1991

Model Uniform Employment Termination Act

National Conference of Commissioners on Uniform State Laws

UNIFORM LAW COMMISSIONERS' MODEL EMPLOYMENT TERMINATION ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDREDTH YEAR
IN NAPLES, FLORIDA
AUGUST 2 - 9, 1991

WITH PREFATORY NOTE AND COMMENTS

UNIFORM LAW COMMISSIONER'S MODEL EMPLOYMENT TERMINATION ACT

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Law Commissioners' Model Employment Termination Act was as follows:

STANLEY M. FISHER, 1100 Huntington Building, Cleveland, OH 44115, **Chair**
FRANCISCO L. ACEVEDO, P.O. Box 366283, San Juan, PR 00936
JOHN FOX ARNOLD, 714 Locust Street, St. Louis, MO 63101
ARTHUR E. BONFIELD, University of Iowa, College of Law, Iowa City, IA 52242
GARY B. GULLIVER, Legislative Service Bureau, P.O. Box 30036, Lansing, MI 48909, **Drafting Liaison**
M. KING HILL, JR., 6th Floor, 100 Light Street, Baltimore, MD 21202
RICHARD L. MORNINGSTAR, One Alewife Center, Cambridge, MA 02140
MARIAN P. OPALA, Supreme Court, Room 245, State Capitol, Oklahoma City, OK 73105
DONALD JOE WILLIS, Suites 1600-1950, Pacwest Center, 1211 S.W. 5th Avenue, Portland, OR 97204
THEODORE J. ST. ANTOINE, University of Michigan Law School, Hutchins Hall, Ann Arbor, MI 48109, **Reporter**
LAWRENCE J. BUGGE, P.O. Box 1497, 1 South Pinckney Street, Madison, WI 53701, **President (Member Ex Officio)**
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, **Executive Director**
HOWARD T. ROSEN, 23rd Floor, 80 Park Plaza, Newark, NJ 07102, **Chair, Division E (Member Ex Officio)**

Review Committee

JAMES A. KING, Suite 208, 928 Nuuanu Avenue, Honolulu, HI 96817, **Chair**
TOM DOWNS, Suite 306, 230 North Washington Square, Lansing, MI 48933
BENNY L. KASS, Suite 1100, 1050 Seventeenth Street N.W., Washington, DC 20036

Advisors to Special Committee on Uniform Law Commissioners' Model Employment Termination Act

Eugene L. Hartwig, American Bar Association
Louis L. Robein, Jr., American Bar Association

UNIFORM LAW COMMISSIONER'S MODEL EMPLOYMENT TERMINATION ACT

Additional Advisors

Robert B. Fitzpatrick, American Bar Association,
Section of Tort and Insurance Practice
Laurence Gold, American Federation of Labor and
Congress of Industrial Organizations
Joseph A. Golden, American Bar Association,
Section of Labor and Employment Law
Walter Kamiat, American Federation of Labor and
Congress of Industrial Organizations
Richard E. Lerner, American Arbitration Association
William L. Mauk, The Association of Trial Lawyers of America
James C. Paras, U.S. Chamber of Commerce
Barry D. Roseman, National Employment Lawyers Association
Mark I. Schickman, American Bar Association,
Section of Tort and Insurance Practice

Additional Participants

Arvid Anderson, National Academy of Arbitrators
Stuart Henry, Ph.D., Ypsilanti, Michigan
Lewis Maltby, American Civil Liberties Union
Clyde W. Summers, Philadelphia, Pennsylvania
William Bennett Turner, San Francisco, California
Richard A. Wenzler, American Association of Retired Persons

Final, approved copies of this Act and copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
676 North St. Clair Street, Suite 1700
Chicago, Illinois 60611
(312) 915-0195

MODEL EMPLOYMENT TERMINATION ACT

PREFATORY NOTE

History of the Act in the Conference

The Scope and Program Committee, at its meeting on January 11-12, 1985, recommended to the Executive Committee that it appoint a Committee to draft a Uniform Wrongful Termination Act. The recommendation was based in part on studies indicating that recent judicial modifications in the doctrine of employment at will had created great uncertainty for both employers and employees. (That uncertainty has grown. **See infra.**) Members of the Scope and Program Committee stressed that uniformity would be desirable because employees might be hired in one state, work in another, and be fired in a third, and that the subject gave the Conference an opportunity to provide sensible guidance in an area of growing confusion.

At the 1985 Annual Meeting, the Executive Committee responded to this recommendation by establishing the Study Committee on Proposed Employment Termination Act. Stanley M. Fisher of Cleveland, Ohio, was appointed chair. On June 2, 1986, Mr. Fisher transmitted a report in which the Study Committee unanimously recommended that the Executive Committee establish a Drafting Committee for a Uniform Employment Termination Act.

The Executive Committee adopted this recommendation at its February 1987 midyear meeting. On October 5, 1987, Mr. Fisher officially advised the members of the new Drafting Committee on Uniform Employment Termination Act of their responsibilities. Professor Theodore J. St. Antoine of the University of Michigan Law School was named Reporter for the Committee and a Review Committee was established with James A. King of Honolulu as its chair.

Advisors were invited from the ABA's Section of Labor and Employment Law and Section of Torts and Insurance Practice; the AFL-CIO; the American Arbitration Association; the American Trial Lawyers Association; the National Association of Manufacturers; the Plaintiff Employment Lawyers Association; the U.S. Chamber of Commerce; and many other interested groups, including law professors and interested attorneys practicing in the field. A large number of law review articles and other relevant studies of wrongful discharge and proposed solutions were circulated among Committee members and advisors. Bills prepared in several states were closely examined, especially those in California, Illinois, Michigan, and New York, as well as the one statute enacted in Montana.

The Drafting Committee held full working sessions in New Orleans on February 19-21, 1988; in Dallas on November 18-20, 1988; and in Los Angeles on March 10-12, 1989. Each session produced a new or completely revised draft. All drafts were duly styled. The draft prepared for the 98th Annual Meeting of the Conference in Kauai, Hawaii, was approved for submission by the Review Committee.

The proposed Act received its first reading in Kauai on August 2 and 4, 1989, with the Commissioners sitting as a Committee of the Whole. There were many varied comments and questions from the floor and two "sense of the house" resolutions were adopted. Subsequently, the Drafting Committee had two more working sessions, in Denver on December 8-10, 1989, and in Chicago on March 9-11, 1990. Particular emphasis was placed on responding to the points raised and resolutions adopted in Kauai. The result was two more revised drafts.

