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EMPLOYMENT AT WILL AND ITS EXCEPTIONS:  
A TROUBLED DOCTRINE IN NEED OF REFORM

A White Paper

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May 2005

This White Paper is made possible through the generosity of **Masterman, Culbert & Tully**  
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## **FOREWORD**

We, at Masterman, Culbert & Tully LLP, are grateful to the New England Legal Foundation for providing us the opportunity to sponsor this thought provoking analysis of “at will” employment on a nationwide basis. This area is subject to frequently imposed exceptions, and efforts by states to enact wrongful discharge statutes that preempt common law. If we are to limit employers’ damages to those which are appropriate and fair, the obvious *quid pro quo* is the restriction of the employer’s discretion to terminate the employment relationship, although some may argue that this has already occurred as a consequence of the courts’ many common law exceptions to the so-called rule.

Some will shudder at the thought of statutory prohibitions against the traditional notion that employees and management alike should have the freedom to decide when to end a relationship, unless they have agreed otherwise. Others will embrace the certainty provided by such proposed legislation and believe that properly drafted laws will truly put an end to the danger of unpredictable liability and damages.

Decide for yourself. This White Paper, which we are proud to sponsor, is thorough and insightful. For those of us practicing in the employment arena, the pages that follow are highly instructive in suggesting a solution to the unpredictability of liability under the expanding common law exceptions to the “at will” doctrine.

*Masterman, Culbert & Tully LLP is a general practice law firm on Boston’s Waterfront at One Lewis Wharf. Among its practice areas, employment law, representing management, is a specialty. For further information about this or any other practice area, you may contact the Firm’s Managing Partner, Andrew C. Culbert, or Partners in the employment group, Mary E. O’Neal or Patricia A. Granger.*

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# **EMPLOYMENT AT WILL AND ITS EXCEPTIONS: A TROUBLED DOCTRINE IN NEED OF REFORM<sup>1</sup>**

## **A White Paper**

### **INTRODUCTION**

The employment-at-will doctrine governs the employment relationship in 49 of the 50 states, and in the District of Columbia. Originally, this doctrine established that, in the absence of an agreement to the contrary, an employer was free to discharge an employee, and the employee was free to quit, for any reason or for no reason at all, and without any notice. While the at-will doctrine once provided broad protection for an employer's exercise of its business judgment, legislatures and courts have eroded the doctrine substantially over the years with many exceptions.

The purpose of this White Paper is to examine the severity and extent of a significant problem facing employers: the risk of exposure to uncertain liability and unpredictable damages under the many common law exceptions to the at-will doctrine in the United States. This paper first considers the most prominent of these common law exceptions and their attendant costs to employers. This paper then evaluates actual and proposed efforts at legislative reform, in the form of comprehensive wrongful discharge statutes that preempt common law claims and limit an employer's damages, in exchange for protecting employees from discharge without "good cause." This paper concludes that legislative reform, while perhaps not a panacea, could achieve far greater stability and predictability in the employment relationship.

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<sup>1</sup> I wish to thank NELF's exceptional team of law student interns--Megan Bisk, Ari Ellenberg, John Hilton, Alex Melloan-Ruiz, Yelena Slutskaya, and Jennifer SunYoung Youn--for their invaluable research and insights on the many issues that have informed this paper.

The at-will doctrine became dominant in the nineteenth century, during the heyday of the doctrines of *laissez faire* and survival of the fittest, and is based on the theoretical symmetry of freedom of contract and equal bargaining power between employer and employee. For the past several decades, legislatures and courts have created numerous exceptions to the at-will doctrine, in recognition of the perceived inequality of bargaining power between most employers and employees, and in an effort to serve social policy goals. These exceptions are intended to limit and deter employers' potential abuses of discretion, and to provide employees with greater job security and legal redress. Most notable among the legislative exceptions to the at-will doctrine are the many federal and state anti-discrimination statutes.

Courts within each state have also recognized various common law exceptions to the at-will doctrine, which allow an employee to sue for wrongful discharge under certain circumstances. The most widely recognized common law exceptions are: (1) wrongful discharge contrary to the terms of an employer's handbook, policy, or manual; (2) discharge in violation of a recognized public policy; and (3) breach of the implied covenant of good faith and fair dealing. These common law claims evade precise definition and employers have few, if any, clear guidelines to follow when making personnel decisions. Liability is unpredictable because the contours of these common law claims expand or contract depending on the facts of each case and on the particular judge applying the law. These claims expose any employer that has discharged an employee to the risk of high defense costs and the uncertainty of large jury verdicts. The cost of defending these claims and the related disruption to business operations can become significant. In this era of tort reform, a comprehensive legislative response may

offer a satisfactory solution.

One way to reduce an employer's exposure to uncertain liability and virtually unlimited damages is a comprehensive wrongful discharge statute that would preempt all common law claims and would limit the employer's exposure to liability and damages. A statutory solution can achieve a reasonable compromise between the employer's interest in making business judgments without incurring liability and the employee's competing interest in job security. Under this statutory quid pro quo, an employer's damages would be limited in amount and kind, in exchange for recognizing a "good cause" standard that would protect an employee from arbitrary termination.

Montana enacted just such a wrongful discharge statute in 1987.<sup>2</sup> It was Montana's business community that initially drafted and lobbied for the Wrongful Discharge From Employment Act ("WDEA"), in response to the extravagant damages awards in wrongful discharge cases. The WDEA embodies a quid pro quo of limiting employers' exposure to liability and damages in exchange for holding employers accountable to a good-cause standard when discharging a non-probationary employee. As enacted, the WDEA preempts common law claims for wrongful discharge, limits an employer's damages to a maximum of four years' severance pay, eliminates all non-

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<sup>2</sup> To date, Puerto Rico is the only other U.S. jurisdiction to enact a wrongful discharge statute, which it did in 1976. See P.R.Laws Ann. tit. 29, §§ 185a-185m (1976). Unlike Montana, however, and most every other jurisdiction of the United States, Puerto Rico is a civil law jurisdiction derived from Spanish law, as opposed to a common law jurisdiction derived from English law. The Puerto Rico wrongful discharge statute accordingly takes a markedly different approach to the issue of wrongful discharge by providing an exhaustive and detailed code of what constitutes good cause for dismissal, rather than the common law approach of allowing courts to apply and interpret a general statutory provision on the facts of each case. See P.R.Laws Ann. tit. 29, § 185b(a)-(f); Todd H. Girshon, *Wrongful Discharge Reform in the United States: International & Domestic Perspectives on the Model Employment Termination Act*, 6 Emory Int'l L. Rev. 635, 641 (1992); Frank Cavico, *Employment At Will and Public Policy*, 25 Akron L. Rev. 497, 530 (1992); Roberto O. Maldonado, *Puerto Rico's Act 80 of 1976: An Experience in the Contract At Will/Wrongful Discharge Dilemma*, 57 Rev. Jurid. U.P.R. 217 (1988). The Puerto Rico Act is therefore outside the scope of this paper, which examines the common law exceptions to the common law at-will doctrine, and legislative responses within this common law context.

economic damages, and allows punitive damages only in a narrow category of cases. The WDEA allows the employer to define a probationary period during which time the new employee remains at will. The statute also encourages, but does not mandate, arbitration as the preferred forum for resolving disputes.

In practice, the WDEA appears generally to have succeeded in reducing an employer's exposure to liability and damages and has imposed minimal additional costs on the employer to accommodate the good-cause standard. Montana's courts generally have applied the good-cause standard reasonably and have entered summary judgment or affirmed favorable jury verdicts for employers in many wrongful discharge cases. According to employment lawyers in the Montana bar, the number of wrongful discharge suits has declined, due principally to the statute's limit on damages. Moreover, any additional costs to employers in documenting an employee's job performance to build a potential good-cause defense are minimal. Leading economic indicators also show that the WDEA has had no adverse impact on Montana's overall economic performance and may well have benefited business.

