); in Louisiana, *Guillory v. St. Landry Parish Police Jury*, 802 F.2d 822 (5th Cir. 1986) (refusing to adopt a public policy exception). Additionally Maine and Florida courts do not allow public policy exception claims, rather state statutes are the sole source of remedy for employees. *Bard v. Bath Iron Works Corp.*, 590 A.2d 152 (Maine 1991), *Smith v. Piezo Technology and Professional Administrators*, 427 So.2d 182, 184 (Flor. 1983). Statutory relief in these states are relatively broad, see note 91 *infra*. In the seventh state, Alabama, the judicial debate over the public policy exception continues. Although courts have never formally adopted the exception, Chief Justice Hornsby advocated its adoption in *Salter v. Alfa Ins. Co.*, 561 So.2d 1050 (Ala. 1990), Chief Justice Horsby concurring.

91. Rhode Island, New York, Maine, Florida and Louisiana protect employees from discharge for refusing to violate the law and whistleblowing. R.I. GEN. LAWS 28-50-3(3), LA. REV. STAT. ANN. 23:967, FLA. STAT. ch. 448.101 to 448.105, ME. REV. STAT. ANN. TIT. 26 section 831 to 840 N. Y. LAB. LAW 740 and 741 and a variety of other protected activities. See Timothy A. Haley, *State Law Exceptions to the Employment at Will Doctrine*, in *LEGAL RIGHTS IN THE WORKPLACE: STATUTORY SUPPLEMENT AND MATERIALS* (Clyde W. Summers, Kenneth G. Dau-Schmidt & Alan Hyde, forthcoming 2007).

92. Alabama protects employees who serve on a jury, ALA. CODE § 12-16-8. Georgia protects employees who are required to serve as a witness, GA. CODE ANN. 15-1-4 and 34-1-3, required to serve on a jury GA. CODE ANN 15-1-4; 34-1-3; and grants a two hour leave for all employees in order to vote GA. CODE ANN. 21-2-404.

93. See, e.g., *Martin Marietta Corp v. Lorenz*, 823 P.2d 100, (Col. 1992) “An employee . . . should not be put to the choice of either obeying an employer’s order to violate the law or losing his or her job.” *Id.* at 109.

94. See, e.g., *Vermillion v. AAA Pro Moving & Storage*, 146 Ariz. 215 (1985).

95. See, e.g., *Jackson v. Minidoka Irrigation Dist.*, 563 P.2d 54 (Idaho 1977).

compensation claim.⁹⁶ As previously mentioned, in jurisdictions where the courts have completely abstained from recognizing this exception, the state legislatures have intervened with at least some protections.

While the public policy exception works well to curtail the most disturbing of employer actions, the public policy exception itself lacks readily discernable boundaries to guide judicial action. As Professor Weiler has noted, after the initial success of judicial determination of overt violations of standards of acceptability, the next wave of cases courts consider are much less obvious.⁹⁷ In the common law regime, the facts and arguments specific to one particular controversy necessarily affect the outcome of future disputes. The fuzzy line that determines what is or is not "public policy" thus dominates both state court decisions as well as legislative action. For our purposes, we consider three aspects typically falling within the bounds of a public policy exception. First, we consider the case of an at will employee discharged for refusing to perform an illegal act. Second, we consider the case of whistleblowers. Last, we consider the case of an employee discharged due to lawful performance of a public duty.

1. Termination for Refusing to Perform an Illegal Act

Though courts in each jurisdiction have nearly unanimously adopted a public policy exception, each state has different limits to the breadth of activities that qualify for protection. To the extent there is consensus, the majority of state courts have agreed that an employer cannot discharge an employee who refuses to perform an act that is illegal. In all, 38 state courts have explicitly allowed a cause of action where an employee refused to perform an illegal act.⁹⁸ Another 8 states (Arizona, North Dakota, New York, New Jersey, Maine, Florida, Louisiana, and Rhode Island) have specific legislation that forbids this type of termination.⁹⁹ Four states have adopted a public

96. See, e.g., *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973).

97. PAUL WEILER, *GOVERNANCE IN THE WORKPLACE* 80 (1990).

98. Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and the District of Columbia. Haley, *supra* note 91.

