The Making of the Model Employment Termination Act

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Abstract: Courts in about 45 states have ameliorated the harshness of employment at will, but the common-law modifications still exhibit serious deficiencies. Legislation is needed. The Model Employment Termination Act proposes a balanced compromise. It would protect most employees against discharge without good cause and it would relieve employers of the risk of devastating financial losses when liability is imposed. Arbitration procedures under the Model Act would also be simpler, faster, and cheaper than existing court proceedings.

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I. INTRODUCTION

Cornelius Peck is one of a small band of scholars who heralded the most significant development in the whole field of labor and employment law over the past quarter century. During that period, and especially during the last dozen years, courts in about 45 jurisdictions have used one legal theory or another to carve out exceptions to the once-universal doctrine of employment at will. Under that pernicious doctrine, as one famous nineteenth century court decision put it, employers could “dismiss their employees at will . . . for good cause, for no cause, or even for cause morally wrong.” In 1967 Lawrence Blades advocated judicial development of the tort of “abusive discharge.” Reasoning by analogy to the abuse of legal process, he argued that even the exercise of a right may be actionable if based on wrongful motives. In 1976 Clyde Summers called for statutory protection against unjust dismissal, believing legislation was necessary because of the courts’ “unwillingness to break through their self-created crust of legal doctrine.”

Professor Peck took a different tack in a 1979 article. First of all, he agreed with Professor Blades that legislative reform was unlikely since there were no organized interest groups to lobby for just cause guarantees. The principal beneficiaries would be unorganized employees. Employers would oppose any limitation on their autonomy in the workplace. Unions would oppose the loss of one of their major selling points, the assurance of job security. Peck then contended that the “continued implementation of the rule that an employer under a contract terminable at will may discharge employees without cause is sufficiently bound up with governmental action that the protections of

4. Id. at 1423–24.
7. Id. at 3.
the Fourteenth Amendment are applicable."\(^8\) Pointing to the substantial body of statutory and common law already in existence to protect some employees against termination without cause, Peck concluded that keeping similar safeguards from nonunion employees in the private sector would "constitute a deprivation of equal protection, because there is no rational basis for denying job protection to some employees while granting it to others."\(^9\)

I recall thinking at the time that Peck's thesis, although its aims were admirable, would fail on two counts. First, the Supreme Court had recently exhibited a strong inclination to cut back on its previous extension of the "state action" concept.\(^10\) Second, legislatures have an established ability to "implement their program step by step," or remedy "one phase of one field . . . neglecting the others," without violating equal protection requirements.\(^11\) I now realize, however, that Peck may have been wiliier than I originally perceived. After making what I felt was a rather strained constitutional argument, he went on to say:

> Even if the arguments developed above fail to persuade courts that the rule currently applied to employment for an indefinite term is unconstitutional, they may nonetheless achieve their purpose if they induce courts to give serious consideration on the merits to the suitability of that rule in contemporary society.\(^12\)

Who knows whether a desire to avoid a sensitive constitutional question may have influenced the approaches of any of the courts that modified at-will employment in the years following Peck's article? At least we know that our highest court has often stretched a statute to finesse vexing constitutional issues.\(^13\) We also know that federal and

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8. Id. at 25–26.
9. Id. at 42.
10. See, e.g., Hudgens v. NLRB, 424 U.S. 507 (1976) (holding that a private shopping center could exclude union pickets from mall and adjacent parking lot), overruling Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (holding that a private club holding a state liquor license could refuse service to a black person).
12. Peck, supra note 6, at 42 (emphasis added).
13. See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568 (1988) (holding that secondary boycott ban on "coercion" of neutral employers did not apply to handbilling urging customers to refrain from patronizing any of the shops in a mall where a nonunion contractor had been retained to construct a department store); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) (holding that congressional authorization for compulsory
state courts have frequently cited Peck, and that the courts have gone on to employ tort, contract, and other common-law theories to ameliorate some of the harshest rigors of employment at will. On a celebratory occasion like this, why need we look closer for a causal link with the thesis of our esteemed honoree?

Elsewhere I have written at length concerning the deficiencies of the judicial modifications of at-will employment, however welcome they are as a first step in the right direction. From the employee's perspective, they do not go far enough. The tort theory generally requires some outrageous violation of a well-established public policy, a relatively rare occurrence. The contract theory will be unavailable if an employer refrains from any oral or written assurance of job security or rescinds a previous commitment by adequate notice to the work force. Only a handful of states accept the most expansive theory, the covenant

dues payments under union security agreements impliedly forbids use of objecting employees' contributions for political causes they oppose; Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944) (congressional grant of exclusive bargaining power to majority union impliedly imposes obligation to represent minority employees fairly and nondiscriminatorily).


of good faith and fair dealing. Finally, even if an employee has a solid legal claim, few rank-and-file workers will have a monetary claim sufficient to attract the services of a lawyer relying on a contingent fee.