After the WDEA's passage, there was another concerted effort to address employment at will with a comprehensive statute. In 1991, the Uniform Law Commissioners proposed the Model Employment Termination Act ("META"), intended as a comprehensive wrongful discharge statute that each state could adopt with some modification. META generally embodies the same quid pro quo as the WDEA, preempting common law claims and limiting damages in exchange for providing good-cause protection to employees, along with recognizing a probationary period. However, META differs in some significant ways, such as by allowing the employer and employee,

by written agreement, to waive good-cause protection in exchange for limited severance pay in the event of future discharge, or to define what constitutes good cause for discharge. This paper provides a critical analysis of META's provisions, discusses reactions to META from employer and employee advocates, and responds to these reactions.

In the wake of the WDEA and META, 16 other state legislatures have considered, frequently more than once, wrongful discharge bills that typically borrow from these models and generally embody the same quid pro quo of limiting damages in exchange for just-cause protection. This paper analyzes the key provisions of these bills and considers some of the lobbying efforts, based on interviews with some of the bills' sponsors. Unlike the WDEA, the genesis of some of these bills appears to be a singular concern for the vulnerability of at-will employees. These bills are apparently not promoted as a balanced solution that can benefit both employers and employees. This fact may explain, at least in part, why no other state has enacted a wrongful discharge statute.

Part I of this paper discusses the at-will doctrine and its exceptions in 49 of the 50 states, including the associated problems and costs for employers. Part II provides a comprehensive analysis of Montana's WDEA, including a discussion of its history and key provisions, the case law interpreting the WDEA's good-cause provision, the opinions of the Montana employment bar (both management and employee-side) on the statute's strengths and weaknesses, and economic data reflecting Montana's overall growth and employment levels before and after the WDEA's enactment. Part II concludes that the WDEA has reduced wrongful-discharge litigation in Montana, has generated minimal compliance costs for employers, and may have benefited Montana's economy. Part III

presents a critical evaluation of META, and other states' proposed wrongful discharge statutes.

This paper concludes that a balanced wrongful discharge statute would be a significant improvement over the current common law thicket of wrongful discharge claims, to the benefit of employers and employees alike. Such a statute would protect both an employer's discretion and an employee's job security, and could also have longer-term benefits for the economy at large. Under a balanced statute, employees would be adequately compensated for, and employers adequately deterred from, adverse employment decisions that do not serve a legitimate business interest. Conversely, the statute would protect an employer's reasonable exercise of business judgment and would limit its exposure to damages in the event of liability. In the long run, a balanced statute and its measured application would reduce an employer's costs associated with each employee, thereby increasing overall productivity and employment opportunities.

## **I. THE AT-WILL DOCTRINE AND ITS COMMON LAW EXCEPTIONS**

### **A. INTRODUCTION**

The shifting and uncertain contours of the common law exceptions to employment at will expose employers to unpredictable liability and damages. The unruly state of the common law undermines an employer's ability to protect its business interests by making measured, rational employment decisions without fearing unknown legal consequences.

The common law doctrine of employment at will has governed employment relationships in the United States since the nineteenth century.<sup>3</sup> Forty-nine of the 50

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<sup>3</sup> See Thomas J. Miles, *Common Law Exceptions to Employment At Will and U.S. Labor Markets*, 16 J.L.

states, and the District of Columbia, still adhere to the doctrine.<sup>4</sup> Under this principle, in the absence of a contract for a fixed term, either the employer or the employee can unilaterally end the employment relationship at any time, for any or no reason at all.<sup>5</sup> The doctrine became prominent in the post-Civil War period, at the height of the development of the new industrial economy.<sup>6</sup> Courts in every state had adopted the doctrine by the first part of the twentieth century.<sup>7</sup>

Starting in the 1960s, however, “when government was focusing more of its regulations on quality of life and individual liberty issues,”<sup>8</sup> legislatures and courts began creating exceptions to the at-will doctrine that limit the permissible circumstances of worker dismissal. Most prominent among the federal statutory exceptions are the anti-discrimination statutes, such as Title VII, the ADEA, and the ADA.

The states’ common law exceptions to the at-will doctrine have also emerged as prominent and frequently litigated remedies for wrongful discharge.<sup>9</sup> These exceptions can be grouped into three general categories: (1) discharge contrary to the terms of an employer’s handbook, policy, or manual (the “implied contract” or “handbook” exception); (2) discharge in violation of a recognized public policy (the “public policy” or “retaliation” exception); and (3) breach of the implied covenant of good faith and fair

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Econ. & Org. 74, 101 (2000).

<sup>4</sup> *See id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See* Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 Am. J. Bus. L. 653, 654 (2000).

<sup>7</sup> *See id.*

<sup>8</sup> *Id.*

<sup>9</sup> *See id.* at 656.

dealing (the “bad-faith” exception).<sup>10</sup> In addition to these three exceptions, nearly every state recognizes the application of various traditional tort claims and damages to the employment-at-will context, especially those of fraud, intentional infliction of emotional distress, defamation, and intentional interference with contractual or advantageous business relations.<sup>11</sup> The three employment-at-will exceptions, however, are a more pronounced departure from precedent than are these applied tort theories, and they represent a more dramatic limit on employer prerogative.

## B. THE HANDBOOK EXCEPTION

Most jurisdictions recognize the contract-based handbook exception to the at-will doctrine.<sup>12</sup> Under this exception, when an employer distributes personnel manuals to its

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<sup>10</sup> See *id.* at 655-56.

<sup>11</sup> See Miles, *supra* note 3, at 80.

<sup>12</sup> At least 38 jurisdictions recognize the “handbook” exception to the at-will doctrine: **Alabama** (Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725 (Ala. 1987)); **Alaska** (Parker v. Mat-Su Council on Prevention of Alcoholism & Drug Abuse, 813 P.2d 665, 666-67 (Alaska 1991)); **Arkansas** (Crain Ind., Inc. v. Cass, 810 S.W.2d 910 (Ark. 1991)); **Arizona** (Leikvold v. Valley View Cmty. Hosp., 688 P.2d 170 (Ariz. 1984), *superseded on other grounds by statute*, Ariz.Rev.Stat. § 23-1501); **California** (Foley v. Interactive Data Corp., 765 P.2d 373, 387 (Cal. 1988)); **Colorado** (Cont’l Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987)); **Connecticut** (Torosyan v. Boehringer Ingelheim Pharm., 662 A.2d 89, 94-5 (Conn. 1995)); **District of Columbia** (Sisco v. GSA Nat’l Capital Fed. Credit Union, 689 A.2d 52, 55 (D.C. 1997)); **Idaho** (Mitchell v. Zilog, Inc., 874 P.2d 520, 523-24 (Idaho 1994)); **Illinois** (Duldulao v. St. Mary of Nazareth Hosp. Ctr., 505 N.E.2d 314 (Ill. 1987)); **Iowa** (Jones v. Lake Park Care Ctr., 569 N.W.2d 369, 375 (Iowa 1997)); **Kansas** (Morriss v. Coleman Co., 738 P.2d 841 (Kan. 1987)); **Maine** (Libby v. Calais Reg’l Hosp., 554 A.2d 1181, 1182 (Me. 1989)); **Maryland** (Suburban Hosp., Inc. v. Dwiggin, 596 A.2d 1069, 1075 (Md. 1991)); **Massachusetts** (O’Brien v. New England Tel. & Tel. Co., 664 N.E.2d 843, 847 (Mass. 1996)); **Michigan** (Lytle v. Malady, 579 N.W.2d 906, 911 (Mich. 1998)); **Minnesota** (Pine River State Bank v. Mettelle, 333 N.W.2d 622 (Minn. 1983)); **Mississippi** (Bobbitt v. Orchard, Ltd., 603 So.2d 356 (Miss. 1992)); **Missouri** (Enyeart v. Shelter Mut. Ins. Co., 693 S.W.2d 120 (Mo. Ct. App. 1985)); **Nebraska** (Hamersky v. Nicholson Supply Co., 517 N.W.2d 382, 385 (Neb. 1994)); **Nevada** (Beales v. Hillhaven, Inc., 825 P.2d 212, 216 (Nev. 1992)); **New Jersey** (Wade v. Kessler Inst., 798 A.2d 1251, 1258 (N.J. 2002)); **New Mexico** (Garcia v. Middle Rio Grande Conservancy Dist., 918 P.2d 7 (N.M. 1996)); **New York** (Nice v. Combustion Eng’g, Inc., 599 N.Y.S.2d 205, 206-7 (N.Y. App. Div. 1993)); **North Dakota** (Dahlberg v. Lutheran Soc. Serv. of North Dakota, 625 N.W.2d 241, 247 (N.D. 2001)); **Ohio** (Wright v. Honda of America Mfg., Inc., 653 N.E.2d 381, 384 (Ohio 1995)); **Oklahoma** (Hinson v. Cameron, 742 P.2d 549, 555 (Okla. 1987)); **Oregon** (Yartzoff v. Democrat-Herald Publ’g Co., 576 P.2d 356 (Or. 1978)); **South Carolina** (Leahy v. Starflo Corp., 431 S.E.2d 567 (S.C. 1993)); **South Dakota** (Niesent v. Homestake Mining Co., 505 N.W.2d 781, 782 (S.D. 1993)); **Tennessee** (King v. TFE, Inc., 15 S.W.3d 457, 461 (Tenn. Ct. App. 1999)); **Texas** (Werden v. Nueces County Hosp. Dist., 28 S.W.3d 649,