MODEL EMPLOYMENT TERMINATION ACT

The Commissioners, again sitting as a Committee of the Whole, conducted a second reading at the 99th Annual Meeting of the Conference on July 18, 1990, in Milwaukee, Wisconsin. Various suggestions received from the floor were incorporated in new drafts discussed at meetings of the Drafting Committee on November 9-11, 1990, in Chicago, and on February 22-24, 1991, in Denver. These drafts, too, were duly styled and resulted in arevision recommended by the Drafting Committee to the Executive Committee to be reported out as a Uniform Act for final reading. The Review Committee concurred.

The third and final reading before the Commissioners sitting as a Committee of the Whole took place at the 100th Annual Meeting of the Conference in Naples, Florida, on August 3, 4, and 5, 1991. A number of changes, primarily of a technical nature, were adopted in response to motions or suggestions from the floor. The Conference formally approved the Employment Termination Act as a Model Act on August 8, 1991.

Background and Summary of the Act

Current law. Beginning in the latter half of the nineteenth century, and continuing for the next hundred years, the well-nigh universal American rule was that employers, absent a fixed-term contract of employment, "may dismiss their employees at will ... for good cause, for no cause or even for cause morally wrong."**Payne v. Western & A.R.R.**, 81 Tenn. 507, 519-20 (1884). During the past couple of decades, however, some 40-45 state jurisdictions, in square holdings or strong dicta, have approved modifications in the at-will employment doctrine. The 1980s have witnessed a virtual landslide of cases, as almost every state has recognized at least one of three theories supporting a cause of action. In 1980, only 13 states recognized one of the new legal theories. Now, fewer states are immune to inroads and pressure has increased for legislation. The three principal theories that have been used to support a cause of action are tort; breach of an express or implied contract; and, more rarely, breach of the implied covenant of good faith and fair dealing. Tort typically involves a discharge in violation of an established public policy, **e.g.**, the employer fires an employee for refusing to commit perjury or engage in a price-fixing conspiracy at the behest of the employer. Contract breaches occur when an employer dismisses an employee despite an oral assurance of job security at the time of hiring, or a policy statement in a personnel manual that discipline will only be imposed for good cause.

Practical effects of current law. Various studies have shown that in wrongful discharge cases reaching a jury in California, plaintiffs won 70 percent or more of the time and averaged between $300,000-$500,000 in damages. Throughout the country, single individuals have received verdicts as high as $20 million, $4.7 million, $3.25 million, $2.57 million, and $2 million. Jury awards exceeding $1 million have been common, usually because of the addition of punitive damages. Attorneys' fees and expenses for defending a typical wrongful discharge case add on another $80,000. Yet it is estimated that 60 to 80 percent of the successful plaintiffs are middle-or upper-level management, professionals, or other highly paid personnel. Rank-and-file workers prevail only infrequently. In all, twomillion nonprobationary, nonunion, non-civil service employees are estimated to be discharged annually, of whom about 150,000 to 200,000 would have legitimate claims under a "good cause" standard.

Adverse impact on employees and employers. A recent study, yet to be completed, concludes that the indirect economic effects of wrongful termination are significant. Those would include the creation of elaborate personnel procedures, internal grievance systems, and the retention by risk-averse employers of unproductive employees. Preli-

minary study implies that indirect effects of wrongful termination doctrines are 100 times as costly as the direct legal costs of jury awards, settlements, and attorney fees. For all these reasons, many observers believe that the new judicial doctrines suffer from significant defects. Some persons emphasize the deficiencies in the substantive rights granted employees. Generally, only the most serious violations of public policy by an employer will give rise to a tort cause of action. Contract suits based on an employer's oral or written assurances can be negated by an employer's avoidance or disclaimer of any such assurances or by a purgation of just-cause provisions from its employee handbook. For other persons, the vice of the current system lies in the devastating awards with which an emotionally aroused jury may saddle a hapless employer. For almost everyone, there is concern about the cost, delays, and sheer unpredictability of these proceedings. Remedial legislation seems necessary.

A recent survey by Professor Stuart Henry of Eastern Michigan University indicates that 40 out of 45 responding states and territories have had bills introduced in their legislatures in the past decade concerning "employment termination, at-will employment, or a related subject." The subject is plainly a matter of intense current interest.

Compromise philosophy and major changes in Model Act. The underlying theme or basic philosophy of the Model Act is one of compromise - an equitable tradeoff of competing interests. Thus, covered employees are granted an expanded substantive right to "good cause" protections against discharge. This right cannot be waived except by an individually executed agreement guaranteeing the employee a minimum schedule of graduated severance payments, depending on length of service. At the same time, the range of available remedies is sharply limited to reinstatement, with or without backpay, and severance pay when reinstatement is unfeasible. Compensatory and punitive damages are eliminated. Because of this latter step, attorney's fees are allowed a prevailing plaintiff; otherwise, practically no rank-and-file worker could obtain legal representation except on a **pro bono** basis. The new statutory right of action also extinguishes a variety of subsidiary tort claims arising out of a termination that have been pursued in recent litigation. Finally, the preferred method of enforcement is the use of professional arbitrators, appointed by an appropriate state administrative agency, instead of courts and juries. This should provide much speedier, more informal, more expert, and less expensive proceedings.

Responses to Conference's three readings. The Conference adopted two "sense of the house" resolutions during the first reading of the proposed Act at the 1989 Annual Meeting. The first would retain all the common law rights in tort, contract, or otherwise, of those employed individuals who are not protected by the statutory "good cause" requirement, **e.g.**, probationary employees, part-time employees, etc. The second would permit agreements between employers and employees to set performance standards, failure to meet which would be good cause for termination. The Model Act incorporates both those provisions. The elimination of the earlier, broader "preemption" provisions (which would have applied to **all** employed individuals, whether protected by statutory "good cause" or not) led to a reconsideration of the prior exclusion of "high-level, policy-making executives." Some management representatives objected strongly to the retention of common-law rights by this group. The Committee eliminated the exclusion of these executives from the protection of the Act; they are now covered like other employees.

During the second reading of the proposed Act at the 1990 Annual Meeting, the Drafting Committee agreed to place special emphasis on an employer's prerogative to

exercise honest business judgment in making economic decisions affecting the size and composition of its work force. In the course of the final reading at the 1991 Annual Meeting, transitional provisions were adopted applicable to fixed-term agreements and to an employer's demand that employees sign a "waiver" agreement in return for severance pay upon termination. Employers and employees were also authorized to agree to alternative dispute-resolution procedures.