99. Arizona: ARIZ. REV. STAT. § 23-1501; North Dakota: N.D. CENT. CODE §34-01-20; New York: N.Y. LAB. LAW 740 and 741; New Jersey: N.J. STAT. ANN 34:19-1 to 34:19-8; Maine: ME. REV. STAT. ANN. TIT. 26 §§ 831-840; Florida: FLA. STAT. CH. 448.101-448.105 ; Louisiana: LA. REV. STAT. ANN. 23:967; Rhode Island: R.I. GEN. LAWS 28-50-3(3).

policy exception but have not yet expressly expanded the doctrine to cover situations where an employee is discharged for refusing to perform an illegal act.¹⁰⁰ Language in these four states and the judicial history of these four states seems to indicate that they would not allow an employer to discharge an employee under these circumstances. Only one state, Georgia, has declined to adopt a judicial public policy exception and also not passed general legislative protection for employees who refuse to break the law, but the Georgia legislature has passed a law that protects all public employees from such discharge.¹⁰¹

However, once it is established that an employee cannot be discharged for failing to violate the law, the courts must then answer the question: Which laws? On this question the jurisdictions vary widely and there is substantial room for litigation. It may seem obvious that employers should not be able to terminate an employee for refusing to commit a crime, for example perjury.¹⁰² It is less obvious whether the courts should interfere with the at will presumption where the employer seeks to induce a violation of a civil statute or administrative rule. Most states have not been squarely addressed by all courts, but among the courts who have addressed the issue, the outcomes vary widely. In Ohio, for example, the courts have debated this issue and ultimately decided to extend public policy exception to all sources of law.¹⁰³ In Minnesota, a filling station employee who was terminated for refusing to pump leaded gas into an unleaded tank was wrongfully discharged, as the act in question violated the Federal Clean Air Act.¹⁰⁴ In Indiana, a truck driver who refused to drive until his vehicle met the safety specification prescribed by the Indiana Department of Transportation was

100. Though these states have not squarely addressed the issue, it seems likely given other opinions that they would grant a cause of action in such instances. Alabama: *See Salter v. Alfa Ins. Co.*, 561 So.2d 1050, Chief Justice Horsby, concurring, advocating such a public policy exception, Alaska: *See ARCO Alaska Inc. v. Akers*, 753 P.2d 1150, 1153, (1988), Kansas: *Fowler v. Criticare Home Health Services*, 10 P.3d 8 (Kan. Ct. App. 2000) finding the activity requested by the employer to be legal, without expressly determining whether the cause of action existed, Wyoming: *Hatfield v. Rachelle Coal Co.*, 813 P.2d 1308 (Wyo. 1991) citing the example of refusal to break the law as a hypothetical event, but the exact incident event has not been directly addressed.

101. GA. CODE ANN. 45-1-4(d)(3). For court refusal to adopt public policy exception, see *Borden v. Johnson*, 395 S.E.2d 628 (Ga. Ct. App. 1990).

102. *See Petermann v. IBT*, 344 P.2d 25 (1959) employee fired for refusing to commit perjury is contrary to public policy; public policy exception adopted in Idaho in *Jackson v. Minidoka Irrigation Dist.*, 563, P.2d 54 (Idaho 1977).

103. The Ohio Supreme Court extended the public policy to cover civil laws in *Collins v. Rizkana*, 652 N.E.2d 653 (Ohio 1995).