employees specifying the procedures and bases for discharge or discipline, the employer's policies may constitute binding contractual obligations limiting the employer's discretion to terminate an at-will employee.<sup>13</sup> The handbook rule is derived from principles of both contract law and equity and seeks to protect the employee's reasonable expectations by recognizing a contract implied-in-fact that arises from the employment policies and procedures recited in the employer's personnel manual.<sup>14</sup> Under the handbook exception, the employers' written policies become enforceable promises against the employer.

Courts typically treat the formation of an implied contract as an issue of fact, depending on the totality of the circumstances.<sup>15</sup> Relevant factors include: whether the manual recites detailed rights and obligations or only provides general guidance, whether the employer generally adheres to the procedures set forth in its manual, whether the manual contains a disclaimer that it is not a contract, whether the manual expressly

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651 (Tex.App. 2000)); **Utah** (Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044 (Utah 1989)); **Vermont** (Dillon v. Champion Jogbra, Inc., 819 A.2d 703, 706-7 (Vt. 2002)); **Washington** (Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1087 (Wash. 1984)); **West Virginia** (Blankenship v. Mingo County Econ. Opportunity Comm'n, Inc., 416 S.E.2d 471, 474 (W. Va. 1992)); **Wisconsin** (Ferraro v. Koelsch, 368 N.W.2d 666 (Wis. 1985)); and **Wyoming** (Lincoln v. Wackenhut Corp., 867 P.2d 701, 703 (Wyo. 1994)).

<sup>13</sup> See Clyde W. Summers, *Employment At Will In The United States: The Divine Right Of Employers*, 3 U. Pa. J. Lab. & Emp. L. 65, 71-2 (2000).

<sup>14</sup> See *id.* at 72. See also Ben-Zvi v. Edmar Co., 47 Cal. Rptr. 2d 12, 15 (Cal. Ct. App. 1995) ("The purpose of the law of contracts is to protect the reasonable expectations of the parties"); Bike Fashion Corp. v. Kramer, 46 P.3d 431, 434 (Ariz.Ct. App. 2002) ("protection of the parties' reasonable expectations [is] 'the basic purpose of contract law'" (quoting 3A Corbin On Contracts § 654A, at 105 (Supp. 1999))); George L. Blum, Annotation, *Effectiveness Of Employer's Disclaimer Of Representations In Personnel Manual Or Employee Handbook Altering At-Will Employment Relationship*, 17 A.L.R. 1, § 2(a) (2004).

<sup>15</sup> See, e.g., O'Brien v. New England Tel. & Tel. Co., 664 N.E.2d at 847; Sisco, 689 A.2d at 55; Parker, 813 P.2d at 666-67.

reserves the employer's unilateral right to change its terms, and whether the employee has negotiated any of the terms of the manual.<sup>16</sup>

The handbook exception varies from state to state and is not uniformly defined or applied. In some states, the terms of an employment manual are presumptively unenforceable against the employer unless the manual contains express language stating otherwise.<sup>17</sup> “[T]he presumption of at-will employment is strong, and a court is disinclined to adopt broad and ill-defined exceptions to the employment-at-will doctrine.”<sup>18</sup> By contrast, in other states, a policy manual can presumptively create an implied contract unless there is an express and conspicuous disclaimer against contract formation.<sup>19</sup> Some courts will go so far as to infer a “for cause only” agreement where an employment handbook recites a detailed list of exclusive grounds for employee discipline or discharge and a specific procedure which the employer agrees to follow prior to an employee's termination.<sup>20</sup>

Jurisdictions also differ widely on their treatment of employers' efforts to defeat contract formation by including written disclaimers that the handbook is not a contract and that its policies are subject to unilateral change at any time. In some jurisdictions, the use of a disclaimer almost invariably defeats an employee's contract claim as a matter of

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<sup>16</sup> See O'Brien, 664 N.E.2d at 847; Foley, 765 P.2d at 388; Hinson, 742 P.2d at 554-56; Wade, 798 A.2d at 125.

<sup>17</sup> See, e.g., Martin v. Capital Cities Media, Inc., 511 A.2d 830, 840-42 (Pa. Super. Ct. 1986) (employment at will presumed in absence of clear statement in handbook to the contrary).

<sup>18</sup> Orr v. Westminster Village North, 689 N.E.2d 712, 717 (Ind. 1997) (summary judgment for employer on breach of contract).

<sup>19</sup> See, e.g., Woolley v. Hoffmann-LaRoche, Inc., 491 A.2d 1257, 1270-71 (N.J. 1985) (manual creates binding contract unless it contains prominent disclaimer).

<sup>20</sup> See, e.g., Niesent v. Homestake Mining Co., 505 N.W.2d 781, 782 (S.D. 1993).

law.<sup>21</sup> In other jurisdictions, however, a disclaimer is only some evidence against the existence of an implied contract.<sup>22</sup> Moreover, some states require that a valid disclaimer be conspicuously placed<sup>23</sup> and will continue to look to the totality of the circumstances when determining the existence of an implied contract.

Another key difference in approach among the jurisdictions is whether courts focus primarily on the reasonable expectations of the employee or consider the expectations of *both* the employer and employee in determining the existence of an implied contract. Courts that consider both parties' perspectives adhere more closely to traditional contract principles of mutual assent and require a "meeting of the minds" before enforcing the manual against the employer.<sup>24</sup> Some courts following this approach have developed multi-factored tests to assure that the traditional requirements for contract formation are present.<sup>25</sup> Jurisdictions that focus primarily on the reasonable

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<sup>21</sup> See *Goos v. Nat'l Assoc. of Realtors*, 715 F. Supp. 2, 4 (D.D.C. 1989); *Permenter v. Crown Cork & Seal Co.*, 38 F. Supp. 2d 372, 377-78 (E.D. Pa. 1999); *Frymire v. Ampex Corp.*, 61 F.3d 757, 770 (10th Cir. 1995).

<sup>22</sup> See, e.g., *Jimenez v. Colorado Interstate Gas Co.*, 690 F. Supp. 977, 980 (D. Wyo. 1988); *Clay v. Horton Mfg. Co.*, 493 N.W.2d 379, 382 (Wis. Ct. App. 1992).

<sup>23</sup> See, e.g., *Swanson v. Liquid Air Corp.*, 826 P.2d 664, 673 (Wash. 1992).

<sup>24</sup> Where it is alleged that an employment contract is one to be based upon the theory of "implied in fact," the understanding and intent of the parties is to be ascertained from several factors which include written or oral negotiations, the conduct of the parties from the commencement of the employment relationship, the usages of the business, the situation and objective of the parties giving rise to the relationship, the nature of the employment, and any other circumstances surrounding the employment relationship which would tend to explain or make clear the intention of the parties at the time said employment commenced.

*Morriss v. Coleman Co.*, 738 P.2d 841, 848-49 (Kan. 1987).

<sup>25</sup> An employee handbook or other policy statement creates enforceable contractual rights if the traditional requirements for contract formation are present. First, the language of the policy statement must contain a promise clear enough that an employee would reasonably believe that an offer has been made. Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Third, the employee must accept the offer by commencing or continuing to work after learning of the policy statement. When these conditions are present, then the employee's continued work

expectations of the employee are more inclined to recognize an implied contract. These jurisdictions determine the employee's reasonable expectations based on the provisions of the personnel manual and the circumstances of its distribution and enforcement.<sup>26</sup>

### C. THE PUBLIC POLICY EXCEPTION

The common law public policy exception to the employment-at-will doctrine has been adopted in some form in 39 jurisdictions.<sup>27</sup> The public policy exception protects an

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constitutes consideration for the promises contained in the statement, and under traditional principles a valid contract is formed.