Public policy; "good cause"; remedies; waivers. Numerous other changes were prompted by the discussions at the various meetings. Very importantly, an employer may contract with individual employees for a continuing "at-will" status, as long as it provides them with fixed minmum amounts of severance pay, graduated according to their length of service. In addition, the use of the distinction between "employee" and "employed individual" and between "employer" and "employing person" has largely been eliminated. This has been achieved by deleting the separate protection the early drafts afforded **all** "employed individuals," even if not "employees" covered generally by the Act, against terminations in violation of "public policy." Such protection for those persons will now have to depend on common law or other statutory developments. The "good cause" definition has been expanded to emphasize management's right to make legitimate business decisions and react to changing economic conditions. Double backpay and punitive damages have been eliminated for aggravated violations of the Act.

A major policy question has been handled by an optional provision placing the cost of operating the system entirely on the states, except for an initial filing fee in a modest amount to be set by each state. Although decisionmaking by professional arbitrators is the preferred method of enforcing the Act, an Appendix sets forth two alternatives. For states concerned about the possible extra expense of outside arbitrators, Alternative A provides for hearing officers who will be full-time civil service or other governmental personnel. For states concerned about possible constitutional problems concerning the right to jury trial, access to the courts, etc., Alternative B leaves enforcement in the hands of the civil courts. (Legal scholars believe that a properly drafted wrongful termination statute may provide for arbitration or other alternative dispute-resolution mechanisms without encountering serious constitutional obstacles in nearly any state. **See, e.g.**, Perritt, "Constitutional, Political and Attitudinal Barriers to Reforming Wrongful Dismissal Law," in **Proceedings of N.Y.U. 42d Annual National Conference on Labor** 3-1, 3-28 - 3-33, 3-37 - 3-43 (1989); **cf.** Golann, "Making Alternative Dispute Resolution Mandatory: The Constitutional Issues," 68 **Ore.L.Rev.** 487, 504-05 (1989).)

Simplification. There is an emphasis on simplification and streamlining throughout the final version of the Act. That is especially true regarding procedure. Speed is also stressed. Resort to an employer's internal procedures is no longer required prior to an employee's filing of a complaint. Mediation is not mandatory. Many details about the arbitration process itself are now omitted, being left to coverage by the Uniform Arbitration Act or determination by the individual states.

Uniformity. The Drafting Committee, the Review Committee, and the Executive Committee recommended this Act be designated as a "Uniform Act." The Conference changed the designation to "Model Act," based on the following criteria set forth in the Conference's "Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts", adopted on August 2, 1988:

> "An act shall be designated a "Uniform Law Commissioners' Model" (or "ULC Model") Act if

(i) "uniformity" may be a desirable objective, although not a principal objective;

(ii) the act may promote uniformity and minimize diversity, even though a significant number of jurisdictions may not adopt the act in its entirety; or

(iii) the purposes of the act can be substantially achieved, even though it is not adopted in its entirety by every state."

The Act gives several alternatives to the states. There have been at least 14 states that have undertaken to draft and/or consider legislation in this area. It is predicted and anticipated that many more states will do so. The ULC Model Act should be proposed and supported to minimize diversity and improve the law. Hopefully, Commissioners and others from each state will endeavor to procure legislative consideration of this Model Act.

Although procedures for enforcement may vary somewhat from state to state, it is highly desirable to have uniformity or at least substantial consistency regarding employees' substantive rights and the remedies available for violations of those rights. Nationwide companies obviously benefit from being able to have standardized personnel policies. But even smaller firms frequently move their workers around the country. Both employers and employees should profit from knowing that their mutual rights and obligations will not turn on the relative accident of where a hiring or firing took place or a job was performed. Interstate competition for "favorable business climates" may also be reduced by establishing uniform standards for employment termination.

Nearly all the comprehensive bills introduced in recent years, including the closely examined bills drafted in California, Illinois, Michigan, and New York, speak in terms of prohibiting discharge except for "just cause." In using the phrase "good cause," the proposed Act intends no substantive difference. The purpose was merely to underscore that an employer's business needs or external economic conditions may be legitimate grounds for a termination, as well as the misconduct or incompetence of a particular employee. "Justice" in the moral sense may have nothing to do with it.

Finally, adoption of a "good cause" standard would not put this country at a disadvantage in global competition by imposing constraints not borne by firms overseas -- quite the contrary. The United States is the last major industrial democracy in the world that does not have generalized legal protections for its workers against arbitrary dismissal. All told, sixty countries currently provide these guarantees, including the whole of the European Community, Scandinavia, Japan, Canada, and most of South America.

The changes reflected in this Act, when understood and carefully analyzed by all interested parties, will be found to be a fair and well-balanced solution that eliminates the uncertainty resulting from the continuing shifts in the legal environment. With the decline in the fraction of the work force that is unionized, there is an increased willingness on the part of the state judiciaries to adopt one or more of the wrongful termination doctrines, if the legislatures do not fill the void. There is increasing need for the legislatures to act in this area.

Section 1. Definitions. In this [Act]:

(1) "Employee" means an individual who works for hire,including an individual employed in a supervisory, managerial, or confidential position, but not an independent contractor.

(2) "Employer" means a person [, excluding this State, a political subdivision, a municipal corporation, or any other governmental subdivision, agency, or instrumentality,] that has employed [five] or more employees for each working day in each of 20 or more calendar weeks in the two-year period next preceding a termination or an employer's filing of a complaint pursuant to Section 5(c), excluding a parent, spouse, child, or other member of the employer's immediate family or of the immediate family of an individual having a controlling interest in the employer.

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

(4) "Good cause" means (i) a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise,job performance, and employment record, or (ii) the exercise of business judgment in good faith by the employer, including setting its economic or institutional goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force and the nature of the positions filled by its work force, and determining and changing standards of performance for positions.

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

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

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

(8) "Termination" means:

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

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

(iii) a quitting of employment or a retirement by an employee induced by

an act or omission of the employer, after notice to the employer of the act or omission without appropriate relief by the employer, so intolerable that under the circumstances a reasonable individual would quit or retire.