104. *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569 (Minn. 1987).

wrongfully discharged, because the court found the public policy exception extends to cover all sources of law for which the employee himself may be held personally liable.¹⁰⁵ In perhaps the most liberal cases, Delaware has extended this exception to cover employees who are terminated for refusing to violate a professional code of ethics.¹⁰⁶

2. Whistleblower Protection

The legal protections for employees who report employer violations of law have increased enormously in the last twenty-five years. Designed to encourage employees to report their employer's legal and administrative transgressions, in large part in response to the Savings and Loan scandal of the mid-1980s and more recently the Enron and World Com debacles, the expansion of whistleblower protection is perhaps the most significant change to the at will relationship since 1980. In 1980, whistleblower protection was a relatively new idea. Michigan and Connecticut enacted such legislation in the early 1980s, while the New York legislature first considered such employee protection in 1983.¹⁰⁷ Today, 34 states provide some whistleblower protection to all at will employees.¹⁰⁸ Ten of these states limit the types of employer violations that an employee can report without discharge.¹⁰⁹ All of the 17 jurisdictions that do not extend whistleblower protection to all employees currently have

105. *Remington Freight Lines Inc. v. Larkey*, 644 N.E.2d 931 (Ind. Ct. App. 1994).

106. *Shearin v. The E. R. Hutton Group*, 652 A.2d 578.

107. DeGuiseppe, *supra* note 85, at 738-740, n.89.

108. These states include Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wyoming. Haley, *supra* note 91.

109. Alabama limits protection to those who report child labor law violations. ALA. CODE § 25-8-57; Delaware statute limits protections to reports of fraud and false reporting DEL. CODE ANN. TIT. 6 Sections 1201-1209. The third circuit has found that the Delaware public policy exception covers all whistle-blowing claims. *Paolella v. Browning Ferris*, 14 I.E.R. Cases 705 (3d Cir. 1998); Massachusetts limits whistle-blower protection to those who report fraud and false reporting: MASS. GEN. LAWS. CH. 12 §§ 5A and 5J; New Mexico limits protection to Safety and Health violations, N.M. STAT. ANN. 50-9-25 and reporting false Medicaid claims: N. M. STAT. ANN. 27-14-12; North Carolina limits protection only for reporting claims of worker's compensation, wages and hours, workplace safety, mine safety, genetic discrimination, sickle cell or hemoglobin C trait discrimination, National guard re-employment, and domestic violence victims rights: N.C. GEN. STAT §§ 95-28.1, 95-28.1A, 95-240 through 95-245; South Carolina limits protections to those who report work-related health and safety violations: S.C. CODE ANN 41-15-510; 41-15-520; and 71 S.C. Code Ann. Regs. 336; Texas provides limited protection for Occupational Health and Safety violations only: TEX. LAB. CODE ANN. 411.082 and 411.083 and TEX. OCC. CODE ANN. 505.603; Utah limits protection to claims for health and safety complaints: UTAH CODE ANN. 34A-6-203; Virginia only allows claims to safety complaints: VA. CODE ANN. 8.01-216.1 to 801-216.9; and Wyoming only allows claims to workplace safety and health complaints only, WYO. STAT. ANN. 27-11-109(e).

legislation that protects at least one class of workers. In these 17 jurisdictions, the classes of workers that are most likely to be protected are government workers and healthcare providers. Additionally, given the rapid growth of acceptance of this exception, it seems likely that a court not bound by precedent or statute may choose to adopt whistleblower protections for all at will employees, given the opportunity.¹¹⁰

3. Performing a Public Duty

In some circumstances, an employee may be forced to choose between obligations imposed by an employer and obligations imposed by American society. Where community obligations rise to the level of public duties, an employee's participation in such activity may be protected by law. That is, an employer cannot lawfully discharge an employee for the employee's fulfillment of his or her public duties. Perhaps the most common scenario for this quandary in the case law involves an employee who is terminated for serving on a jury.¹¹¹ In such cases, the employee is caught between the obligation to her employer to show up and perform work and her obligation to her community to serve as a peer in jury cases. Sometimes, courts have awarded damages for breach of contract or tort on the basis of the public policy exception to employees who are discharged or disciplined for fulfilling their obligation of jury duty.¹¹² Perhaps more remarkably, all of the state legislatures have spoken definitively on the subject and it is a violation of public policy for an employer to discharge an employee for serving on a jury in every jurisdiction.¹¹³