*Duldulao v. St. Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 318 (Ill. 1987).

<sup>26</sup> See *Parker v. Mat-Su Council on Prevention of Alcoholism & Drug Abuse*, 813 P.2d 665, 666-67 (Alaska 1991) (“When the provisions of a personnel manual create the reasonable expectation that employees have been granted certain rights, the employer is bound by the representations contained in those provisions. . . . Generally it is a question of fact whether the manual did modify the employment agreement”).

<sup>27</sup> The following jurisdictions recognize the common law public policy exception: **Alaska** (*Reed v. Municipality of Anchorage*, 782 P.2d 1155, 1158 (Alaska 1989)) (requiring employee to act contrary to public policy violates implied covenant of good faith and fair dealing); **Arkansas** (*Island v. Buena Vista Resort*, 103 S.W.3d 671, 679 (Ark. 2003)); **California** (*Green v. Ralee Eng'g Co.*, 960 P.2d 1046, 1051 (Cal. 1998)); **Colorado** (*Flores v. Am. Pharm. Servs., Inc.*, 994 P.2d 455, 458-59 (Colo. Ct. App. 1999)); **Connecticut** (*Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385, 388-89 (Conn. 1980)); **Delaware** (*Lord v. Souder*, 748 A.2d 393, 400 (Del. 2000)) (discharge in violation of public policy actionable under “limited implied covenant of good faith and fair dealing”); **District of Columbia** (*Carl v. Children's Hosp.*, 702 A.2d 159, 160 (D.C. 1997)); **Hawaii** (*Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 631 (Haw. 1982)); **Idaho** (*Thomas v. Med. Ctr. Physicians, P.A.*, 61 P.3d 557, 565 (Idaho 2002)); **Illinois** (*Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 879-80 (Ill. 1981)); **Iowa** (*Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 281-85 (Iowa 2000)); **Kansas** (*Palmer v. Brown*, 752 P.2d 685, 689-90 (Kan. 1988)); **Kentucky** (*Grzyb v. Evans*, 700 S.W.2d 399, 401-02 (Ky. 1985)); **Maryland** (*Wholey v. Sears Roebuck*, 803 A.2d 482, 494 (Md. 2002)); **Massachusetts** (*Shea v. Emmanuel College*, 682 N.E.2d 1348, 1349-50 (Mass. 1997)); **Michigan** (*Dudewicz v. Norris-Schmid, Inc.*, 503 N.W.2d 645, 649-50 (Mich. 1993)) (limited to cases where statutory source of public policy at issue does not provide remedy for retaliatory discharge); **Minnesota** (*Vonch v. Carlson Cos.*, 439 N.W.2d 406, 408 (Minn. Ct. App. 1989)); **Mississippi** (*McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 607 (Miss. 1993)); **Missouri** (*Luethans v. Wash. Univ.*, 894 S.W.2d 169, 171 n.2 (Mo. 1995)); **Nebraska** (*Schriner v. Meginnis Ford Co.*, 421 N.W.2d 755, 757-59 (Neb. 1988)); **Nevada** (*Allum v. Valley Bank*, 970 P.2d 1062, 1063-64 (Nev. 1998)); **New Hampshire** (*Cloutier v. Great Atl. & Pac. Tea Co.*, 436 A.2d 1140, 1142-43 (N.H. 1981)) (requiring employee to act contrary to public policy violates implied covenant of good faith and fair dealing); **New Jersey** (*Ballinger v. Del. River Port Auth.*, 800 A.2d 97, 108 (N.J. 2002)); **New Mexico** (*Silva v. Am. Fed'n of State, County & Mun. Employees*, 37 P.3d 81, 83 (N.M. 2001)); **North Carolina** (*Amos v. Oakdale Knitting Co.*, 416 S.E.2d 166, 167 (N.C. 1992)); **North Dakota** (*Ressler v. Humane Soc'y*, 480 N.W.2d 429, 431-32 (N.D. 1992)); **Ohio** (*Pytlinski v. Borcar Prods., Inc.*, 760 N.E.2d 385, 387-88 (Ohio 2002)); **Oklahoma** (*Barker v. State Ins. Fund*, 40 P.3d 463, 468-70 (Okla. 2001)); **Oregon** (*Dunwoody v. Handskill Corp.*, 60 P.3d 1135, 1142 (Or. Ct. App. 2003)); **South Carolina** (*Ludwick v. Minute of*

employee from a discharge that offends a recognized public policy that a court has typically derived from a source other than the common law--a statute, constitutional provision, or even an administrative regulation.<sup>28</sup> Establishing the existence of a well-established public policy is typically the most difficult element of a successful claim, and is generally an issue of law for the court to decide.<sup>29</sup> The issue whether the discharge violated a clear public policy is generally one of fact, to be determined by a jury.

Depending on the jurisdiction, the public policy exception generally protects an employee from discharge for exercising a right or duty, for refusing to break the law, and/or for reporting an employer's unlawful or wrongful conduct (whistleblowing). The public policy exception varies considerably from state to state. Courts generally recognize one, some, or all of the four following categories of retaliatory discharges that can violate public policy: (1) discharges for refusing to violate the law (e.g., firing a truck driver for refusing to drive without a required inspection sticker);<sup>30</sup> (2) discharges

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Carolina, Inc., 337 S.E.2d 213, 216 (S.C. 1985)); **South Dakota** (Dahl v. Combined Ins. Co., 621 N.W.2d 163, 166-67 (S.D. 2001)); **Tennessee** (Guy v. Mut. of Omaha Ins. Co., 79 S.W.3d 528, 534-35 (Tenn. 2002)); **Utah** (Rackley v. Fairview Care Ctrs., Inc., 23 P.3d 1022, 1026-27 (Utah 2001)); **Vermont** (Payne v. Rozendaal, 520 A.2d 586, 588 (Vt. 1986)); **Virginia** (Dray v. New Mkt. Poultry Prods., Inc., 518 S.E.2d 312, 313 (Va. 1999) (recognizing public policy exception, but rejecting application to “generalized, common law ‘whistleblower’ retaliatory discharge claim”)); **Washington** (Dicomes v. State, 782 P.2d 1002, 1006 (Wash. 1989) (en banc)); **West Virginia** (Feliciano v. 7-Eleven, Inc., 559 S.E.2d 713, 718 (W. Va. 2001)); **Wisconsin** (Hausman v. St. Croix Care Ctr., 571 N.W.2d 393, 397-98 (Wis. 1997)); **Wyoming** (McLean v. Hyland Enters., 34 P.3d 1262, 1268- 69 (Wyo. 2001)).

For an excellent nationwide survey of the public policy doctrine, see Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 Wash. L.R. 1029 (2004).

<sup>28</sup> See, e.g., David J. Walsh and Joshua L. Schwartz, *State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, And Rationales*, 33 Am. Bus. L.J. 645, 651 (1996).

<sup>29</sup> See Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 841 (Wis. 1983) (“The determination of whether the public policy asserted is a well-defined and fundamental one is an issue of law and is to be made by the trial court”).

<sup>30</sup> See Adams v. George W. Cochran & Co., 597 A.2d 28, 34 (D.C. 1991).

for fulfilling legal (and sometimes civic) obligations (such as serving jury duty);<sup>31</sup> (3) discharges for exercising statutory or constitutional rights or privileges (e.g., firing a worker in anticipation of her filing a workers' compensation claim);<sup>32</sup> and (4) discharges for whistleblowing (firing an employee for reporting activity that the employee believes in good faith to be illegal or dangerous).<sup>33</sup>

While ten jurisdictions do not recognize the common law exception,<sup>34</sup> three of these ten states have codified the public policy exception by statute, which has become the exclusive remedy for a public policy claim.<sup>35</sup> In one state, Arizona, "it is an open and much debated question" whether a recent general whistleblower protection law preempts the common law public policy exception.<sup>36</sup> It should also be noted that every state

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<sup>31</sup> See *Nees v. Hocks*, 536 P.2d 512, 516 (Or. 1975).