From the employer's perspective, when the common-law regime does operate, it goes too far. Several studies of California cases found that a plaintiff who could reach a jury won almost 75 percent of the time, with the average verdict around $450,000. Juries can succumb to emotional appeals, and they have awarded single individuals $20 million, $4.7 million, $3.25 million, $2.57 million, $2 million, $1.5 million, $1.19 million, and $1 million. Company attorneys have told me that the expense of even a successful defense of a wrongful termination claim before a jury could range as high as $100,000 to $200,000. On balance, the present common-law system ill serves all parties, except perhaps the plaintiffs' bar. Therefore, while recognizing the validity of Peck's concerns about political obstacles, I still believe that ultimately legislation must provide the solution. I should not even object if some solons were moved by Peck's insistence that a constitutional infirmity afflicts the current state of the law.

In this paper I first provide a brief history of the drafting of the Model Employment Termination Act (META) and its reception by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Thereafter I discuss in more detail META's individual provisions and the various policy choices that were made in the course of its formulation.

II. THE UNIFORM LAW COMMISSIONERS AND THE MODEL ACT

A. Background of the Commissioners

The National Conference of Commissioners on Uniform State Laws was formed in 1892, following a recommendation of the American Bar

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Association that the states create a body of commissioners to promote uniform legislation in the United States.\textsuperscript{25} All the states, the District of Columbia, and Puerto Rico eventually participated. Each state decides on the manner of selecting its own commissioners. State delegations average about six persons each, so that the total membership of the Uniform Law Commissioners (ULC) is around 300. Commissioners tend to be prominent and influential lawyers, judges, legislators, and academics in their state—usually solid, middle-of-the-road types, not given to extremes of any sort.

The NCCUSL meets for a whole week every year, usually near the time of the ABA’s annual meeting. All proposed uniform or model acts must be read through line by line at two annual sessions before being approved. The more complex or controversial measures may require three or more readings. Suggestions and amendments from the floor, as well as questions and comments, are frequent and discussion is spirited and uninhibited. Final adoption is by vote of the states, with each delegation casting a single vote.

Since its founding, the NCCUSL has promulgated some 200 uniform laws.\textsuperscript{26} Over 30 of these have been passed in at least half of the U.S. jurisdictions, including such major and varied enactments as the Uniform Commercial Code, the Uniform Arbitration Act, the Uniform Partnership Act, the Uniform Anatomical Gift Act, and the Uniform Controlled Substances Act.\textsuperscript{27}

Drafting committees perform the bulk of the commissioners’ work in producing proposed acts for consideration by the full NCCUSL. The ten or so voting members of these committees are drawn exclusively from the ULC. They are usually generalists or specialists in areas of the law other than the one under study. The aim is to avoid persons with preconceptions or axes to grind. Reporters or draftpersons, almost always law professors, and a substantial number of outside advisers from a wide range of interested groups provide technical expertise. The ULC committee members, however, have ultimate responsibility for all policy judgments.

\begin{itemize}
\item \textsuperscript{27} \textit{Id.} at 114–18.
\end{itemize}
The committee makes a determined effort at achieving consensus, but majority rule prevails on the most divisive issues. There is little, if any, secrecy. Invited outsiders participate vigorously in debates and are present during committee votes. At least in theory, any member of the public may observe committee deliberations. A drafting committee ordinarily meets two or three times during the year for intensive two-and-a-half-day working sessions. The entire committee then makes a presentation before the NCCUSL at the annual meeting.

B. The Commissioners' Treatment of the Model Act

The ULC Scope and Program Committee recommended in January, 1985, that the Executive Committee appoint a committee to draft a Uniform Wrongful Termination Act.28 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. Somewhat ironically, in light of subsequent developments, the original impetus for the move may have been a concern that the courts were improperly breaching the wall of at-will employment. 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 NCCUSL an opportunity to provide guidance in an area of growing confusion. Despite this rationale, the entire venture was undoubtedly something of a departure from the traditional mission of the organization, which was the codification of existing principles rather than law reform.29 In 1985, Montana had not yet passed what is still the only state statute forbidding a discharge except for good cause,30 and no state court had gone that far as a matter of common law.31 But of course, a willingness to burst the confines of original boundaries is a hallmark of almost any dynamic institution.