Although jury duty is the most commonly accepted public duty for the public policy exception, most states accept others. The state legislatures have protected many other activities from employer retaliation, and each state has its own unique set of activities that are protected from employer retaliation. Some of the more common protections include the protection from termination for those

110. For example, the Third Circuit found that the Delaware public policy exception covers all whistleblowing claims. *Paoletta v. Browning Ferris*, 14 I.E.R. Cases 705 (3d Cir. 1998), even though State statutes only protect a single class of claims.

111. See, e.g., *Nees v. Hocks*, 536 P.2d 512 (Ore. 1975).

112. See, e.g., *Patterson v. I.H. Services, Inc.*, 368 S.E.2d 215 (S.C. Ct. App. 1988), *Nees v. Hocks*, 536 P.2d 512 (Ore. 1975), *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. Super. Ct. 1995).

113. See *Haley*, *supra* note 91.

employees who serve as witnesses before a tribunal (22 states),¹¹⁴ protected leave for employees to vote (28 states),¹¹⁵ and re-employment for those who serve in the military (47 states and the District of Columbia).¹¹⁶

B. *Implied-in-fact Contracts*

Another important "exception" to the employment at will doctrine is the doctrine of implied-in-fact contract. In cases where an employer hires an employee at will, but later represents to the employee either through her actions or words that the employee has job security, courts have been willing to imply a "for cause" term in the employment contract. The implied contract exception most often arises in the context of employee handbooks,¹¹⁷ though it can arise anytime there is a document or representation that expresses an intent to alter the at will status of employment.¹¹⁸ Because implied-in-fact arguments rely on the representations and reasonable expectations of the parties they can be thought of more as a less rigid application of traditional contract principles, rather than as an exception to contract principles. If a court finds that the employee has been promised for cause protection, then an arbitrary dismissal will subject the employer to liability for breach of contract.

The doctrine of implied-in-fact contract rights is almost entirely found within a jurisdiction's common law. Surprisingly, states appear very settled on whether rights may arise based on the implied-in-fact doctrine. Forty-two jurisdictions allow employee rights arising from implied-in-fact contracts.¹¹⁹ There has been virtually no change in state law on this matter in the last ten years.¹²⁰ Despite the fact that the majority of states provide an implied contract exception to the employment at will doctrine, the exception can be quite limited. First,

114. Alaska, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New York, North Dakota, Ohio, Pennsylvania, South Carolina, Texas, Wyoming. Haley, *supra* note 91.

115. Alaska, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, Wyoming. Haley, *supra* note 91.

116. All states and the District of Columbia allow for re-employment of military members except: Alaska, Kentucky, and Tennessee. Haley, *supra* note 91.

117. Rosenthal, *supra* note 89, at 1163.

118. ARIZ. REV. STAT. 23-1501.

119. Nine jurisdictions do not allow or have declined to determine whether employee handbooks give rise to termination rights: Delaware, Florida, Georgia, Indiana, Louisiana, Missouri, North Carolina, Rhode Island, Tennessee; Haley, *supra* note 91.

120. Rosenthal, *supra* note 89, at 1167 n.64.

a discharged employee is required to show at the very least the existence of some statement purporting to alter the at will relationship. Even if an employee can point to a specific page in an employment handbook, usually a conspicuous disclaimer anywhere in the manual releases the employer of liability under the manual.¹²¹ Producing evidence of such a term outside an employment manual can be extremely difficult.

