Managing the Future Employment Relationship: The Legislative Alternative

Glenn M. Gomes, Associate Professor, California State University
James F. Morgan, Associate Professor, California State University

Dramatic changes in the employment relationship over the last few decades have created substantial challenges for the management community. Employers are becoming increasingly nervous about the threat of wrongful discharge liability brought on by the erosion of employer prerogatives to terminate an employee “at will.” Confronted with a changing employment relationship emanating from an external environment perceived to be hostile and uncertain, employers typically have reacted defensively by adopting procedures designed to insulate the firm from the risks associated with an increasingly litigious workforce.

Fortunately, a more proactive approach is available, which enables employers to control their own destinies more effectively by determining how future employment relationships are defined. The evolving employment relationship must be managed assertively to protect reasonable managerial discretion while acknowledging strong employee interests in job security. This balance between the interests of management and employees can best be accomplished by pursuing a legislative resolution to these competing claims.

In the past, employers have tended to oppose any legislation aimed at limiting their prerogatives in employment decisions. They must rethink this position. Current trends indicate that the question is not whether comprehensive legislation will be enacted to protect nonunionized employees from arbitrary terminations, but rather what form such legislation will take. Indeed, due to the current tide of wrongful discharge litigation, self-interest dictates that management should bargain for legislation that recognizes and protects employee rights in job security. This enlightened self-interest is not limited only to the benefits derived from protecting the firm from a perceived hostile workforce. While these cost savings may be substantial, other significant benefits will accrue to the firm in the form of increased productivity, loyalty, and workplace harmony directly attributable to an employee’s sense of job security.

To help stimulate discussion and debate on this topic, this article will: (1) briefly survey the changing shape of the employment relationship; (2) review management’s largely ineffectual attempts to protect itself from the risks of these developments; and (3) enumerate issues requiring management’s attention in shaping its legislative agenda.

The Changing Shape of the Employment Relationship

From the Industrial Revolution of the nineteenth century through the onset of the Great Depression of the 1930s, most employment relationships were framed by the laissez-faire doctrine of “termination at will.” This at-will prerogative, which holds that employees can be terminated for good reasons, bad reasons, or no reasons at all, was considered an employer’s property right protected by the U.S. Constitution. In a period of rapid industrial growth, the unfettered right to fire an employee supposedly created negligible costs for employer and employee alike—employers could easily find new employees, and employees could just as easily obtain employment elsewhere. This assumed that both parties possessed equal (and countervailing) bargaining power. The doctrine has been defended most recently on the grounds that its intrinsic fairness fosters economic efficiency while protecting...
basic principles of freedom of contract. These defenders, however, are clearly in the minority.

Critics of at-will employment increasingly suggest that the rule is harsh, inflexible, and inconsistent with the realities of contemporary economic life. Likening termination to economic "capital punishment," these critics point to the pervasive inequality of bargaining power that favors employers over employees, the decreasing opportunities for costless job mobility, and the economic and psychic costs of job loss. Moreover, employment at will is at odds with the growing perception that employees are entitled to job security as a fundamental property right.

The United States remains the only western industrialized nation that retains the presumption of employment at will whereby a just or valid reason need not be given for the dismissal of employees. Nevertheless, precedents exist for legislation that curtails the right of employers to dismiss employees at will. For example, the National Labor Relations Act (NLRA) protects the right of organized employees to jointly determine their relationship with employers through collective bargaining. Moreover, the NLRA legitimizes the principle that dismissals can occur only for "just cause," a feature now reflected in the vast majority of collective bargaining agreements. In addition, federal and state laws currently shield employees from many forms of discrimination by protecting them from arbitrary dismissal on the basis of race, color, sex, religion, national origin, age, handicap, pregnancy, military service, or alienage. By diminishing management's traditional and (assumed) absolute prerogative to fire employees at will, these legislative developments, among others, have eroded employer sovereignty.