<sup>32</sup> See *Wal-Mart Stores v. Baysinger*, 812 S.W.2d 463, 466 (Ark. 1991).

<sup>33</sup> See *Ballam*, *supra* note 6, at 669.

<sup>34</sup> The following states do not recognize the public policy exception: **Alabama** (*Salter v. Alfa Ins. Co.*, 561 So. 2d 1050, 1053 (Ala. 1990)); **Florida** (*Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327, 1329-30 (Fla. Dist. Ct. App. 1985)); **Georgia** (*Eckhardt v. Yerkes Reg'l Primate Ctr.*, 561 S.E.2d 164, 165-66 (Ga. Ct. App. 2002)); **Indiana** (*Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054, 1060-61 (Ind. Ct. App. 1980)); **Louisiana** (*Quebedeaux v. Dow Chem. Co.*, 820 So. 2d 542, 545-46 (La. 2002)); **Maine** (*Bard v. Bath Iron Works*, 590 A.2d 152, 156 (Me. 1991)); **New York** (*Horn v. N.Y. Times*, 790 N.E.2d 753, 759 (N.Y. 2003)); **Pennsylvania** (*Donahue v. Fed. Express Corp.*, 753 A.2d 238, 244 (Pa. Super. Ct. 2000)); **Rhode Island** (*Pacheco v. Raytheon Co.*, 623 A.2d 464, 465 (R.I. 1993) (*per curiam*)); **Texas** (*City of Midland v. O'Bryant*, 18 S.W.3d 209, 215 (Tex. 2000)).

<sup>35</sup> These states are **New York** (*Horn v. N.Y. Times*, 790 N.E.2d 753, 759 (N.Y. 2003) (refusing to recognize common law public policy exception, but stating that private employee is protected if employee "discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety," under N.Y. Lab. Law § 740)); **Pennsylvania** (Pa. Stat. Ann. tit. 43, §§ 1421-1428 (2004) (whistleblower law protects private and public employees who report wrongdoing or waste)); and **Rhode Island** (R.I. Gen. Laws §§ 28-50-1 to -9 (2004) (Rhode Island Whistleblowers' Protection Act protects private and public employees and independent contractors reporting violations of law)).

<sup>36</sup> See *Galati v. Am. W. Airlines, Inc.*, 69 P.3d 1011, 1015 (Ariz. Ct. App. 2003) ("[w]hether a common law tort for wrongful termination still exists after the [Arizona Employee Protection Act] is an open and much debated question in Arizona law") (discussing Ariz. Rev. Stat. § 23-1501(3)(c)(ii), which protects employees who report violations of "the Constitution of Arizona or the statutes of this state"). See also Ariz. Rev. Stat. § 23-1501 (2004) (protection for refusing to break law, for exercising a legal right, or for

legislature has adopted various “area-specific” whistleblower provisions, which protect an employee from retaliation for exercising a particular statutory right or duty, such as filing a workers’ compensation claim or reporting a worker safety code violation.<sup>37</sup>

All states that recognize the public policy exception recognize the first category, wrongful discharge for refusing to violate a law.<sup>38</sup> Colorado and Texas, however, do not recognize any other category of violation.<sup>39</sup> Thirteen states, including Michigan, New Jersey, and Wisconsin, also recognize the third category, wrongful discharge for exercising a right, but do not recognize any other category of discharge.<sup>40</sup> The remaining jurisdictions that recognize the public policy exception do not distinguish among the different types of discharges and therefore recognize all four of the categories of claims

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blowing whistle on various statutory violations).

<sup>37</sup> See, e.g., Ala. Code § 25-1-28 (2004) (unlawful employment practice--age discrimination); *id.* § 25-5-11.1 (filing for workers’ compensation or reporting violation of safety rule in writing); Ariz. Rev. Stat. § 3-376 (2003) (pesticide control); *id.* § 3-3120 (occupational safety and health--agricultural employment); Cal. Bus. & Prof. Code § 2056 (2003) (physicians advocating for medically appropriate health care); Del. Code Ann. tit. 6, § 1208 (Supp. 2002) (false claims actions); Ga. Code Ann. § 31-8-60 (2001) (long-term care facility); *id.* § 31-8-87 (abuse or exploitation of residents in long-term care facilities); Me. Rev. Stat. Ann. tit. 5, § 23 (2002) (testimony by state employees to legislative committees); *id.* § 4572 (fair employment); Mo. Ann. Stat. § 198.070 (2004) (abuse--nursing homes); *id.* § 198.090 (misappropriation of funds--nursing homes); Nev. Rev. Stat. § 394.377 (2004) (prohibited treatment of students with disabilities by private school officials); N.J. Stat. Ann. § 34:4A-13 (2004) (ski lift and tramway operators); Or. Rev. Stat. § 652.220 (2003) (wage discrimination); Pa. Stat. Ann. tit. 43, § 955 (2004) (unlawful discriminatory practices--human relations).

<sup>38</sup> See, e.g., *Adler v. American Standard Corp.*, 432 A.2d 464, 470 (Md. 1981); *Kroen v. Bedway Sec. Agency, Inc.*, 633 A.2d 628, 633 (Pa. Super. Ct. 1993); *Call v. Scott Brass, Inc.*, 553 N.E.2d 1225, 1227 (Ind. Ct. App. 1990).

<sup>39</sup> See *Rocky Mountain Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 527 (Colo. 1996); *Winters v. Houston Chronicle Publ’g Co.*, 795 S.W.2d 723, 724 (Tex. 1990).

<sup>40</sup> See *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425, 428 (Ind. 1973); *Geary v. United States Steel Corp.*, 319 A.2d 174, 176 (Pa. 1974); *Nees v. Hocks*, 536 P.2d 512, 514-15 (Or. 1975); *Sventko v. Kroger Co.*, 245 N.W.2d 151, 153 (Mich. Ct. App. 1976); *Jackson v. Minidoka Irrigation Dist.*, 563 P.2d 54, 59 (Idaho. 1977); *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 357 (Ill. 1978); *Howard v. Door Woolen Co.*, 414 A.2d 1273, 1274 (N.H. 1980); *Keneally v. Orgain*, 606 P.2d 127, 129 (Mont. 1980); *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980); *Murphy v. City of Topeka*, 630 P.2d 186, 192 (Kan. Ct. App. 1981); *Adler*, 432 A.2d at 469-71; *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840-41 (Wis. 1983); *Vigil v. Arzola*, 699 P.2d 613, 619 (N.M. Ct. App. 1983).

identified above.<sup>41</sup>

Jurisdictions also differ in what they recognize as a legitimate source of public policy. At the narrowest end of the spectrum are states that only accept statements of public policy explicitly set forth in state and federal statutes.<sup>42</sup> By contrast, most other states draw freely from a range of policy sources including statutes, constitutional provisions,<sup>43</sup> administrative regulations,<sup>44</sup> professional codes of ethics,<sup>45</sup> and occasionally even the common law.<sup>46</sup> None of the many jurisdictions that recognize the public policy exception require that the public policy be expressly job-related.<sup>47</sup>

Finally, the many legislative efforts to protect employees from discharge in violation of public policy have done little or nothing to limit or clarify an employer's potential liability under the uncertain common law public policy exception. As already discussed, every jurisdiction has enacted various "area-specific" whistleblower statutes, which protect a narrowly defined act, such as jury duty or filing a workers' compensation claim.<sup>48</sup> These statutes, however, do not limit or preempt the common law exception but

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<sup>41</sup> See, e.g., *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 381 (Ark. 1988).

<sup>42</sup> See *Vigil*, 699 P.2d at 620-21; *Cummins v. EG & G Sealol, Inc.*, 690 F. Supp. 134, 139 (D.R.I. 1988) (applying Rhode Island law).

<sup>43</sup> See *Luedtke v. Nabors Alaska Drilling*, 768 P.2d 1123, 1132 (Alaska 1989); *Logan v. Forever Living Prods. Int'l, Inc.*, 52 P.3d 760, 763-64 (Ariz. 2002); *Sterling Drug*, 743 S.W.2d at 381.