Second, since the exception is founded in contract law, most states require the employee show either the employer's intent to be bound by such a term, or an employee's reasonable reliance on the employer's representations. In some cases, an employee's mere knowledge of the terms in the handbook suffice. In Illinois for example, the manual constitutes an offer and an employee's knowledge of the terms and act of commencing or continuing services for the employer constitutes acceptance and consideration.¹²² In other cases, an employee must show the employer intended to be bound by the terms, either by the express language of the term,¹²³ or by some form of employer conduct.¹²⁴

As a result, employers have a great degree of control of their liability under implied contract. Employers can avoid liability for implied-in-fact contract terms by avoiding representations or practices that give rise to expectations of job security and using conspicuous disclaimers in any employment handbook or policy. Since employee handbooks are becoming more common means of communicating expectations between employers and employees,¹²⁵ an employer's efforts to maintain many at will employees and maximize profits may ultimately give rise to enforceable employment rights. Stated differently, as an employer conducts business, the employer's habits regarding the discharge of its employees may, at some point, become enforceable in implied contract, particularly if these habits are memorialized in writing, and given to the employees.

121. See, e.g., *Elliott v. Bd. Of Trs. Of Montgomery County Cmty. Coll.*, 655 A.2d 46 (Md. Ct. Spec. App. 1995).

122. *Duldulao v. St. Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314 (Ill. 1987). The handbook constitutes an offer, the employee accepts by becoming aware of its contents, and continued performance constitutes adequate consideration to enforce the handbook terms.

123. See, e.g., *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489 (Ky. 1983), *Hoffmann-LaRoche v. Campbell*, 512 So.2d 725 (Ala. 1987), see also *Arizona Employment Protection Act*, ARIZ. REV. STAT. 23-1501.

124. *Rood v. Gen. Dynamics Corp.*, 507 N.W.2d 591 (Mich. 1993) (requiring employer conduct demonstrating employer's intent to be bound by the policies in the handbook). See also *Bobbitt v. The Orchard Ltd.*, 603 So.2d 356 (Miss. 1992) (requiring the employer pass the handbook to all employees before it becomes part of the contract).

125. Verkerke, *supra* note 13, at 861-69.

C. *Good Faith and Fair Dealing*

The third major exception to the at will rule is the implied covenant of good faith and fair dealing. The doctrine arose from commercial dealings, particularly after the adoption of the Uniform Commercial Code (UCC), but has recently found application in employment contracts in some jurisdictions. Under the doctrine, every contract contains an implicit promise that the parties will treat each other in ways that comply with general notions of "good faith and fair dealing." The narrowest rationale for the doctrine is that neither side to a contract should be able to treat the other in a way that robs him or her of "the benefit of the bargain." For example, where the doctrine is accepted it is commonly held that the employer cannot discharge the employee in order to avoid paying a commission that has been earned, even though the parties have expressly contracted for employment at will.¹²⁶ In such cases the implied covenant is logically required because allowing the employer to treat the employee in this way would effectively make the employment contract a nullity. However, some jurisdictions have applied a broader theory of the implied covenant requiring that the parties treat each other in fair and consistent ways, for example not discharging the employee for doing what he or she was told to do.¹²⁷

Currently, twenty-one states imply some form of the covenant of good faith and fair dealing in employment contracts.¹²⁸ This number has remained constant for the last ten years.¹²⁹ Nine states recognize a cause of action for discharge in violation of the implied covenant,¹³⁰ while in another six jurisdictions the discharged employee has a cause

126. *Frankina v. First Nat'l Bank of Boston*, 801 F. Supp. 875 (D. Mass 1992), 364 N.E.2d 1251 (1991) (terminating an at will employee to avoid paying sales bonuses is bad faith termination); see also *Hall v. Farmers Ins. Exch.*, 713 P.2d 1027 (Okla. 1985).