COMMENT

Paragraph (2): The definition of "employer" is based in part on Title VII of the Civil Rights Act of 1964. Since the general view is that state law should apply more broadly than federal law, the suggested minimum number of employees is reduced from 15 to 5, and the 20 qualifying weeks may be spread over a period of 24 months. To enable an early and certain determination of the status of the employer in question, the count should be taken as of the date of the employee's discharge or of the employer's filing for a "declaratory" ruling. Thus, if an employee were terminated on May 31, 1995, the critical period for finding 20 qualifying weeks would run from June 1, 1993, to May 31, 1995. This avoids the problem of the federal approach as reflected in **Slack v. Havens**, 522 F.2d 1091 (9th Cir. 1975). In determining whether a person is an employer, employees of that person are counted even though they are not protected by the Act. The language concerning the exclusion of the employer's "immediate family" from the count (but not from the protections of the Act if otherwise covered) is drawn from the Fair Labor Standards Act.

Uniformity is less important with regard to public employees because they are not employees of multi-state employers. In addition, many public employees are members of a civil service system that offers protection against termination. Thus, their coverage is left to local option. A state legislature may wish to consider, however, whether it is sound policy to prescribe differential treatment for such institutions as public and private universities.

Paragraph (3): "Benefit of economic value" includes food, lodging, and tuition reimbursement.

Paragraph (4): Examples of "good cause" for a termination under subparagraph (i) include theft, assault, fighting on the job, destruction of property, use or possession of drugs or alcohol on the job, insubordination, excessive absenteeism or tardiness, incompetence, lack of productivity, and inadequate performance or neglect of duty. Off-duty conduct may be "good cause" if it is relevant to the employee's performance on the job, to the employer's business reputation, or to similar concerns.

In the determination of good cause, principles and considerations generally accepted in arbitration which are to be applied include such factors as the reasonableness of the company rule violated, the employee's knowledge or warning of the rule, the consistency of enforcement of the rule and the penalties assessed, the use of corrective or progressive discipline, the fullness and fairness of the investigation including the opportunity given the employee to present his or her views prior to dismissal, and the appropriateness of the penalty in light of the conduct involved and the employee's employment record. Consideration will also be given to the character of the employee's responsibilities, including the professional, scientific, or technical character of the work, the management level of the employee's position in the enterprise, and its importance to the success of the business. An employer's discrimination in violation of applicable federal, state, or local law, or an employer's violation of established public policy, is inconsistent with the requirement of good cause for termination. Similarly, "whistleblowers" in various circumstances would be protected against retaliatory discharges.

Under subparagraph (ii), an employer's decision as to the economic goals and methodologies of the enterprise and the size and composition of the work force, as contrasted with decisions as to individual

dismissal, is governed by honest business judgment. In no way is this Act to operate as a plant-closing law; an employer remains entirely free to shut down an operation on economic or institutional grounds. The use of the term "including" in subparagraph (ii) and the listing of illustrative managerial decisions are intended to invoke the principle of **ejusdem generis** in the interpretation of the subparagraph. Although an employer's cutback in the number of employees may be economically justified, an individual employee may still contest his or her selection for layoff on the grounds it was discriminatory under applicable federal, state, or local law, or a violation of established public policy. Examples of valid grounds for selecting a particular employee for layoff include seniority, performance on the job, attendance record, etc. A sham layoff cannot be used as a device to dismiss an employee as to whom there is not good cause for a termination, as it violates the requirement that business judgment be exercised in good faith.

"Standards of performance" for positions will necessarily depend on the nature of the particular position. In fields that are traditionally or inherently highly competitive, such as professional sports, the entertainment industry, most professions, teaching at a university, etc., a performance standard could be "the most proficient performer available for a particular position." An employer is entitled to change the performance standards of any or all of the positions in its operation, as long as those changes are clearly communicated to the employees affected.

With regard to subparagraphs (i) and (ii), allowance is made for the difficulty of evaluating objectively the performance of certain positions.

Paragraph (7): "Person" includes several entities, such as co-employers. Uniformity is less important with regard to public employers and employees for the reasons set forth in the Comments on paragraph (2). Thus, the inclusion of public entities as persons is left to state option.

Paragraph (8)(iii): An act or omission making employment intolerable may consist of several acts or omissions or a course of conduct by an employer. Subparagraph (iii) incorporates the doctrine commonly known as "constructive discharge." It could include a series of suspensions no one of which exceeds the two months necessary to constitute a termination under subparagraph (ii). A "constructive discharge" in and of itself is not a violation of this Act. It is merely a termination, and, like other terminations, it becomes a violation only in the absence of good cause.

Section 2. Scope.

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

(b) This [Act] does not apply to a termination at the expiration of an express oral or written agreement of employment for a specified duration, which was valid, subsisting, and in effect on the [effective] date of this [Act].

(c) Except as provided in subsection (e), this [Act] displaces and extinguishes all common-law rights and claims of a terminated employee against the employer, its officers, directors, andemployees, which are based on the termination or on acts taken or statements made that are reasonably necessary to initiate or effect the termination if the employee's termination requires good cause under Section 3(a), is subject to an agreement for severance pay under Section 4(c), or is permitted by the expiration of an agreement for a specified duration under Section 4(d).

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

(e) This [Act] does not displace or extinguish rights or claims of a terminated employee against an employer arising under state or federal statutes or administrative rules or regulations having the force of law [or local ordinances valid under state law], a collective-bargaining agreement between an employer and a labor organization, or an express oral or written agreement relating to employment which does not violate this [Act]. Those rights and claims may not be asserted under this [Act], except as otherwise provided in this [Act]. The existence or adjudication of those rights or claims does not limit the employee's rights or claims under this [Act], except as stated in Section 7(d).

COMMENT

Subsection (b): The agreement of "specified duration" described here includes a fixed-term agreement of any length, measured in months, years, or some other time period, and is not limited to the type of specified-duration agreement authorized by Section 4(d). Specified-duration agreements permitted under this transitional provision cannot be renewed or extended except by an agreement meeting the requirements of Section 4(d). A state legislature may require that an agreement permitted under this subsection must be in effect on a date other than the effective date of the Act, **e.g.**, on the day the bill was introduced in the legislature.

Subsection (c): In return for statutory protections, tort actions based on the termination of employment as such are abolished. These include defamation, intentional infliction of emotional distress, and the like. There may be independent tort actions for assault, malicious prosecution, false imprisonment, etc., if there are independent facts separate and apart from the termination itself to support such causes of action. The key to the abolition of a tort action is not the nature of the tort, however, but whether its basis is the termination itself or acts taken or statements made that are reasonably necessary to initiate or effect the termination. An employer's report of a termination or the grounds for it, **e.g.**, to another prospective employer, will be governed by the doctrine of qualified privilege. This Act is not intended to expand, contract, or modify in any way a state's common law or statutory law of defamation. Contract actions based on terminations under implied-in-fact employment agreements are also abolished for employees protected by this Act.