At the 1985 annual meeting, the ULC Executive Committee set up the Study Committee on Proposed Employment Termination Act. The chair was Stanley M. Fisher, a leading antitrust lawyer in a major Cleveland

28. This and much of the following historical material is drawn from the prefatory note accompanying the official text of the Model Employment Termination Act, which was mostly prepared by the drafting committee's reporter (the author of the present article). See 9A Lab. Rel. Rep. (BNA) IERM 540:21, 21-23 (Dec. 1991).
29. White, supra note 25, at 2098 and authorities cited therein.
31. See supra text accompanying notes 15-17.
corporate law firm. In June, 1986, Fisher transmitted a report in which the study committee unanimously recommended establishing the Drafting Committee on Uniform Employment Termination Act. The Executive Committee adopted this recommendation at its February, 1987 midyear meeting. On October 5, 1987, Chair Fisher formally advised the eight other members of the new drafting committee of their responsibilities. In addition, two ex officio members participated regularly. I was named reporter, or principal draftsperson. A three-person review committee was also appointed, with union lawyer James A. King of Honolulu as chair.

The ULC invited advisers from the ABA’s Section of Labor and Employment Law and Section of Torts and Insurance Practice, the AFL-CIO, the U.S. Chamber of Commerce, the National Association of Manufacturers, the National [Plaintiff] Employment Lawyers Association, the Association of Trial Lawyers of America, the American Civil Liberties Union, the American Arbitration Association, the National Academy of Arbitrators, and other interested groups and individuals, including legal scholars and attorneys practicing in the field. Most responded positively and contributed substantially to the drafting committee’s deliberations, even submitting statutory language or explanatory commentary at critical junctures. The committee circulated a large number of law review articles and other relevant studies of wrongful discharge and proposed solutions among its members and advisers. The committee also examined bills prepared in several states, especially those in California, Illinois, Michigan, and New York, as well as the one statute that had just been enacted in Montana.

The drafting committee held full working sessions on February 19–21, 1988, in New Orleans, on November 18–20, 1988, in Dallas, and on March 10–12, 1989, in Los Angeles. Each meeting produced a new or completely revised draft. The core of the proposal was the prohibition of the discharge of most classes of employees unless there was good cause. The preferred method of enforcement was to be through professional arbitrators rather than civil trials. The review committee approved submission of the draft to the 98th annual meeting of the NCCUSL in Kauai, Hawaii.

The proposed act received its first reading on August 2 and 4, 1989, with the commissioners sitting as a committee of the whole. In addition to presenting many varied questions and comments from the floor, the commissioners adopted two “sense of the house” resolutions. The first called for an explicit antipreemption provision preserving the common-law rights of those employees, such as probationers, who would not be
entitled to the new statutory protections. The second directed the drafting committee to include an authorization for employers and employees to execute agreements setting performance standards. Failure to meet the agreed standards could constitute good cause for dismissal.

During the first reading, the most notable occurrence was a motion to discharge the drafting committee on the grounds the whole project was a futility and a waste of the commissioners' time. A comfortable though not overwhelming margin defeated the motion. Even so, this almost unprecedented vote, conducted before the initial reading of the statute was actually completed, was a striking demonstration of the hostility the Act could arouse when first encountered. That may make all the more significant the ultimate disposition of the proposal two years later by the NCCUSL. The subsequent about-face of the commissioners may be a harbinger of events in other arenas in the years to come.

Responding to the points raised and the resolutions adopted in Hawaii, the drafting committee had two more meetings on December 8–10, 1989, in Denver and on March 9–11, 1990, in Chicago. Two more revised drafts resulted from the meetings. The NCCUSL conducted a second reading on July 18, 1990, at the annual meeting in Milwaukee, Wisconsin. A principal development there was the committee's compliance with suggestions from the floor to emphasize an employer's prerogative to exercise honest business judgment in making economic decisions affecting the size and composition of its work force.

What proved the committee's final drafting sessions were held on November 9–11, 1990, in Chicago and on February 22–24, 1991, in Denver. The third and last reading before the NCCUSL took place on August 3–5, 1991, at the 100th annual meeting of the conference in Naples, Florida. The committee adopted a number of changes, primarily of a technical nature, following motions from the floor. Employers and employees were also permitted to agree to private dispute-resolution procedures as an alternative to the statutory system. Final votes were taken on August 8. By the fairly close margin of 29 to 21, the conference first declined to adopt the employment termination proposal as a uniform act. It then approved the proposal as a model act, with the impressive majority of 39 states in favor and only 11 against.\(^{32}\)