127. See *Smith v. American Greetings Co.*, 804 S.W.2d 683 (Ark. 1991); see also *Cloutier v. Great Atlantic & Pacific Tea Co.*, 436 A.2d 1140 (N.H. 1981). In these two states, the good faith and fair dealing covenant is implied to all employment contracts, but it does not add any extra protection to employees. Rather, the implied covenant of good faith and fair dealing overlaps and justifies the public policy exception. It appears as though the doctrine in these states provides no new employee protections.

128. Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Idaho, Illinois, Indiana, Louisiana, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Pennsylvania, South Carolina, Vermont, Wyoming; Haley, *supra* note 91.

129. Rosenthal, *supra* note 89, at 1162 n.36.

130. Alabama, Alaska, California, Delaware, Idaho, Massachusetts, Nevada, Oklahoma, Wyoming. Louisiana has conflicting authority, see *Viator v. City of New Iberia*, 428 So.2d 1329 (La Ct. App. 3d Cir. 1983) (stating that for cause termination is inherent in most employment contracts). See *contra Varnado v. Roadway Express*, 557 So.2d 413, 415 (La. Ct. App. 1990) (denying a cause of action in tort for a claim of breach of the implied covenant of good faith and fair dealing). Haley, *supra* note 91.

of action to recover the withheld wages or benefits, but has no remedy for the discharge itself.¹³¹ Another three jurisdictions limit the use the good faith and fair dealing doctrine or limit the remedies an afflicted employee can receive. In Illinois, an employer who violates the implied covenant of good faith and fair dealing can no longer enforce any restrictive covenants imposed upon an employee, such as a non-compete agreement.¹³² In New York, while the implied covenant itself is not recognized, professional codes of ethics are implied upon the employment contract.¹³³ In South Carolina, the implied covenant of good faith and fair dealing only becomes implied when an employment contract, such as an employee handbook, is implied.¹³⁴ Generally speaking, however, a discharged employee's recovery is limited to contract damages in 18 of the 21 jurisdictions that allow the cause of action; only four of the jurisdictions allow for tort recovery, including both compensatory and punitive damages.¹³⁵ The remaining 30 jurisdictions do not recognize the implied covenant of good faith and fair dealing at all in the employment context.

IV. CONCLUSION

The rise of the new information technology and the globalization of the economy have had a profound impact on the employment relationship in the United States. This transformation of our economy has contributed to the decline of employee organization in the United States. As a result, a greater proportion of employees in the United States are governed under the regime of individual contract that caters to marginal, rather than average, employee interests.

131. Arizona, Connecticut, Indiana, New Jersey, Pennsylvania, Vermont; Haley, *supra* note 91. Recall that Arkansas and New Hampshire recognize the doctrine, but it adds nothing more to the public policy exception, *supra* notes 89–97 and accompanying text.

132. In Illinois, there is generally no implied covenant of good faith and fair dealing. Miller v. Ford Motero Co., 152 F. Supp.2d 1046 (N.D. Ill. 2001). However, an employer who discharges an employee in bad faith or without cause may not also take advantage of restrictive covenants tied to the employment relationship. Francorp v. Siebert, 126 F. Supp.2d 543 (N.D. Ill. 2000).

133. New York implies professional ethical obligations into the employment relationship Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992).

134. South Carolina courts take the curious position that an employment relationship that is not written is not a contract at all. Under this logic, an implied contract can only arise when there is a valid employment contract, such as an employee handbook. See Keiger v. Citgo, 482 S.E.2d 792 (S.C. Ct. App. 1997), and Shelton v. Oscar Mayer Foods Corp., 459 S.E.2d 851 (S.C. Ct. App. 1995).

135. Alabama allows for both contract and tort recovery. Tort recovery in Alabama is limited to insurance agreements. The four states that allow tort recovery: Alabama: Grant v. Butler, 590 So.2d 254 (Ala. 1991) Nevada: Shoen v. Americo Inc., 896 P.2d 469 (Nev. 1995); Oklahoma: Hall v. Farmers Ins. Exch., 713 P.2d 1027 (Okla. 1985); Wyoming: Loghry v. Unicoover Corp., 927 P.2d 706 (Wyo. 1996).