Subsection (c) applies only to employee actions against an employer or its representatives, and does not affect employer actions against an employee, **e.g.**, for disloyalty, breach of a covenant not to compete, theft or destruction of property, etc.

Subsections (d) and (e): Employees who get no new statutory protections retain all their common-law rights. At the same time, however, employees who do benefit from the statutory scheme, and thus lose certain common-law rights, retain rights granted them under statutory law, collective-bargaining agreements, and other express employment agreements.

State law, of course, cannot interfere with the rights of "interstate" employees covered by collective-bargaining agreements governed by federal law. Subsection (e) similarly preserves the rights of intrastate employees and public employees under union agreements. Subsection (e) also leaves intact existing law concerning the enforceability of express oral or written agreements having a specified duration -- determined either by a fixed time period or by a particular task, **e.g.**, the term

agreements of professional athletes and entertainers, business executives, etc. -- or agreements providing special benefits upon termination, such as "golden parachutes."

Individuals not otherwise protected by this Act, including employees with less than a year's seniority and part-time workers, may still be protected by express or implied-in-fact agreements of employment, whether written or oral. Furthermore, such "uncovered" individuals retain any other common-law rights to which they may be entitled. Finally, even "protected" employees retain common-law claims against third parties arising out of a termination.

Unionized employees and employees covered by collective-bargaining agreements subject to federal law are entitled to exercise rights under this Act to the extent permitted by the developing law of federal preemption. **See, e.g., Lingle v. Norge Div. of Magic Chef, Inc.**, 486 U.S. 399 (1988). Unionized employees subject to state law are entitled to exercise rights under this Act to the extent not foreclosed by this or other state statutes. Arbitrators and courts will have to answer the necessary jurisdictional questions on a case-by-case basis.

There is no displacement or extinguishment of rights or claims under state statutes or administrative regulations, such as those relating to "whistle-blowing," workers' compensation, and occupational safety and health. Furthermore, by statutory enactment any state may provide separate, independent remedies for certain classes of terminated employees -for example, whistle-blowers and the victims of egregious violations of public policy -- which are broader and more extensive than those prescribed by this Act. It is only common-law rights and claims that this Act displaces. Rights that are preserved from displacement or extinguishment may, at the option of a state, include rights under municipal ordinances that are valid under state law.

Subsection (e): The common-law remedies available to a terminated employee under an agreement include not only any remedies expressly provided by the agreement but also whatever legal or equitable remedies a court would customarily provide for breach of such an agreement.

Section 3. Prohibited Terminations.

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

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

COMMENT

Subsection (a): Terminations because of race, sex, religion, or other grounds prohibited by applicable state or federal law are not terminations for "good cause" within

the meaning of this Act. Findings and conclusions regarding "good cause" and "public policy" in proceedings under antidiscrimination or similar laws in other forums are entitled to appropriate weight in proceedings under this Act, in accordance with traditional common-law doctrines concerning res judicata, collateral estoppel, and the preclusion of facts, issues, and judgment. See Sections 2(e) and 7(d). A finding in another tribunal that an employer did not practice race or sex discrimination does not, however, preclude a charge that a termination of an employee by the employer was, nonetheless, a termination without good cause under this Act. That an employer has not discriminated does not necessarily mean that it had justifiable grounds for the discharge.

Subsection (b): The Act provides a one-year probationary period before there is a requirement of "good cause" for discharge. Temporary breaks in service (one year or less) do not necessarily destroy the status of a nonprobationary employee and, thus, seasonal workers may be covered. But, in all cases, an average of 20 hours or more per week must be worked during the 26 weeks preceding termination for good cause protections to apply. To that extent, part-time employees are not covered.

A "break in service" includes any time not actually spent on the job except periods, like vacations or sick leaves or "personal days," when an employee is entitled to be away from the job on the basis of the employer's contract, policy, or special permission. Such a break in service or a layoff interrupts the accrual of credit toward meeting the oneyear requirement. Thus, seasonal workers would ordinarily need more than one twelve-month calendar period to qualify.

An individual's periods of employment with two separate legal entities may be "tacked" or combined to meet the one-year probationary requirement if both legal entities meet the definition of "employer" (e.g., employing five or more employees) and if the predecessor and the successor are deemed the "same person" because the successor is an "alter ego" of the predecessor, has assumed the legal obligations of the predecessor, etc.

Section 4. Agreements Between Employer And Employee.

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

(b) By express written agreement, an employer and an employee may provide that the employee's failure to meet specified business-related standards of performance or the employee's commission or omission of specified business-related acts will constitute good cause for termination in proceedings under this [Act]. Those standards or prohibitions are effective only if they have been consistently enforced and they have not been applied to a particular employee in a disparate manner without justification. If the agreement authorizes changes by the employer in the standards or prohibitions, the changes must be clearly communicated to the employee.

(c) By express written agreement, an employer and an employee may mutually waive the requirement of good cause for termination, if the employer agrees that upon the termination of the employee for any reason other than willful misconduct of the employee, the employer will provide severance pay in an amount equal to at least one month's pay for each period of employment totaling one year, up to a maximum total payment equal to 30 months' pay at the employee's rate of pay in effect immediately before the termination. The

employer shall make the payment in a lump sum or in a series of monthly installments, none of which may be less than one month's pay plus interest on the principal balance. The lump-sum payment must be made or payment of the monthly installments must begin within 30 days after the employee's termination. An agreement under this subsection constitutes a waiver by the employer and the employee of the right to civil trial, including jury trial, concerning disputes over the nature of the termination and the employee's entitlement to severance pay, and constitutes a stipulation by the parties that those disputes will be subject to the procedures and remedies of this [Act].

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

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

(f) An employing person and an employee not otherwise subject to this [Act] may become subject to its provisions to the extent provided by express written agreement, in which case the employing person is deemed to be an employer.

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

(h) By express written agreement, an employer and an employee may settle at any time a claim arising under this [Act].

(i) By express written agreement before or after a dispute or claim arises under this [Act], an employer and an employee may agree to private arbitration or other alternative dispute-resolution procedure for resolving the dispute or claim.