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32. 9A Lab. Rel. Rep. (BNA) IERM 540:21 (Dec. 1991). There were two abstentions. Furthermore, Puerto Rico voted against approval as a model act because it was irked at the conference's failure to approve the legislation as a uniform act. Puerto Rico already has a "good cause" discharge statute. P.R. Laws Ann. tit. 29, § 185a (1985, Supp. 1990).
The technical explanation for designating a proposal as a model act rather than a uniform act is that the NCCUSL considers uniformity a desirable but not a principal objective, with the act's purposes being achievable without its adoption "in its entirety by every state" and "without the same emphasis on adhering to the verbatim text." Operationally, commissioners from each state are obligated to seek legislative consideration of both uniform and model acts but this obligation appears to be stronger for uniform acts. Naturally, a greater cachet is attached to a uniform act. But the controversial and innovative nature of the Model Employment Termination Act probably explains why a majority of the state delegations in the NCCUSL opted for the model designation.

III. THE MODEL EMPLOYMENT TERMINATION ACT

A. Philosophy

The premise of the Model Employment Termination Act is that both employees and employers have valid, if sometimes competing, interests in the employment relationship which deserve legal protection. Employees are entitled to freedom from arbitrary treatment in the workplace. Employers are entitled to maintain efficient and productive operations. When resort to the legal process becomes necessary, employees and employers alike are entitled to procedures that are as fast, simple, and inexpensive as is practicable. META tries to meet these manifold needs by a series of practical compromises. The objective is a fair balancing of the claims of the affected parties. Employees covered by META gain certain irreducible substantive rights to job security. Employers are relieved of the risk of potentially devastating monetary liability. All parties should profit from the superior decision-making of professional arbitrators. A more detailed analysis of the principal provisions of the Model Act follows.

34. Id. at 113.
B. Analysis

1. Good Cause

The Model Employment Termination Act would prohibit the discharge of covered employees except for “good cause.” Good cause may be either misconduct or malperformance on the part of an individual worker, or the economic goals and requirements of the enterprise, as determined by an employer exercising good-faith business judgment. The drafters chose “good cause” rather than the “just cause” found more commonly in union contracts to emphasize the discretion allowed management in economic decisions. The official comments expressly urge attention to “principles and considerations generally accepted in arbitration” in the interpretation of META. This means that literally thousands of arbitral precedents are available to help flesh out the term “good cause.”

Examples of good cause for the termination of an individual employee listed in the commentary on META include theft, assault, destruction of property, drug or alcohol use on the job, insubordination, excessive absenteeism, and inadequate performance. Off-duty conduct may be grounds for termination if it affects the employee’s job performance or the employer’s reputation.

The standard applicable to individual dismissals is objective. Ultimately the arbitrator or other factfinder must make the judgment. Distinguished management counsel among the drafting committee’s advisers actually favored the good-cause criterion over a subjective standard like good faith and reasonable belief. The drafters thought the more objective term to be more equitable and more predictable because of its long use and refinement in labor arbitrations.

Several factors may enter into a good-cause determination. Was the work rule allegedly violated reasonable? Was the employee properly apprised of it? Was enforcement consistent? Was there a full and fair investigation? Was the penalty that was assessed appropriate? All of these considerations are familiar to anyone experienced in union-management arbitrations. In addition, the level and importance of the employee’s position will be significant. An employer’s latitude in

36. META § 1(4) commentary at 71 (Supp. 1993).
37. Id.
deciding on the suitability of the individual’s continuing employment will increase according to the level and sensitivity of the employee’s position. Finally, discrimination in violation of applicable federal, state, or local law or other violation of established public policy would, of course, contravene the good-cause requirement.

In contrast to the generally objective review of the discharge of a given individual, the standard governing economic decisions concerning layoffs or other terminations is largely subjective. The nature and scope of the enterprise, the size of the work force, the location of plants, and similar matters are all entirely within the province of management. The only limitation on an employer’s business judgment is good faith. Thus, a sham layoff, for example, may not be used as a device to dismiss an employee when there is no good cause for a termination.

An employer is also entitled to set performance standards for particular positions, and the level may be as high or demanding as the employer wishes. The only qualification is that standards may not be arbitrarily varied in order to prejudice a disfavored individual. In traditionally competitive fields, such as professional sports, the entertainment industry, or most professions, the standard could be “the most proficient performer available.”