Recent state court decisions have accelerated the shift in the balance of bargaining power from employer to employee by establishing exceptions to the at-will rule. For example, various courts have recognized a "public policy" exception that protects employees who refuse to commit an unlawful act (e.g., perjury), who perform a public obligation (e.g., jury duty), who exercise a right (e.g., voting), or who report unlawful employer conduct (e.g., whistleblowing). Additionally, the employment-at-will presumption can be modified by express or implied contractual provisions aimed at limiting the right of employers to dismiss without just cause. Assumptions of job security are derived from reasonable expectations arising out of employer and employee conduct. Longevity of employment, commendations, promotions, and oral representations suggesting dismissal would occur only for good cause are a few examples of how implied assurances of job security might arise. Finally, in a few states the courts have awarded damages where a breach of the employment contract was motivated solely by malice, bad faith, or retaliation.

In seeking a proper balance between the rights of employers and employees, courts are now fine-tuning these exceptions to the at-will doctrine. Unfortunately, there is little consistency from state to state on the configuration of rights and responsibilities within the employment relationship. The ensuing disarray of rulings prompted one judge to write that the law of employment termination has become "an amorphous mass of confusion . . . precariously perched on the brink of change." As a result, employers acting out of a sense of paranoia now may be less willing to fire even the most unproductive workers.

Management's Defensive Response

The employment-at-will doctrine is viewed with increasing suspicion and disdain by the millions of workers who remain unprotected by collective bargaining agreements, anti-discrimination statutes, civil service rules, or individual employment contracts. As a result, the assault on the employer's prerogative increasingly takes the form of wrongful discharge lawsuits based on the judicially created exceptions to the at-will doctrine. Faced with the erosion of the at-will prerogative, employers typically attempt to protect the "right to fire" by undertaking defensive routines designed to ward off wrongful discharge claims.

Expert advice to managers regarding the creation of defensive measures usually focuses on specific procedural recommendations which attempt to preserve at-will employment within the expert's best assessment of the current state of the law. In erecting these defenses, the following protective measures are often suggested: (1) review recruitment and hiring procedures and emphasize the at-will nature of the employment relationship, while establishing and articulating standards for termination; (2) review employee handbooks, prominently including disclaimers and restrictive clauses, and purging language that implies job security; (3) put in writing any changes in employment policies; (4) conduct regular and accurate performance appraisals; (5) centralize all
discharge decisions; (6) terminate in private, respecting the confidentiality of personnel decisions; (7) avoid outrageous and malicious conduct; and (8) implement separation agreements (with releases for liability).

Although these defense measures may be successful to some degree, such a piecemeal approach to the problem does not guarantee insulation from wrongful discharge claims. Further, the adoption of defensive policies only fosters declining employee morale and encourages increased government intervention. In fact, from the employee’s perspective, protection from unjust discharge has acquired, in the words of one author, “the force of a moral and historical imperative.” Thus, employees will continue to challenge employers by petitioning the courts to determine the scope of the judicially created exceptions to the at-will doctrine.

Some firms have abandoned at-will employment principles in favor of a just-cause standard for dismissal. Yet these contractual provisions are also subject to criticism and attack. Even if the just-cause standard is made explicit in the employment agreement, managerial adherence may be missing because the provisions lack the moral imperative of law. Until the principle of “just cause” is embodied in federal or state law, employer solace in a voluntarily created just-cause provision is misplaced and illusory.

The only way to provide employers with protection against the rising tide of litigation and its accompanying confusion is to cement in statute, as a matter of public policy, the essence of the changing employer-employee relationship. This approach has a better chance of achieving workplace harmony and protecting the rights of both employers and employees. Given society’s increasingly adverse reaction to the at-will doctrine, legislation affirmatively recognizing the employee’s reasonable expectations of job security is now warranted.

Legislating Employment Termination Principles: A Viable Alternative
Momentum is gathering in an increasing number of states to halt the haphazard evolution of employment termination principles created by the courts. While employers have historically opposed legislation that would limit employer autonomy or impose sanctions for actions taken against employees, some employers are beginning to favor legislation that increases the predictability of the employment relationship. Legislative remedies would not only define employee protections (e.g., dismissal only for just cause) but also would provide a predictable remedial process and limitations on employer liability. Any legislative response will seek a compromise between two competing claims that the traditional employment-at-will doctrine is inherently unfair and antiquated; and that wrongful termination damage awards are excessive and unwarranted.