(j) By express written agreement after a dispute or claim arises under this [Act], an employer and an employee may agree to judicial resolution of the dispute or claim.

(k) The substantive provisions of this [Act] apply under an agreement authorized by subsections (i) and (j).

COMMENT

Section 4 lists ways in which employers and employees may impose significant qualifications on the statutory rights otherwise accorded employees. Subject

generally to the requirement of good faith, employers and employees may agree in advance on what will constitute "good cause" for termination, or even dispense with the requirement of good cause altogether as long as a minimum schedule of graduated severance payments is provided. By express agreement, employers may also provide additional substantive and procedural rights for employees. Finally, individuals not covered by the statutory good-cause protections because they are part-time workers, probationers, etc., may "opt in" to the Act with the agreement of their employer. They would, of course, then lose the common-law rights displaced by Section 2(c).

Agreements defining performance standards or specifying conduct that constitutes good cause for termination pursuant to Section 4(b) and agreements for severance pay under Section 4(c), if valid, will be enforced in proceedings under this Act. But employment agreements of a specified duration (Section 4(d)) and other contractual claims preserved under Section 2(e) will be enforceable through the usual processes of law in the courts (or through private arbitration, if so provided) unless the parties expressly agree to use the procedures and remedies provided by this Act.

It is the intent of Section 4 not to allow so-called "contracts of adhesion" to be used to waive or otherwise circumvent employees' rights under the Act.

Section 4 does not affect an employer's right to enter into and enforce covenants not to compete and similar agreements with its employees.

Subsection (b): Great flexibility is accorded employers and employees in agreeing upon performance standards for particular positions, so long as there is no duress or overreaching by either party. If valid, an express written agreement may in effect define what constitutes "good cause" for a termination, a determination that would otherwise have to be made by the arbitrator in the case of an individual employee's dismissal.

Subsection (c): An employer may secure the power to dismiss an employee for any reason at any time, thus making the employment "at will," if the employer gets the employee's agreement in an express writing that provides for a specified minimum graduated severance payment in the event of a termination on any grounds other than the employee's willful misconduct. As a practical matter, the use of such "waiver" agreements is likely to be confined generally to management personnel, key professionals, and other persons not subject to periodic layoff. Otherwise, an employer would be taking the risk that a worker who was laid off for more than two months would opt to treat the layoff as a "termination" under Section 1(8)(ii), thus entitling the employee to severance pay under the Section 4(c) agreement. Of course, such an employee would then forfeit any recall rights with the employer.

Subsection (d): When an employee has been employed only for the completion of a specified task, project, undertaking, or assignment, pursuant to an express oral or written agreement to that effect, a termination upon the expiration of the task, project, etc., does not violate the Act. For example, a skilled craftsperson may be hired to help install the plumbing in a new office building or a university professor may be invited to visit at another school and offer a certain set of courses. Even though each assignment takes over a year of full-time work, neither employee has a claim to continued employment upon the completion of the respective undertakings. Similarly, seasonal employees, even if covered under the Act, would ordinarily be considered as hired for a task or project of specified duration and may lawfully be terminated upon its completion. Such employees, however, are not treated differently from other employees with respect to other sorts of terminations; such employees, if they meet the requirements of Section 3(b), may file complaints under the Act to vindicate their "good cause" rights under Section 3(a) in the event of

any other terminations. Like other employees under the Act, such employees also retain, pursuant to Section 2(c) and (d), their full common-law rights until the period of their employment qualifies them for protection under Section 3(a). The execution and application of agreements having a specified duration are subject to the usual principles concerning duress, contracts of adhesion, and the like.

Subsections (h), (i), and (j): Through an express writing parties may either settle substantive claims arising under this Act or agree to resolve them by alternative procedures outside the Act, including court actions. To avoid any pressure on an incumbent employee to agree in advance to what might possibly be costly, complex, and long-delayed judicial proceedings, a resort to the courts may be agreed upon only after a claim has arisen, i.e., ordinarily after a termination has occurred and the employee has little or nothing to lose by insisting on the right to statutory arbitration.

Section 5. Procedure And Limitations.

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

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

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

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

[(e) When a complaint is filed, a complainant employee or employer shall pay a filing fee to the [Commission; Department; Service] in [the amount of $_____] [an amount not exceeding the maximum filing fee for a civil action in the courts of general jurisdiction of this State]. The [Commission; Department;

Service] may waive or defer payment of the filing fee upon a showing of the complainant employee's indigency.]

COMMENT

Subsection (a): No time limit is imposed on the pursuit of an employer's grievance procedures or other internal remedies because the employer can usually terminate them at any time and because the employee can always desist from pursuing them further.

Subsection (e): As a matter of principle, the preferred method for financing the enforcement of a public right like the right not to be discharged without good cause is through the public treasury. Nonetheless, in times of financial stringency, some states may feel it necessary to seek alternative funding rather than assume the full cost of a new administrative procedure. A substantial part of the cost could be placed on the parties themselves, perhaps with a cap in the case of the employee in an amount equal to one or two weeks' pre-termination pay. Or else a state could impose a special "employment termination tax" on businesses covered by the Act, with the use of an experience rating akin to that applied to unemployment insurance.

Section 6. Arbitration; Selection And Powers Of Abritrator; Hearings; Burden Of Proof.

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

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

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

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

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

(f) If an employee establishes that a termination was motivated in part by impermissible grounds, the employer, to avoid liability, must establish by a

preponderance of the evidence that it would have terminated the employment even in the absence of the impermissible grounds.

COMMENT

Subsection (a): As a public right, the right to protection against discharge without good cause should be administered by a public agency, either new or existing. Possibilities include a state department of labor, labor relations commission, mediation service, or unemployment compensation bureau. In many instances, it might be sensible to delegate day-to-day operational functions to an outside private agency like the American Arbitration Association. But to maintain the public character of the proceedings under the Act, the formal appointment of arbitrators should be the responsibility of the public agency.

Although this Act, in the interest of expediting proceedings, does not mandate any sort of agency investigation, screening of complaints, or mediation prior to arbitration, all of these possible intermediate steps are matters that could be considered by the administering agency in preparing its rules and regulations.