<sup>44</sup> See *Green v. Ralee Eng'g*, 960 P.2d 1046, 1060 (Cal. 1998).

<sup>45</sup> See *Miles*, *supra* note 3, at 78.

<sup>46</sup> See *Watson v. Peoples Sec. Life Ins. Co.*, 588 A.2d 760, 767 (Md. 1991).

<sup>47</sup> See *Collins v. Rizkana*, 652 N.E.2d 653, 658 (Ohio 1995).

<sup>48</sup> See note 30, *supra*.

instead provide an additional basis for employer liability that supplements the common law.<sup>49</sup>

Clearly, the relief available to a whistleblower under a statutory cause of action comes nowhere near the complete relief available in an action based upon the . . . public-policy exception to the doctrine of employment at will. In our judgment, the relief available in an action for the tort of wrongful discharge merely complements the limited statutory relief available . . . . Thus, we find that the mere existence of statutory remedies for violations of (state whistleblower statute) does not operate as a bar to alternative common law remedies for wrongful discharge in violation of public policy embodied in the Whistleblower Statute.<sup>50</sup>

Moreover, even the three or four states discussed above that have codified the public policy exception by statute as the exclusive remedy for such claims, have done so in broad terms that provide little predictability or guidance to employers of potential liability.<sup>51</sup> Some statutes expressly preserve common law public policy claims and even provide that, in the event of a conflict between the statute and common law, the law with “more beneficial provisions favoring the employee shall prevail.”<sup>52</sup>

Courts have also held repeatedly that the whistleblower provisions of various federal statutes do not preempt state common law claims.<sup>53</sup> Indeed, the newest member of this group, the whistleblower provision of the Sarbanes-Oxley Act, preserves state common law claims: “Nothing in this [statute] shall be deemed to diminish the rights,

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<sup>49</sup> See *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308, 320-21 (Ohio 1997) (at-will employee can sue under both common law public policy exception and state whistleblower statute, but can only recover once).

<sup>50</sup> *Wiles v. Medina Auto Parts*, No. 3131-M, 2001 WL 615938, at \*4 (Ohio Ct. App. 2001).

<sup>51</sup> See note 35, *supra*; Walsh and Schwartz, *supra* note 28, at 651; Frank J. Cavico, *Private Sector Whistleblowing And The Employment-At-Will Doctrine: A Comparative Legal, Ethical, And Pragmatic Analysis*, 45 S. Tex. L. Rev. 543, 583-84 (2004).

<sup>52</sup> Haw. Rev. Stat. Ann. § 378-69 (2003) (expressly preserving common law public policy claims).

<sup>53</sup> See Cavico, *supra* note 51, at 585-86.

privileges, or remedies of any employee under any Federal or *State law*, or under any collective bargaining agreement.”<sup>54</sup> Therefore, many of the state and federal whistleblower statutes leave virtually intact the common law public policy exception and consequently fail to limit an employer’s exposure to liability and damages under this exception.

#### **D. THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

Breach of the implied covenant of good faith and fair dealing, i.e., the bad-faith exception, is an exception to the at-will doctrine that derives from general contract law and rests on the assumption that the at-will employment relationship is contractual in nature.<sup>55</sup> Every contractual relationship gives rise to this implied covenant, which in the employment context bars an employer from discharging an employee to prevent the employee from enjoying the benefits of his employment, typically interpreted as wages, salary, or other monetary benefits that the employee has already earned but not yet received. Courts in at least 14 jurisdictions have recognized the bad-faith exception to the at-will doctrine.<sup>56</sup>

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<sup>54</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806(d), 116 Stat. 745, 802 (to be codified at 18 U.S.C. § 1514A(d)) (emphasis added).

<sup>55</sup> Restatement (Second) of Contracts § 205 (1981).

<sup>56</sup> **Alaska** (Mitford v. de Lasala, 666 P.2d 1000, 1007 (Alaska 1983)); **Arizona** (Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1040 (Ariz. 1985)); **Arkansas** (Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380, 381 (Ark. 1988)); **California** (Foley v. Interactive Data Corp., 765 P.2d 373, 389-401 (Cal. 1988)); **Connecticut** (De La Concha of Hartford, Inc. v. Aetna Life Ins. Co., 849 A.2d 382, 388 (Conn. 2004)); **Delaware** (E.I. DuPont de Nemours and Co. v. Pressman, 679 A.2d 436, 449 (Del. 1996)); **Idaho** (Metcalf v. Intermountain Gas Co., 778 P.2d 744, 748-49 (Idaho 1989)); **Louisiana** (Wiley v. Missouri Pacific R. Co., 430 So.2d 1016, 1020-21 (La. Ct. App. 1982)); **Maryland** (Beye v. Bureau of Nat’l Affairs, 477 A.2d 1197, 1200-01 (Md. Ct. Spec. App. 1984)) (Maryland does not recognize separate implied covenant claim but includes such claim under public policy exception); **Massachusetts** (Fortune v. Nat’l Cash Register Co., 364 N.E.2d 1251, 1256-57 (Mass. 1977)); **Nevada** (Perry v. Jordan, 900 P.2d 335, 338 (Nev. 1995)); **New Hampshire** (Porter v. City of Manchester, 849 A.2d 103, 114 (N.H. 2004)); **New Mexico** (Salazar v.

The bad-faith exception is far from uniform and varies from state to state. Most courts restrict the exception to discharges that deny the employee payment for benefits earned.<sup>57</sup> However, the kinds of benefits covered under this definition can be numerous and unpredictable. Recoverable benefits may include “commission [sic] due, wages earned, profit share, pension benefits, and severance benefits. . . . [and compensation for] the denial of sick leave. . . .”<sup>58</sup> In some jurisdictions, longevity of service is a necessary factor to support a claim for breach of the implied covenant.<sup>59</sup> Other courts require an “aspect of fraud, deceit, or misrepresentation” to support a bad-faith discharge.<sup>60</sup> Courts following this latter approach have recognized claims for bad-faith discharge when the employer intentionally misrepresented to the employee that his job would be secure for an indefinite duration.<sup>61</sup>

In short, the implied covenant exception suffers from the same lack of consistency and clarity that mars the other common law exceptions to the at-will doctrine and creates confusion for employers when making personnel decisions.

## **E. DAMAGES: THE SKY’S THE LIMIT**

The common law exceptions to the at-will doctrine subject employers to

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Furr’s, Inc., 629 F. Supp. 1403, 1409 (D.N.M. 1986) (New Mexico combines wrongful discharge tort with tortious breach of the implied covenant of good faith and fair dealing)).

<sup>57</sup> See Fortune, 364 N.E.2d at 1257; Susan Dana, *The Covenant of Good Faith and Fair Dealing: A Concentrated Effort to Clarify the Imprecision of its Applicability in Employment Law Transactions*, 2004 Tenn. Bus. L. J. 291, 300; Wagenselle, 710 P.2d at 1030-41.

<sup>58</sup> Dana, *supra* note 57, at 300-01.

<sup>59</sup> See, e.g., *Life Care Ctrs. of Am., Inc. v. Dexter*, 65 P.3d 385, 394 (Wyo. 2003).

<sup>60</sup> *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 101 (Del. 1992).

<sup>61</sup> See *id.* at 102.

considerable uncertainty about the types of behavior that will expose them to liability. These claims also expose employers to unpredictable and potentially significant damage awards.<sup>62</sup> Employers are exposed to potentially large awards for economic damages (lost pay and benefits), non-economic damages (emotional distress), and, where permissible, punitive damages.<sup>63</sup>

Plaintiffs have received large damage awards in a wide range of wrongful discharge claims. A number of recent verdicts have exceeded \$500,000 in economic and non-economic damages and \$1,000,000 in punitive damages.<sup>64</sup> Where permitted,

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<sup>62</sup> See Francis M. Dougherty, *Damages Recoverable for Wrongful Discharge of At-Will Employee*, 44 A.L.R.4th 1131, 1217.