In 1987, for example, Montana enacted the Wrongful Discharge from Employment Act, the first of its kind in the nation. The law protects employees from wrongful discharge in three instances: (1) when the discharge is in retaliation for refusal to violate (or report violations) of public policy; (2) when the employee has successfully completed a probationary period and the dismissal is not for good cause; and (3) when the dismissal violates the express terms of written personnel policies. During the 1989 legislative year, at least eleven other states considered similar bills.

The National Conference of Commissioners on Uniform State Laws also is considering the creation of a Uniform Employment Termination Act to serve as a model for legislative efforts in all states. A recent draft of the Uniform Act prohibits discharge when the termination violates public policy derived from constitutional or statutory law; is based on an individual’s good faith whistleblowing; and violates the principle of “good cause.” Good cause is defined as a “reasonable basis for the employment action taken in light of the employee’s duties and responsibilities, the employee’s conduct and performance record, and the legitimate economic needs of the employer.”

The Legislative Agenda: Critical Issues
As legislation is introduced that defines the principles of employment termination, the business community must not only understand but also influence five critical issues:

- A Public Policy Standard for Dismissal. Legislation should protect an employee’s legitimate expectations of job security, particularly as they relate to issues of fundamental public concern. To this end, any legislative proposal should unequivocally define the parameters of public policy regarding employee rights to job security, including references to existing statutory limitations on employer prerogatives. Employment security cannot be threatened because the employee exercised constitutional, civil, or other legal rights and duties, or because an employee refused to
engage in unlawful conduct as a condition of employment. Courts have allowed generous damages in actions based on violations of public policy when an employer puts its interests above the interests of the public. Since society has a strong interest in these types of dismissals, legislative proposals need to include a provision forbidding employers from terminating an employee in violation of a public policy.

- **A “Just Cause” Standard for Dismissal.** Sound legislation must also include a clear criterion distinguishing legitimate from illegitimate dismissals. Recognizing the increasing importance society now attaches to job security, a “just cause” standard strikes an equitable balance between managerial discretion and employee expectations. Because expectations and standards of conduct may vary from industry to industry, fair dismissal legislation need not precisely define the term “just cause.” However, four decades of grievance arbitration under collective bargaining agreements provide a clear set of just-cause standards of conduct, thereby increasing the likelihood of predictable results. For the employer, valid reasons for termination would not include decisions that are arbitrary or capricious. For the employee, a just-cause standard asks whether a reasonable person, taking into account all relevant information, would find the employee’s conduct warranted dismissal. At-will employees would be protected in much the same way that unionized workers, civil service employees, or professionals covered by tenure rules are protected in the public and private sector.

Requiring “just cause” for dismissals does not eliminate management’s inherent right to manage the firm efficiently, to direct the activities of its workforce, or to establish business policies. Managerial decisions, directives, and policies are presumed to be valid to the extent that they are reasonably related to achieving efficient, profitable operations in a competitive economic environment, and are not abusive of employee rights. Of course, legitimate business reasons based on bona fide economic necessity (e.g., layoffs, plant closings), and not prohibited by law or public policy, should be protected by statute as constituting acceptable grounds for exercising the dismissal prerogative.

- **Employee/Employer Coverage.** While there should be no exceptions to legislative provisions forbidding terminations that violate public policy, the “just cause” standard may not be appropriate for certain classes of employees and employers. For example, employers may need to retain discretion in terminating members of upper-level management because these employees hold positions that are critically important to the firm and generally involve a high degree of trust and confidence. As a result, wrongful discharge legislation conceivably could exempt high-level employees.

Consideration must also be given to the coverage of part-time employees by the just-cause standard. Some proposals have established a minimum threshold of 20 hours per week, while others provide protection to all employees. Additionally, any legislative proposal must address whether the just-cause standard applies to new employees. In determining the employee’s suitability for continued employment, a probationary period (e.g., six months) should be established during which the performance and expectations of employer and employee can be mutually evaluated. While undertaking this initial review, the employer should be afforded broad discretion to dismiss without showing just cause.