Subsection (b): Even though an agency may decide to engage ad hoc arbitrators who devote only a portion of their time to cases under this Act, such arbitrators would be fully invested with the constitutional powers of a public official while operating under this Act. **See, e.g., City of Detroit v. Police Officers Ass'n**, 408 Mich. 410, 294 N.W. 2d 68 (1980), **app. dismissed**, 450 U.S. 903 (1981); **cf. Country-Wide Ins. Co. v. Harnett**, 426 F. Supp. 1030 (S.D. N.Y. 1977), **aff'd**, 431 U.S. 934 (1977). Under its authority to prescribe the qualifications of arbitrators, the administering agency may establish a schedule of fees and expenses for arbitrators.

Subsection (c): Arbitration proceedings should generally be informal, speedy, and inexpensive. Discovery ought to be limited to what is reasonably necessary to enable both parties to prepare adequately. Labor arbitration does not ordinarily contemplate that each side will know in advance all the details of the other side's presentation. The arbitrator should take account of these considerations in ruling on a party's request for discovery prior to the hearing. In a given case, it might be appropriate for an arbitrator to hold a prehearing conference with the parties to go over the ground rules on discovery. The arbitrator can deal with genuine, prejudicial surprise to a party at a hearing by calling a recess or granting an adjournment to allow time for rebuttal. Section 7 of the Uniform Arbitration Act contains fairly flexible provisions concerning discovery. In issuing regulations governing discovery under this Act, the administering agency could consider imposing time limits or other restrictions to prevent possible abuse of the discovery process.

Subsection (d): The Act authorizes formal representation in statutory arbitration proceedings by attorneys or by others approved under state law. This may include paralegals acting under the supervision of an attorney. The Act does not intend to prevent an employer or an employee from obtaining the sort of assistance in preparing and presenting a case that is customarily provided in labor arbitrations by personnel managers, labor union officials, and coworkers. Only attorneys, however, may legally represent the parties in judicial proceedings under Section 8, unless the applicable court rules provide otherwise.

Subsection (f): This provision generally incorporates the "dual motive" principles set forth in **Price Waterhouse v. Hopkins**, 490 U.S. 228 (1989).

Section 7. Awards.

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

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

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

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

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

(4) reasonable attorney's fees and costs.

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

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

(2) reasonable attorney's fees and costs.

(d) An arbitrator may not make an award except as provided in subsections (b) and (c). The arbitrator may not award damages for pain and suffering, emotional distress, defamation, fraud, or other injury under the common law; punitive damages; compensatory damages; or any other monetary award. In making a monetary award under this section, the arbitrator shall reduce the award by the amount of any monetary award to the employee in another forum for the same conduct of the employer. In making an award, the arbitrator is subject to the rules of issue, fact, and judgment preclusion applicable in courts of record in this State.

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

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

COMMENT

Subsection (b): When an employee is terminated without good cause but neither reinstatement, backpay, nor severance pay is warranted or appropriate, an arbitrator may issue an award in the nature of a "declaratory judgment" to vindicate the rights of the employee.

Subsection (b)(2): Backpay may be awarded with or without reinstatement. Thus, if there is no reinstatement but a severance payment is awarded instead, backpay may still be provided. Backpay runs from the termination to the date of the award (or date of reinstatement); severance pay runs from the date of the award. The formulas for calculating backpay and severance pay are also somewhat different.

The objective as to fringe benefits is to make the employee whole for any losses or expenditures related to the wrongful termination. If the employee has exercised COBRA rights and continued health insurance coverage or acquired alternative coverage, all money spent for such coverage should be recouped. In addition, if the substitute coverage did not match the employee's prior protections, whatever additional out-of-pocket expenditures were necessary should also be awarded.

If the employee justifiably did not replace the coverage lost and then incurred medical expenses, the award would include the amount of financial obligation stemming from the wrongful denial of the coverage. All other benefits, including optical, dental, and disability, would be handled in a similar fashion. To balance the obligation of the employer to pay actual expenses when there is no replacement insurance or the subsequent coverage is inferior, the employer should not be responsible for restoring past premiums for unreplaced insurance if the benefit would not have been utilized during the period of unemployment.

With regard to pension rights, if the employee could not be placed in the position of one who had never been terminated, the arbitrator would be charged with placing a dollar value on the vesting time lost.

Deductions are based on the usual common law principles concerning the mitigation of damages by a discharged employee.

In all awards that include the loss of future earnings, pension benefits, etc., the amount of the award should be discounted to reflect present values, and should be reduced where appropriate by the amount of any workers' compensation or other disability payments.

Subsection (b)(3): Reinstatement is the preferred remedy for terminations in violation of this Act. If that is unfeasible because of the personal relations between the employer and the employee, changes in the employer's business, or other appropriate grounds, severance pay may be awarded instead. Whatever maximum period for severance pay is adopted, such an amount should not be awarded as a matter of course even though an arbitrator concludes that a worker will probably not find new employment during that time. Subsection (b)(3) adopts the concept of "proportionality," under which the employer should be held liable on the basis of an assessment of **both** the employee's likely loss and the degree of the employer's responsibility for, or contribution to, that loss. Thus, an employer should be held liable for a much greater portion of the maximum period if it had lured the employee away from another highly paid position, the employee had served long and well, and the reasons for the dismissal were egregious, than if the employee had recently been hired while out of work and the termination was not a flagrant violation of the good cause standard. In fixing the severance payment, the arbitrator should consider any actual earnings received by the employee elsewhere, as well as the likelihood that such reemployment will continue.

Subsections (b)(4), (c)(2), (e), and (f): The language of the Act allowing reasonable attorney's fees and costs to prevailing employees and under certain conditions to prevailing employers deliberately tracks the language of Title VII of the 1964 Civil Rights Act and of Supreme Court decisions interpreting Title VII. See **Albemarle Paper Co. v. Moody**, 422 U.S. 405 (1975); **Christiansburg Garment Co. v. EEOC**, 434 U.S. 412 (1978). In calculating the appropriate amount of attorney's fees, federal decisions under Title VII and 42 U.S.C. § 1988 may be helpful but are not controlling. The "prevailing market rate" is a common starting point, and the successful pursuit of a small monetary claim may justify a fee exceeding the amount of the award. See **Blum v. Stenson**, 465 U.S. 886 (1984); **City of Riverside v. Rivera**, 477 U.S. 561 (1986). **Cf. Hensley v. Eckerhart**, 461 U.S. 424 (1983) (extent of success "crucial").

Subsection (d): The last two sentences must be read together. Preclusion covers all claims subject to the usual doctrines of res judicata or collateral estoppel, and the penultimate sentence would not allow a second recovery if the underlying claim had been precluded by a prior judgment or award.