2. Persons Covered

META would protect most full-time employees (those working 20 or more hours per week) after they have served one year with an employer. While the probationary period under most collective bargaining agreements is shorter, META reflects a dramatic change in the employment relationship, and it applies to all levels of employees, including higher-ranking personnel in policy-making posts. The drafters felt it appropriate to grant management a rather generous length of time to evaluate personnel. Moreover, an employee’s sense of an equity in the job grows as the months pass. The drafters believed that a year is about the point at which this sense could properly be treated as a reasonable expectation.

The Act does not cover smaller firms having less than five employees. The drafters realized small firms may be guilty of some of the most reprehensible conduct in the workplace. Nevertheless, many

38. Id. at 72.
39. META §§ 1(1), 3(b).
40. Id. § 1(2).
worried about a misallocation of scarce resources and about a counterproductive intrusion into the intensely hostile atmosphere that an intimate setting can generate.

My own initial notion was to exclude high-level policy-making executives. In the upper reaches of management, it seemed to me, policy judgments could become so intertwined with the question of good cause for termination as to defy an outsider's capacity for judgment. Besides, corporate vice-presidents could be counted on to take care of themselves through "golden parachutes" and the like. But once it became clear that anyone not covered by the statute would retain all common-law rights, employer representatives objected to my proposed exclusion. Well-paid corporate personnel are the very people with those six- and seven-figure claims that employers fear the most. The committee thus revised META to protect even the highest-ranking corporate officials, but at the same time deprive them of tort and implied contract actions.

Unionized workers are covered by META to the extent permitted by federal preemption law. In the past, the U.S. Supreme Court has tended to reject preemption claims against state laws dealing with employment discrimination, minimum labor standards, and employee welfare generally. It is thus unlikely that a statute affording good-cause protections would be preempted merely because workers were unionized. A greater problem could arise, however, once employees became subject to a union contract. The Court's current test for preemption under section 301 of the Labor Management Relations Act (Taft-Hartley Act) is whether an interpretation of the collective bargaining agreement is necessary for a determination of the employee's right.

To my mind that approach is overly simplistic. Why should a union worker lose a state statutory claim whenever a court is required to examine the labor contract to see whether the employee's right to sue

41. Id. § 2(d). See also supra text in part II.B. concerning the 1989 annual meeting of the NCCUSL.
42. META §§ 2(d), (e) commentary at 73 (Supp. 1993).
might have been waived by a provision calling for arbitration instead? If anything, the contrary seems more plausible. Would it not raise a serious constitutional question if a state statute denied employees certain job protections because they had exercised their federal right to organize and engage in collective bargaining?

META leaves the coverage of public employees to the choice of the individual states. Uniformity is less important here since multi-state employers are not involved. Furthermore, many public employees have civil service protections, and all enjoy at least some constitutional rights in their jobs.

3. Preemption of Common-Law Actions

The underlying concept of META is an equitable trade-off of opposing interests. Nowhere is this more evident than in the treatment of the imaginative new causes of action that have been devised to contest employee discharges. In return for the nearly universal good-cause protection it provides, META would preempt or extinguish most common-law claims based on statutorily prohibited terminations, including implied contract actions and all tort actions, such as defamation, prima facie tort, and the intentional infliction of emotional distress. META would not, however, displace rights or claims under express contracts, such as fixed-term agreements, or under statutes or administrative regulations. Nor would it restrict existing legislation dealing with "whistle-blowing," race or sex discrimination, or occupational safety and health.

META would also not affect independent torts like assault, malicious prosecution, and false imprisonment, if facts exist separate and apart from the termination itself to ground such causes of action. But nomenclature is not the key to the survival of a tort. The test is whether the basis of the suit is something other than the termination itself, or something other than the steps that are reasonably necessary to effectuate the termination. Kicking an employee on his way out the door would

47. META §§ 1(2), (7).
48. Id. §§ 2(c), (e).
49. META § 2(c) commentary at 73 (Supp. 1993).
still be actionable. As indicated earlier, employees who do not receive the good-cause protections of the statute retain all their common-law rights and remedies. The official commentary on META seeks to clarify several related questions concerning the status of common-law claims. For example, an employer’s report of the grounds for an employee’s dismissal to another prospective employer would continue to be governed by existing state tort law, including the doctrine of qualified privilege. Similarly, the preemption provision only applies to employee suits against an employer or its representatives. META does not restrict an employer’s capacity to sue an employee on grounds such as disloyalty, theft or destruction of property, or breach of a covenant not to compete.

4. Remedies Under the Model Act

Remedies under META are those of the original federal Civil Rights Act of 1964, which include reinstatement, with or without back pay, and attorneys’ fees for a prevailing party. When reinstatement is impracticable, a severance payment may be granted up to a maximum of 36 months’ pay for the most flagrant violations. Compensatory and punitive damages are expressly excluded.