Moreover, this transformation of the economy has undermined union and employee bargaining power and promoted short-term employment relationships. Under the new regime, employers demand greater flexibility in employment practices and greater protection of their interests in investments and have the bargaining power to achieve these objectives. Perhaps in response to the rise of employer power under the new regime of individual contract, courts and legislatures have developed more exceptions to America's traditional legal doctrine of employment at will, in order to mitigate the worst abuses of employer power. With the blessings of the Supreme Court, employers have recently begun adopting provisions to arbitrate employment claims under individual agreements to arbitrate.

Our survey of the literature and the available data confirms that the new regime of individual contract responds to marginal, rather than average, workers and provides greater protection of employer interests. First, in general, individual employees do not achieve a written contract unless the employer has some valuable interest that she wishes to protect or retain, for example intellectual property or trade secrets. This stands in sharp contrast to governance of the workplace under collective agreements, almost all of which are written. Second, an individual employment contract is much more likely to specify employment at will than a collective agreement. Fifty-two percent of individual employment contracts expressly specify an at will relationship while an additional 33% do not specify a standard for discipline, resulting in at will relationships under the default American rule. In contrast, 92% of the collective bargaining contracts expressly reserve a just cause standard for employee discipline. Employer discretion under the regime of individual contract goes beyond the standard for discipline since non-union workers are less likely to have formal evaluation criteria and seniority protection. Third, employees are less likely to enjoy fringe benefits under individual contract than under collective agreement and what benefits they do enjoy will be tailored more for flexible employment. Individual employees are less likely to have insurance or a pension than union employees and will make larger personal contributions to those benefits even if they have them. Fourth, where written, the individual employment contract is more likely to allow the employer to retain intellectual property rights and be free from competition from the employee after the term of employment. The regime of individual contract is more likely to protect the employer's interests in investments in intellectual property and trade secrets than the employee's interest in job mobility. Finally, since the Supreme

Court's opinion in *Gilmer*, the percent of individual employment contracts specifying employer sponsored arbitration systems as the means for adjudicating employment disputes has risen from almost zero to around 20%. Although there may be advantages in cost savings and accessibility under these systems, concerns remain about the fairness and equity of resolving disputes in this way.

Because the vast majority of employees under individual employment contracts are employed at will, we included in this essay a survey of the common law and statutory exceptions to the at will rule in the jurisdictions of the United States. Although there is broad acceptance of the at will rule across the United States every jurisdiction has at least some exceptions. There is little consensus among the American jurisdictions on the breadth of these exceptions. Every jurisdiction forbids an employer from discharging an employee for serving on a jury. Additionally, every state except Georgia forbids an employer to discharge an employee for refusing to perform an illegal act. Every state has enacted at least limited protection for whistleblowers in the last twenty years, perhaps as a result of corporate scandals that have come to light in that time. Thirty-four states have enacted legislation that protects all employees from discharge for reporting employer transgressions, while the remaining jurisdictions protect certain classes of employees such as government workers and healthcare providers. State courts are somewhat more reluctant to grant employees causes of action based on theories of implied contract. Forty-two jurisdictions allow the cause of action, while nine jurisdictions do not, and there has been very little change in the last ten years. However, even if a jurisdiction allows a claim based on an implied contract, it can be very difficult for the employee to succeed in court because disclaimers can preserve the employer's at will defense. A significant minority of American jurisdictions apply the implied covenant of good faith and fair dealing in employment cases. Twenty-one states allow for some form of implied covenant but, of those, only nine extend the exception to the standard for discipline and even then, the firing must deny the employee contractual rights she has already earned. Twelve of the twenty-one jurisdictions apply the covenant to all employment terms except the standard for discipline, so a termination in those jurisdictions would remain valid, but would not deny the employee rights to compensation, commission, or retirement pensions already earned.