Section 8. Judicial Review And Enforcement.

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

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

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

(1) the award was procured by corruption, fraud, or other improper means;

(2) there was evident partiality by the arbitrator or misconduct prejudicing the rights of a party;

(3) the arbitrator exceeded the powers of an arbitrator;

(4) the arbitrator committed a prejudicial error of law; or

(5) another ground exists for vacating the award under the [Uniform Arbitration Act] [_____ arbitration act of this State].

(d) In an application for vacation, modification, or enforcement of an arbitrator's award, the court may award a prevailing employee reasonable attorney's fees and costs. In an application by an employee for vacation of an arbitrator's award, the court may award a prevailing employer reasonable attorney's fees and costs if the court finds the employee's application is frivolous, unreasonable, or without foundation.

COMMENT

Some states have constitutional provisions governing judicial review of administrative decisions that may have to be taken into account.

Subsection (a): The substantive law applicable in either arbitration proceedings or the judicial review of an arbitral award must be determined according to the choice-of-law rules governing transitory rights of action.

Subsection (c)(4): The United States Supreme Court has sharply limited judicial review of the merits of arbitration awards under collective—bargaining agreements subject to federal law. The exceeding of jurisdiction and arbitrator misconduct are about the only recognized grounds for reversal, although of course a court may refuse to enforce an award (like any contract) that is contrary to positive law. **Steelworkers v. Enterprise Wheel & Car Corp.**, 363 U.S. 593 (1960); **Paperworkers v. Misco, Inc.**, 484 U.S. 29 (1987). That approach lends great finality to arbitral awards, and it is hoped that courts would similarly accord considerable deference to arbitration awards under this Act. But the basis of the Supreme Court's position is that unions and employers have **agreed** to treat arbitral awards as "final and binding," and that it is the parties' own contract the arbitrator is applying. When individual statutory rights are at stake, the Court has declined to give the same weight even to the awards of arbitrators empowered by union-management agreements. **Alexander v. Gardner-Denver Co.**, 415 U.S. 36 (1974); **Barrentine v. Arkansas-Best Freight Sys.**, 450 U.S. 728 (1981). In this Act, individual statutory rights are the issue, and arbitration as the enforcement method has been imposed upon, not agreed to by, the parties. For these reasons the additional ground for judicial review, "prejudicial error of law" by the arbitrator, has been included. But a court should not vacate an award unless the legal error has adversely affected the rights of a party.

Subsection (c)(5): The reference to "another ground" for vacating an arbitral award is meant to be confined to other specific bases spelled out in the Uniform Arbitration Act or cited state arbitration act and is not intended to open up the award for a broadscale judicial review.

Section 9. Posting. An employer shall post a copy of this [Act] or a summary approved by the [Commission; Department; Service] in a prominent place in the work area. An employer who violates this section is subject to a civil penalty not exceeding [$ _____]. The [Attorney General] may bring a civil action, on behalf of this State, to impose and collect any civil penalty arising under this section.

Section 10. Retaliation Prohibited And Civil Action Created. An employer or other employing person may not directly or indirectly take adverse action in retaliation against an individual for filing a complaint, giving testimony, or otherwise lawfully participating in proceedings under this [Act], whether or not the individual is an employee having rights under this [Act]. An employer or other employing person who violates this section is liable to the individual subjected to the adverse action in retaliation for damage caused by the action, punitive damages when appropriate, and reasonable attorney's fees. A separate civil action may be brought to enforce this liability. The employer is also subject to applicable procedures and remedies provided by Sections 5 through 8.

Section 11. Severability Clause. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect

other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

Section 12. Effective Date. This [Act] takes effect _____.

Section 13. Repeals. The following acts and parts of acts are repealed:

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

Section 14. Savings and Transitional Provisions. This [Act] does not apply to the termination of an employee within six months after the effective date of this [Act] based upon the employee's refusal to enter into an agreement meeting the minimum standards of Section 4(c), which the employer, in the exercise of good faith business judgment, may impose as a condition of continued employment.

APPENDIX

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

ALTERNATIVE A

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

[Section 6. Remedies.

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

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

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

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

(4) reasonable attorney's fees and costs.

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

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

(2) reasonable attorney's fees and costs.

(c) The [Commission; Department; Service] may not make an award except as provided in subsections (a) and (b). The [Commission; Department; Service] may not award damages for pain and suffering, emotional distress, defamation, fraud, or other injury under the common law; punitive damages; compensatory damages; or any other monetary award under this [Act]. In making a monetary award under this section, the [Commission; Department; Service] shall reduce the award by the amount of any monetary award to the employee in another

forum for the same conduct of the employer. In making an award, the [Commission; Department; Service] is subject to the rules of issue, fact, and judgment preclusion applicable in courts of record in this State.

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

(e) Upon the complaint of an employer, the [Commission; Department; Service] may issue an order declaring whether there is good cause for the termination of a named employee. If the [Commission; Department; Service] dismisses the employer's complaint, the [Commission; Department; Service] may award reasonable attorney's fees and costs to the prevailing employee.]

ALTERNATIVE B

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

[SECTION 5. JUDICIAL REMEDIES.

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

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

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

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

(4) reasonable attorney's fees and costs.

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

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

(2) reasonable attorney's fees and costs.

(c) The court may not make an award except as provided in subsections (a) and (b). The court may not award damages for pain and suffering, emotional

distress, defamation, fraud, or other injury under the common law; punitive damages; compensatory damages; or any other monetary award under this [Act]. In making a monetary award under this section, the court shall reduce the award by the amount of any monetary award to the employee in another forum for the same conduct of the employer. In making an award, the court is subject to the rules of issue, fact, and judgment preclusion applicable in courts of record in this State.

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

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

COMMENT

The preferred method for enforcing the statutory protection against termination without good cause is through the use of professional arbitrators appointed by an appropriate public agency. Such persons have the requisite skill, training, and experience to understand the special problems of the workplace, and are most likely to be acceptable to the management and employee communities. Their efficiency in resolving disputes over discharge and discipline may also reduce the time and expense of the proceedings.

Some states may believe, however, that it will be less costly to employ full-time civil service or other governmental personnel as hearing officers. For these states, Alternative A is provided.

The third option is Alternative B, which would place enforcement in the hands of the civil courts. This would almost surely be the most complex, expensive, and time-consuming procedure. But a few states may believe that their constitutional provisions on the right to jury trial, access to the courts, etc., preclude the use of other forums.