<sup>63</sup> A brief explanation of terminology is in order here. This paper refers to three categories of damages for common law claims: economic damages, non-economic damages, and punitive damages. The terms “compensatory damages” and “actual damages” are used frequently but inconsistently by courts and commentators when discussing the first two categories. To minimize confusion, this paper avoids usage of these terms, as much as possible. Instead, the term economic damages is used to refer to compensation for the employee’s benefit of the bargain--lost pay and benefits, including both back and front pay. The term non-economic damages, in turn, refers to compensation for mental anguish, emotional distress, and loss of dignity. Punitive damages are a third category of damages. The term compensatory damages will be used only as a last resort, when a court fails to specify the basis of a jury award of non-punitive damages in a wrongful discharge case.

<sup>64</sup> *McConkey v. AON Corp.*, 804 A.2d 572 (N.J. Super. Ct. 2002) (employee awarded \$1,063,000 in economic damages and \$5,000,000 in punitive damages for wrongful termination on fraudulent inducement theory); *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662, 665, 673 (N.M. 2002) (employee awarded \$500,000 in compensatory damages and \$1,750,000 in punitive damages for wrongful discharge in retaliation for whistleblowing on workplace safety issues); *Cent. Bering Sea Fishermen’s Ass’n v. Anderson*, 54 P.3d 271, 279 (Alaska 2002) (in claims for constructive retaliatory discharge and defamation for reporting financial misconduct, promissory estoppel, and defamation, court affirmed punitive damage award of \$600,000, where economic damages were only \$13,000 and non-economic damages \$35,000); *Walia v. Aetna, Inc.*, 113 Cal. Rptr. 2d 737, 742, 748 (Cal. Ct. App. 2001) (employee awarded \$54,312 in economic damages, \$125,000 for emotional distress, and \$1,080,000 in punitive damages after being wrongfully terminated contrary to public policy for refusing to sign a non-compete agreement); *Trendwest Resorts, Inc. v. Ford*, 12 P.3d 613, 618 (Wash. Ct. App. 2000) (affirming \$235,000 verdict for economic damages where employee discharged after seeking counseling for alcohol abuse despite provision in employee agreement authorizing such counseling); *Dillard Dep’t Stores, Inc. v. Beckwith*, 989 P.2d 882, 884, 888 (Nev. 1999) (employee awarded \$424,028 in economic damages, \$200,000 for emotional distress and \$1,872,084 in punitive damages for tortious constructive discharge--demotion upon return after injury and filing of workers’ compensation claim--and for intentional infliction of emotional distress); *Reinneck v. Taco Bell Corp.*, 696 N.E.2d 839, 846 (Ill. App. Ct. 1998) (employee awarded \$370,000 in economic damages, \$25,000 for mental anguish, and \$1,000,000 in punitive damages, for retaliatory discharge for filing workers’ compensation claim).

punitive damages are particularly common with public policy claims.<sup>65</sup> In one case, two employees were each awarded \$1.5 million in punitive damages where the jury awarded one employee only \$10,000 in economic damages and the other only \$35,102.<sup>66</sup>

The size of a damages award for a particular wrongful discharge claim depends in part on whether the relevant jurisdiction recognizes that claim as a contract or tort action. Wrongful discharge claims sounding in contract are typically limited to economic damages and reinstatement. Wrongful discharge tort damages also include the wild card of non-economic damages,<sup>67</sup> such as emotional distress and loss of dignity, as well as punitive damages.<sup>68</sup>

Handbook claims sound in contract and generally warrant only the contract damages of back pay and reinstatement. The implied covenant claims defy clear categorization and can sound either in tort or contract, or both.<sup>69</sup> Regardless of this distinction, many of the jurisdictions recognizing this claim limit recovery to wages

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<sup>65</sup> See, e.g., *Hollowell v. Wilder Corp. of Delaware*, 743 N.E.2d 707, 711 (Ill. App. Ct. 2001); *Vandevender v. Sheetz, Inc.*, 490 S.E.2d 678, 689-90 (W.Va. 1997); *Rhein v. ADT Auto., Inc.*, 930 P.2d 783, 791 (N.M. 1996); *Moyer v. Allen Freight Lines, Inc.*, 885 P.2d 391, 395-96 (Kan. Ct. App. 1994); *D'Angelo v. Gardner*, 819 P.2d 206, 218-19 (Nev. 1991); *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980); *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1335 (Cal. 1980).

<sup>66</sup> *Paracelsus Health Care Corp. v. Willard*, 754 So. 2d 437, 440 (Miss. 1999) (employees discharged in retaliation for reporting supervisor's forgery of company checks). These punitive damage awards of \$1.5 million for each employee were therefore 150 and approximately 43 times the employees' respective economic damages of \$10,000 and \$35,102.

<sup>67</sup> See *Halbasch v. Med-Data, Inc.*, 192 F.R.D. 641, 652 (D. Or. 2000) (award of \$25,000 in non-economic damages not excessive where employee experienced severe depression after termination); *Rodriguez v. Consol. Coal Co.*, 524 S.E.2d 672, 681-82 (W.Va. 1999) (refusing to reduce award of \$75,000 in non-economic damages to employee terminated in retaliation for refusing to lie about mine accident).

<sup>68</sup> See *Mantha v. Liquid Carbonic Indus.*, 839 P.2d 200, 206 (Okla. Ct. App. 1992) (upholding award of \$359,759 for economic, non-economic, and punitive damages to employee discharged after filing workers' compensation claim).

<sup>69</sup> See *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1318 (9th Cir. 1982) (implied covenant sounds in both contract and tort under California law).

already earned, and some jurisdictions bar the recovery of punitive damages.<sup>70</sup> Some jurisdictions allow the recovery of back pay, non-economic damages, and punitive damages for breach of the implied covenant.<sup>71</sup> Most jurisdictions recognize the public policy claim as a tort claim, allowing for substantial non-economic damages and frequently punitive damages.<sup>72</sup> A small minority of jurisdictions recognize the public policy exception as a contract claim and bar non-economic and punitive damages.<sup>73</sup>

While there is a dearth of comprehensive nationwide studies on the number of wrongful discharge suits and related damage awards,<sup>74</sup> available studies of a more limited geographical scope demonstrate employers' vulnerability to significant damage awards for wrongful discharge claims. Three studies focusing exclusively on California verdicts are discussed below.

## 1. THE ORRICK STUDY

In 1981, the San Francisco law firm of Orrick, Herrington & Sutcliffe began a still ongoing study examining California jury verdicts in wrongful discharge cases ("Orrick study").<sup>75</sup> The Orrick study reports that, between 1989 and 2002, there were 511 common law wrongful discharge verdicts, of which 321, or 63%, were for the employee.<sup>76</sup> Many

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<sup>70</sup> See *Pierce*, 417 A.2d at 512 (no punitive damages because implied covenant claim sounded in contract only); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 841 (Wis. 1983).

<sup>71</sup> See *Cancellier*, 672 F.2d at 1318 (punitive damages recoverable under implied covenant claim under California law because theory sounded both in contract and tort).

<sup>72</sup> See, e.g., *Paracelsus Health Care Corp. v. Willard*, 754 So. 2d at 440.

<sup>73</sup> See, e.g., *Brockmeyer*, 335 N.W.2d at 841.

<sup>74</sup> See *Miles*, *supra* note 3, at 78-9.

<sup>75</sup> See Orrick, Herrington & Sutcliffe LLP, Summary of California Jury Verdicts in Employment Cases (2002) (on file with author).

<sup>76</sup> *Id.* at 2.

of the common law claims included in the study--i.e., public policy violations, fraud, defamation, and breach of the implied covenant of fair dealing--allow the recovery of non-economic and punitive damages under California law.<sup>77</sup>

The Orrick study compares damage awards in statutory discrimination claims with awards in common law wrongful discharge claims and shows that the common law claims can subject employers to even higher damage awards than the discrimination claims. The study considers both average and median<sup>78</sup> damage awards. When the average award is significantly higher than the median award, this discrepancy indicates that there are a small number of extremely large damage awards that raise the average considerably. “When comparing the median verdict with the average verdict, it is important to note that an average is very sensitive to extremely high or extremely low jury awards.”<sup>79</sup> It is precisely this kind of extravagant damage award that a statutory limit on damages would target and ameliorate.

The Orrick study reveals that common law claims expose employers to greater risk of liability than discrimination claims. Plaintiffs won 63% of the common law

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<sup>77</sup> *See id.*

<sup>78</sup> The median is the value in an ordered set of values above and below which there is an equal number of values.