Employers won most of the battles over damages within the drafting committee, including the elimination of double back pay for willful or bad-faith terminations. That can be justified, however, not only on the precedents of the Civil Rights Act and most union-sector arbitrations, but also on the theory that returning wrongfully discharged employees to their old jobs should be the primary goal of the legislation. A large monetary award to punish a grievous misdeed may give momentary satisfaction, but in the long run, an employee is likely to benefit more from a restored opportunity to exercise acquired skills.

When reinstatement is not feasible because of the intensity of personal hostility or other reasons, the decisionmaker has the authority to provide a suitable severance payment. META proposes an extremely flexible

50. See supra note 41 and accompanying text.
51. META § 2(d).
52. META § 2(c) commentary at 73 (Supp. 1993).
53. Id.
55. META § 7(b).
56. Id. § 7(d).
standard, based on the principle of proportionality.\textsuperscript{57} The maximum figure of three years’ severance pay would not necessarily apply whenever unemployment was expected to last three years or more. Also to be taken into account are the circumstances of the hiring, the length and nature of the service, and the gravity of the employer’s wrong in firing the employee. The doctrine of mitigation would apply as well.

The drafters settled on the three-year period after much debate. Employer representatives complained that a 36-months award would be excessive under any circumstances. Representatives of the American Association of Retired Persons complained it could be inadequate, especially for an older worker who might never be able to find a job equivalent to the one that was lost. The 36-months cap was one of those practical compromises that cannot be wholly rationalized by a quantitative analysis.

A prevailing party may receive attorneys’ fees under the standards governing civil rights legislation.\textsuperscript{58} The purport is that a prevailing employee should recover in ordinary course, “in all but special circumstances,” and a prevailing employer may recover in the discretion of the court if the employee’s complaint is “frivolous, unreasonable, or without foundation.”\textsuperscript{59} The availability of attorneys’ fees for fired workers is a necessity, particularly in light of the elimination of compensatory and punitive damages. Otherwise, few if any rank-and-file employees will have monetary claims substantial enough to merit the attention of lawyers operating on the basis of contingent fees.

5. Procedures for Enforcement

Debates over enforcement procedures were about as heated as those over the substantive provisions of META. Even persons ostensibly espousing employees’ interests, such as plaintiffs’ lawyers and union representatives, were often at odds. For instance, most plaintiffs’ lawyers wished to retain the right to jury trial. Union representatives considered court proceedings too costly and cumbersome. Union and management advocates joined in supporting arbitration as the principal enforcement mechanism, but they divided over the latter group’s

\textsuperscript{57} META § 7(b)(3) commentary at 80 (Supp. 1993).
\textsuperscript{58} META §§ 7(b)(4), (c)(2), (e), (f) and accompanying commentary.
\textsuperscript{59} Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417, 421 (1978); see also Albemarle Paper Co. v. EEOC, 422 U.S. 405, 415 (1975).
proposal to authorize private arbitration arrangements as an alternative to the state-administered system.

Eventually the drafters settled on three options for enforcing META. The preferred method is the appointment of professional arbitrators by an appropriate state agency. Arbitrators presumably have the expertise and grasp of workplace realities to command the respect of both employers and employees. Their greater experience should also make for shorter and less expensive proceedings. In addition, the use of ad hoc arbitrators would avoid the need to create a new permanent staff of hearing officers.

Amendments to META, adopted from the floor at the 1991 annual meeting, permit employers and employees to provide, by an express writing, for the substitution of private dispute-resolution procedures or court recourse as an alternative to the state-managed arbitration system. The judicial alternative should cause relatively little trouble, since there an agreement is authorized only after the dispute has arisen, usually after the discharge has occurred and the employee has almost nothing to lose by refusing to go along. But an agreement for private arbitration or a similar device may be entered into at any time, and that is more disturbing. Much as we prize freedom of contract in the abstract, industrial realities counsel against too ready an acceptance of employee waivers of statutory rights. Most individual workers have such negligible bargaining power that they will sign any form an employer places before them. That gives great power to management to stack the deck in its favor. Therefore, in assessing any alternative scheme for disposing of claims, the courts should not only look closely for any coercion on the employer's part but should also insist on strict adherence to due process standards before upholding the displacement of the prescribed statutory procedures.