Finally, legislation should decide whether to exempt small businesses from the just-cause standard. Laws governing collective bargaining and anti-discrimination policy, which often exempt small businesses, were designed to apply to large segments of the workforce having a significant impact on the economy. As a result, ample precedent exists for exempting businesses employing fewer than some minimum of workers (e.g., 10 or 30). Furthermore, the relationship between employer and employee in a small business is more likely to be guided by informal understandings and greater interpersonal contact. For this very reason, however, employees in small businesses arguably may deserve “just cause” protection to an even greater extent than those employees working within a more structured employment environment.

- **Dispute Resolution Alternatives.** To supplement a firm’s internal grievance procedures, any legislative proposal would have to provide an acceptable external method of resolving disputes. In addition to the common practice of litigating wrongful discharge claims, two other approaches for resolving disputes should be considered in designing fair dismissal legislation.

First, arbitration may be well suited to handle this type of controversy. Less expensive and less time consuming for both parties, arbitration has proven to be an effective means of resolving disputes between unions and management. However, employees generally receive smaller
awards than if the case had been heard by a jury, and employers should be braced for more claims under arbitration, because the costs associated with litigation are avoided. From the employer’s perspective, legislation providing arbitration procedures would eliminate both the vagaries of the present jury system and the debates over entitlement to (and the amount of) punitive damages. For the employee, such legislation would guarantee timely and relatively costless access to due process, thereby eliminating the uncertainties and costs inherent in a process that typically discriminates against lower-level employees who may be naive, skeptical, or fearful of the legal system.

A more radical suggestion is to provide that all wrongful discharge disputes be resolved within existing administrative agencies (e.g., the unemployment compensation system). Procedural mechanisms are already in place, hearing officers have expertise in matters relating to wrongful discharge, and the costs to the participants are minimal.

- Remedies. Any legislation addressing employment termination principles must address the types and extent of remedies available to employers and employees. Employers must be protected from frivolous lawsuits and damages with no ceilings. For the employee, reinstatement, back pay, and lost benefits would appear to be proper, although reinstatement may not be appropriate in dismissals involving small businesses because of the more restricted working space. When reinstatement is not appropriate, severance pay or “front pay” (i.e., the equivalent of one or two years wages) may be warranted. Employers should be aware, however, that consideration probably will be given to additional damages as compensation for emotional distress. Legislators may also find punitive damages appropriate for particularly egregious cases.

**Conclusion**

The employment-at-will doctrine has outlived its usefulness. Reactionary attempts to reassert and defend the employer’s unfettered rights under the traditional at-will rule are inconsistent with current notions of workplace morality and entitlement to job security. The erection of defensive routines to protect the employer’s “right to fire” is founded upon misguided and erroneous assumptions—that the preservation of the at-will principle is both possible and desirable. Given the new direction in the employment relationship, employers must take the initiative in proposing and crafting progressive legislation that strikes a sensible balance between managerial discretion to terminate and employee expectation of job security. Such action must be taken by employers now before unfavorable legislation is imposed upon them.

Continued reliance on voluntary in-house grievance procedures whereby management invariably has the last word, or opposition to wrongful discharge legislation, will only cause employees to become more suspicious of management’s sincerity regarding the protection of employee rights. The risk of liability for wrongful discharge can best be minimized through a four-step action agenda:

1) voluntarily relinquishing claim to the outdated “right” of employment at will, and replacing it with a policy of dismissal only for “just cause”;

2) professionalizing the human resource management process in all its phases (hiring, training, performance appraisal, and, if necessary, termination) by eliminating arbitrariness and bad faith;

3) respecting the demands and expectations of public policy, and encouraging employees to do likewise; and

4) supporting well-crafted legislative proposals seeking to create more uniform termination laws that eliminate exposure to varying standards of wrongful termination liability.

Unless legislation is adopted to stem the tide of wrongful discharge lawsuits, dismissing an employee in the 1990s may entail even more risks and pitfalls than in the litigious 1980s. Given a choice between actively managing the future employment relationship, or merely reacting defensively to inevitable but uncertain change, the management community should be willing to initiate legislative solutions to the problems created by evolving interpretations of employment rights and responsibilities.

---

**Dr. Gomes has published several interdisciplinary articles on strategic management and the business-society relationship, emphasizing the small business sector; Dr. Morgan has authored several papers relating to business and employment law. The authors wish to acknowledge the helpful comments of Professor Susan Gardner.**

**References**


