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THE MODEL EMPLOYMENT TERMINATION ACT

By Theodore J. St. Antoine

The Model Employment Termination Act (META), which the Uniform Law Commissioners have recommended for adoption by all state legislatures, could provide the most significant legal change of this quarter century in the American workplace. In addition, if the annual caseload of grievance arbitrations in this country now stands at somewhere around 65,000, the Act holds the potential for at least quadrupling that figure.

Our colleague Jack Stieber has calculated that there are 60 million U.S. employees who are not protected by union contracts or civil service laws, and are thus subject to the employment-at-will doctrine. They can be fired for any reason whatsoever (absent a civil rights violation), and, in fact, 2 million of them are discharged each year. Stieber further estimates that 150,000-200,000 of these workers would have a claim under the "just cause" standards generally applicable in unionized industries.

During the past couple of decades the courts in 40-45 jurisdictions have relied on three main theories to carve out certain exceptions to the traditional principle of employment-at-will. Those three theories include tort (violations of public policy, or "abusive" or "retaliatory" discharge); breach of an express or implied contract, embodied in a personnel manual or an oral assurance at the time of hiring; and breach of the covenant of good faith and fair dealing. For both employers and employees, however, there are serious deficiencies in these common law doctrines. They constitute a fragile safeguard for the worker who has been wronged. Yet, in a given case, they can wreak havoc on a hapless employer who runs afoul of them.

The tort or violation of public policy claim will be limited by its nature to rare, egregious situations. Few employers are going to order their employees to commit perjury or engage in an illegal price-fixing scheme, and then fire them if they refuse. To avoid a contract obligation, all an employer has to

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do is refrain from making any commitment about future job security. Even existing policy statements against arbitrary dismissal can generally be rescinded, as long as there is adequate notice to the affected workers. The covenant of good faith and fair dealing, potentially the most expansive protection, has been recognized in only a handful of states and is being cut back there. Finally, the great majority of successful plaintiffs are professionals or upper-level management personnel. Rank-and-file workers who are fired usually have too little money at stake to make their case worthwhile for lawyers operating on a contingent fee basis.

At the same time, the results may be devastating for an employer who does get entangled in a wrongful discharge court suit. Various California studies show that a plaintiff who can get to the jury wins around 75 percent of the time, with an average award of approximately \$450,000. Multimillion dollar verdicts for single individuals are not uncommon. Even successful defenses may cost between \$100,000 and \$200,000. In addition, a recent RAND study indicates that the "hidden costs" incurred by American business in trying to avoid this onerous litigation, including the retention of undesirable employees, may amount to 100 times more than the adverse judgments and other legal expenses.

The central defects of the existing common law regime are that employees' substantive rights are too limited and uncertain, the remedies against employers are too random and often excessive, and the decision making process is too inefficient for all concerned. META, for which I had the opportunity to serve as reporter or draftsman, attempts to address each of these problems. The approach is practical, balanced compromise. The Act guarantees the vast majority of workers certain irreducible minimum rights against wrongful discharge, but substantially reduces the liability of employers. As the preferred method of enforcement, the Act substitutes the use of arbitrators in place of long, expensive court proceedings. That also means the elimination of wayward verdicts by emotionally aroused juries.

Employees covered by META could not be discharged except for "good cause." Good cause could consist of either misconduct or poor performance on an individual worker's part, or the economic needs and goals of the enterprise as determined by the employer in the good faith exercise of business judgment. No difference is intended from the application of the familiar "just cause" standard appearing in collective bargaining agreements.

META would cover most full-time employees (i.e., those working 20 or more hours a week) after one year of service with an employer. An exception exists for small employers, those having less than five employees. Unionized employees are covered to the extent permitted by federal preemption law. The inclusion of public employees is left to state option.

A major tradeoff in META is the displacement or extinguishment of most common law actions based on terminations forbidden under the Act. Those would include implied contract claims and tort claims grounded in such theories as

defamation, intentional infliction of emotional distress, and the like. There would be no extinguishment of rights or claims under express contracts or under statutes or administrative regulations, such as those dealing with job discrimination, "whistle blowing," or occupational safety and health.

Remedies would be confined to those customary under the original Civil Rights Act of 1964, namely, reinstatement with or without back pay and attorneys' fees for a prevailing party. Severance pay is allowable when reinstatement is impracticable, up to a maximum of 36 months' pay in the most egregious cases. Compensatory and punitive damages are expressly excluded.

An appropriate state agency would ordinarily appoint the arbitrator. Awards under this statutory scheme would be subject to slightly greater judicial review than awards in consensual arbitrations. The grounds would include corruption, an exceeding of authority, or a prejudicial error of law.

As a matter of principle, the new public right to be free from unjust dismissal, like any other public right, ought to be enforced at public expense. Yet the prospect of an additional and ill-defined fiscal burden for today's financially troubled states could be fatal for a measure that is bound to generate controversy in any event. META therefore suggests, as an alternative to the normal filing fee, that the states consider imposing a substantial portion of the cost on the parties themselves, perhaps with a cap on the employee's share in an amount equal to one or two weeks' pre-termination pay.

Two hotly debated provisions of META allow employees and employees to "opt out" of the statute. The parties may eliminate the good cause guarantee and substitute a mandatory severance payment of at least one month's pay for each year of employment. Or they may agree on a private arbitration procedure to resolve their dispute. "Freedom of contract" carried the day here, despite the concern that an employee is seldom in a position to bargain effectively with an employer. Courts may be able to minimize the risks of employer overreaching by resort to such theories as economic duress, contracts of adhesion, and procedural fairness.

Getting META (or its equivalent) adopted in this country will be a long, hard process. The plaintiff's bar opposes it because it will eliminate large contingent fees. Many non-union employers oppose it because it will reduce their suzerainty in the workplace. The AFL-CIO has endorsed the principle of legislation prohibiting wrongful discharge but will probably not assign it a high priority. I remain confident though that the United States will not remain forever the only major industrial democracy in the world without generalized legal protection against unjust dismissal. The action of the Uniform Law Commissioners — a mainstream group of influential lawyers, judges, and legislators — is itself indicative of what education can accomplish. Initially, the Commissioners considered discharging the META drafting committee before we had even finished presenting our first report. Two years later, on the final vote by states, the Commissioners approved META by the overwhelming vote of 39 to 11.

Editor's Note: This article is reprinted, with permission, from The Chronicle, published by The National Academy of Arbitrators. Theodore St. Antoine is Professor of Law at the University of Michigan Law School.