The burden of proof under META rests on a complainant employee. The allocation is a departure from arbitral practice in the unionized sector but is in accord with the usual rule in the civil courts. In recognition that the employer knows best why it terminated the employee, however, META ordinarily requires the employer to proceed first to present its case. The practical importance of the burden of persuasion in arbitration, as distinguished from the burden of production, is debatable. Many arbitrators insist they pay little or no heed to it in

60. META § 6.
61. Id. §§ 4(i), (j).
62. Id. § 6(e).
their decision-making. I think that somewhat overstates the case, but my own experience as an arbitrator leads me to agree that a substantial majority of arbitral decisions are reached without regard to burdens of proof.

Earlier versions of META provided for fairly detailed arbitration procedures. The drafting committee ultimately decided, however, to rely for the most part on a general reference to the Uniform Arbitration Act or the applicable state arbitration statute, along with a directive to the appropriate state agency to adopt any necessary supplemental rules and regulations.\(^6\) This decision was in keeping with an overall policy of the NCCUSL to avoid procedural prescriptions in substantive legislation whenever possible. It also had the pragmatic advantage of eliding a whole set of sticky technical issues. The significant question of discovery, for example, is left to the discretion of the arbitrator, subject to administrative rules to be issued by each state.\(^7\)

META limits judicial review of arbitration awards to such grounds as fraud and corruption, an exceeding of authority, or a prejudicial error of law.\(^8\) This is still a broader scope of review than the U.S. Supreme Court calls for in arbitrations under collective bargaining agreements,\(^9\) and the META standard evoked some criticism from the American Arbitration Association (AAA). Granted, the U.S. Supreme Court does not mention legal error as a basis for review. But the Court, in applying its narrower test, was dealing with voluntary arbitrations pursuant to the agreement of unions and employers that the awards would be “final and binding.” Even there, the Court has declined to give the same weight to arbitral awards when individual statutory rights are at stake.\(^10\) META implicates individual statutory rights, and imposes arbitration upon the parties unless they agree otherwise. Consequently, the drafters added an arbitrator’s “prejudicial error of law” as a basis for judicial review. Nonetheless, I believe there is sufficient merit in the AAA’s reservations about the potential loss of finality that a court should not vacate an award absent a showing that an error of law has adversely affected the rights of a party.

\(^{63}\) Id. § 6(a).
\(^{64}\) Id. § 6(c).
\(^{65}\) Id. § 8(c).


Some states may believe that it would be less costly to employ full-time civil service or other government personnel as hearing officers than to retain arbitrators on a case-by-case basis. META provides for such staffing as an alternative to arbitration. A few states may fear that their constitutional guarantees of jury trial or of access to the courts for the full redress of wrongs preclude the substitution of other forums. I am satisfied by my own research that only one or two states might be so restricted. At any rate, for the benefit of such states, a third option under META would allow enforcement by the civil courts. This would undoubtedly be the most complex, expensive, and time-consuming procedure.

6. **Buyouts and Waivers**

An emphasis on voluntarism and freedom of contract inspired the drafting committee to include an authorization for employer-employee agreements modifying several aspects of the META scheme. The alternative enforcement procedure of private arbitration has already been discussed. In addition, by an express writing, the parties may dispense with the good-cause protections and substitute a mandatory severance payment of at least one month’s pay for each year of service up to 30 months’ pay. This “buyout” or waiver plainly suffers from the same infirmities, from an employee’s perspective, as afflict the previously considered agreement for a private dispute resolution procedure.

Fortunately, well-accepted theories like economic duress and contracts of adhesion may enable the courts to remedy the grosser instances of overreaching. Moreover, apart from its generous payment schedule, the severance provision has certain technical features that will tend to confine its use to higher-level managerial or professional employees. For example, the definition of termination in META includes a layoff of more than two months. Under a valid buyout agreement, severance pay becomes due if there is a termination for any reason except an employee’s willful misconduct, including what would otherwise be good cause, like an economic downturn. An employer would therefore incur

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68. META App., Alternative A.
69. META App., Alternative B.
70. See supra text accompanying note 61.
71. META § 4(c).
72. Id. § 1(8)(ii). An employee not subject to a buyout agreement would not have a claim, however, since a layoff or termination resulting from economic conditions would be for good cause.
the risk that any employee subject to periodic layoffs of more than two months could treat the layoff as a termination and claim the severance payment.

7. Financing

The proposed new right to protection against wrongful discharge, like any other public right, should be enforced by a publicly funded tribunal. That is lofty principle speaking. The grim situation of most state treasuries today sounds a different note. An extra fiscal burden of unknown size could be the proverbial last straw for a proposal that will probably generate stiff opposition in any event.

Accordingly, the META drafters suggest that the states consider placing a substantial part of the cost on the parties themselves.\(^7\) I calculate that a local arbitrator’s fee and expenses for a case involving a one-day hearing and an abbreviated opinion would be in the $1200 to $1800 range. Administrative costs would add another $200 to $400. If the total was shared equally, each party would pay about $700 to $1100. The figure is not insignificant, but a person with a job at stake should be able to come up with it. The employee’s portion could be capped in the amount of one or two weeks’ pretermination pay. An alternative funding method would be for a state to impose a special “employment termination tax” on businesses subject to the statute, with an experience rating like that used in unemployment insurance.

C. Prospects for Enactment

So far Cornelius Peck has proven all too prescient in his forecast that the lack of support from organized interest groups would stymie efforts to enact legislation forbidding discharge without good cause.\(^7\) To date, META, or bills based at least in part upon it, have been introduced in about ten states.\(^7\) Quick or easy passage seems unlikely anywhere. The AFL-CIO’s Executive Council officially endorsed the concept of statutory prohibition of unjust dismissal in 1987,\(^7\) and representatives of

\(^7\) META § 5(e) commentary at 77 (Supp. 1993).

\(^7\) See supra text accompanying notes 7–9.

\(^7\) Connecticut, Delaware, Hawaii, Iowa, Maine, Massachusetts, Nevada, New Hampshire, and Oklahoma, with further variants in New York and Pennsylvania. This information was provided by ULC headquarters in Chicago and by Professor Stuart Henry of Eastern Michigan University, Ypsilanti, Michigan.

the AFL-CIO and the American Civil Liberties Union were the only spokespersons for major groups to urge the NCCUSL to adopt a model act in 1991. But counsel for the AFL-CIO have expressed concern about META’s acceptance of employer-sponsored alternative dispute-resolution procedures and about the possibility of federal preemption of state legislation. Union lobbyists have exhibited no enthusiasm for the bills that have been introduced around the country.

Legal counsel for management have occasionally commended the proposal as a fair compromise in private communications, but have not rushed to go on record in support. Employers apparently remain confident that the havoc of multimillion-dollar jury verdicts will befall hapless colleagues elsewhere but not themselves. Or they believe that such precautions as the excising of “just cause” policy statements from employee handbooks will immunize them against liability.

Curiously, plaintiffs’ attorneys are the most outspoken opponents of META. No doubt some sincerely feel that such features as the denial of punitive and general compensatory damages constitute fatal defects. Trying not to be too cynical, one must sadly conclude that others are influenced by the prospective loss of the large contingent fees they now receive from their upper-middle-class clients.

Hope for META or its equivalent ultimately rests on such intangibles as Americans’ regard for justice and fair play, and perhaps the serendipitous emergence somewhere of a doughty crusader with either a grievance or a sense of mission. Who would have predicted that Montana would be the first state to pass “good cause” legislation? Yet I am told by observers on the scene that the campaign there was led by a retired business executive whose company had been burned by what he considered excessive court awards. I would be much less sanguine were it not for the experience with the Uniform Law Commissioners. Their initial reaction to the proposal of an act was skepticism, if not outright antagonism. Over the course of three years, however, this tough-minded group of veteran lawmakers came to see the inherent fairness of the balance struck by META. Their overwhelming 39 to 11 final note of approval is a warrant for optimism.

77. Copies of the letters are on file with the Washington Law Review.


IV. CONCLUSION

The weaknesses of META are also its strengths. It is truly a compromise, a product of many contentious voices, of many diverse hands. But the presence of much partisan input should not obscure another key element. Both within the drafting committee and before the full conference, persons with no vested interests determined the ultimate shape of the Act. There was much discussion but eventually little controversy about META’s central tenet, that an employer should not be able to fire a non-probationary employee without good cause. Every other major industrial democracy in the world has accepted that principle as a matter of simple justice.\(^{80}\) The principal votes on the floor of the NCCUSL (apart from the early motion to discharge the drafting committee) dealt with differences over the procedures to implement the good-cause requirement. Now the issue rests with the legislatures of this country. I know that even Professor Peck would applaud if he were eventually proven wrong about their intransigence.\(^{81}\)

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80. Ass'n of Bar of City of New York, At-Will Employment and the Problem of Unjust Dismissal, 36 The Record 170, 175 (1981). In all, about 60 nations prohibit discharge without cause, including the European Community, Sweden, Norway, Japan, Canada, and others in South America, Africa, and Asia. See also Convention No. 158 Concerning Termination of Employment at the Initiative of the Employer, International Labour Conference and Recommendations, 68th Sess. xxxviii (June 22, 1982).

81. Professor Peck is one of 32 nationally prominent labor law and industrial relations scholars who have signed a statement supporting META.