<sup>79</sup> Orrick, *supra* note 75, at 1.

wrongful discharge cases but only 45% of the discrimination cases.<sup>80</sup> The study also shows that the median and average damage awards in common law claims are equivalent to, and occasionally even higher than, the median and average damage awards in statutory discrimination claims. In discrimination cases, the median awards ranged from \$140,242 to \$500,000, depending on the category of discrimination. By comparison, the median award for common law claims ranged from \$123,000 to \$400,938, depending mainly on whether the claim was contract- or tort-based.<sup>81</sup> The average awards for discrimination claims ranged from \$320,070 to \$1,452,837. By comparison, the range of average awards for discrimination claims began at a higher amount (\$679,335), and reached a slightly lower amount (\$1,360,837), again depending on the nature of the

<sup>80</sup> See *id.*, table 1, reproduced in relevant part below:

WRONGFUL TERMINATION					
Issues	Total Verdicts	Averages Based on Total Verdicts	Plaintiff Prevailed: Number (Percent)	Average Jury Award	Median Jury Award
<u>Discrimination</u>					
Sex	190	\$188,854	87 (46%)	\$412,441	\$220,000
Race	107	665,318	49 (46%)	1,452,837	452,676
Age	122	386,232	50 (41%)	942,406	500,000
Disability	50	199,427	26 (52%)	383,513	254,248
<b>Total**</b>	<b>469</b>		<b>212 (45%)</b>		
<u>Non-Discrimination</u>					
Breach of Contract/Covenant	317	456,462	218 (67%)	679,335	255,263
Violation of Public Policy	114	602,625	62 (54%)	1,108,053	250,000
Fraud/Misrepresentation	16	661,917	9 (56%)	1,176,742	451,876
Defamation/Slander	16	510,314	6 (38%)	1,360,837	123,000
Retaliation	27	532,525	18 (67%)	798,787	224,805
<b>Total**</b>	<b>511</b>		<b>321 (63%)</b>		

\*\* These totals overlap due to more than one cause of action in some cases.

<sup>81</sup> The range of common law claims covered were breach of contract and covenant of good faith and faith dealing, violation of public policy, fraud, defamation and slander, and retaliation.

underlying claim.<sup>82</sup>

## 2. THE RAND STUDY

In 1988, the Rand Corporation’s Institute for Civil Justice published a study of California jury verdicts in common law wrongful discharge cases by Dertouzos, Holland and Ebener (“the Rand study”).<sup>83</sup> The Rand study examined 120 California common law wrongful discharge jury verdicts between 1980 and 1986. Of the 120 cases, eighty-one (67.5%) resulted in plaintiffs’ verdicts, with an average total award of \$646,855.<sup>84</sup>

<sup>82</sup> See Orrick, *supra* note 75, at 2.

<sup>83</sup> See James N. Dertouzos, Elaine Holland & Patricia Ebener, *The Legal and Economic Consequences of Wrongful Termination*, Rand Inst. for Civil Justice, Report R-3602-ICJ (1988). This study did not provide any information on what percentage of cases went to trial or the size of pre-trial settlements.

<sup>84</sup> See *id.* at 25-7 and tables 9-10, relevant portions of which are reproduced below:

**Table 9: Summary of Jury Verdicts in Wrongful Termination Trials**

Number of trials	120
Plaintiffs’ verdicts	81 (67.5%)
Punitive damage awards	40 (33.3%)
Average total verdict (120 cases)	\$436,626
Average compensatory verdict	\$262,237
Average punitive verdict	\$174,389
Average total award (81 cases)	\$646,855
Average compensation award (81 cases)	\$388,500
Average punitive award (40 cases)	\$523,170

**Table 10: Distribution of Jury Awards**

Issues	Total	Million \$ Awards (ten largest awards)
Number of cases	81	10
Average award	\$646,000	\$3,931,000
Minimum award	\$7,000	\$1,000,000
Maximum award	\$8,000,000	\$8,000,000
Punitive as percent of total damages	39.9	43.5

Punitive damages constituted 39.9% of total damages, averaging \$523,170.<sup>85</sup> Ten of the 81 plaintiffs' verdicts exceeded \$1,000,000 in total damages, with an average award of \$3,931,000, and punitive damages constituting 43.5% of total damages.<sup>86</sup>

The Rand study suggests that the possibility of bountiful damage awards generates more wrongful termination litigation.<sup>87</sup> Specifically, the Rand study found that from 1986-1987, jurisdictions recognizing tort remedies for wrongful discharge averaged six times more wrongful termination court trials per one million employees per annum than jurisdictions which provided no tort remedies.<sup>88</sup> While this information does not reflect the number of cases settled before trial, it is nonetheless food for thought.

### 3. THE JUNG & HARKNESS STUDY

A different study conducted by Jung & Harkness of verdicts in California common law wrongful discharge cases from 1979 through 1988 determined that the average award for these claims was \$452,570.<sup>89</sup> Common law damage awards were

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<sup>85</sup> *See id.*

<sup>86</sup> *See id.*

<sup>87</sup> *See id.* at 17-8.

<sup>88</sup> *See id.*

<sup>89</sup> *See* David J. Jung & Richard Harkness, *Life After Foley: The Future of Wrongful Discharge Litigation*, 41 *Hastings L.J.* 131, 136 (table one) (1989):

<b>Total Awards in California Wrongful Discharge Cases: 1979-1988</b>		
	Average Award	Median Award
All Wrongful Discharge Cases	\$452,570	\$133,700
Retaliation	579,974	215,000
Handbook	193,898	100,000
Bad Faith	426,929	150,000

typically higher for tort-based than contract-based claims, because tort plaintiffs were not restricted to economic damages and could also recover punitive damages. According to the study, verdicts in retaliatory discharge cases in violation of public policy produced the highest average award (\$579,974), followed by bad-faith discharge cases (\$426,929), and then by handbook cases (\$193,898).<sup>90</sup> By contrast, the range of the median recoveries was narrower: \$215,000 for retaliation, \$150,000 for bad-faith claims, and \$100,000 for breach of contract, suggesting that the exceptionally large damage awards unique to tort claims boost the average in these cases far above the median.<sup>91</sup>

The size of these wrongful discharge awards is explained partly by the fact that highly paid employees are more likely to bring wrongful discharge suits and therefore can recover more significant awards of back and front pay.<sup>92</sup> According to Jung & Harkness, half of all wrongful termination suits were brought by middle managers and corporate executives.<sup>93</sup>

Anecdotal evidence also supports the conclusion that the possibility of high awards has a distorting effect on wrongful discharge litigation. For example, in 1990, Marshall B. Babson, a partner at Morrison & Foerster and former member of the NLRB, appearing before the House of Representatives Committee on Education and Labor on behalf of the United States Chamber of Commerce,<sup>94</sup> testified that:

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<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

<sup>92</sup> Back pay refers to lost wages and benefits from the time of the wrongful discharge until judgment. Front pay refers to wages and benefits from the time of judgment into the future.

<sup>93</sup> *See id.* at 148.

<sup>94</sup> *See* David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and*

Recent experience in California has shown that the availability of compensatory and punitive damages turns employment litigation into a high-stakes lottery in which everyone--employees, employers, and the courts-- loses. Once compensatory and punitive damages became available in California, wrongful discharge litigation went out of control. The courts were overwhelmed with cases, and juries seemed to lose touch with reality. Between 1980-1986, employees won more than 70% of the cases tried before juries, and the average award was more than \$645,000. Million dollar verdicts to plaintiffs were not uncommon, and one verdict in Santa Clara County exceeded \$50 million.<sup>95</sup>

Damage awards are only one type of cost associated with wrongful discharge claims. Settlement costs can also exact a heavy toll on employers' finances. This is so because many of the wrongful discharge claims can involve disputed issues of fact that survive summary judgment. While these settlement amounts are often confidential, the fact of settlement, or at least the fact of an employer's unsuccessful motion for summary judgment, is a matter of public record. Therefore, data on employee verdicts alone do not convey the full extent and scope of the financial burden to employers for wrongful discharge claims.

Wrongful discharge claims expose employers to unpredictable damage awards and settlement costs that can entail not only economic damages but also non-economic and punitive damages. A comprehensive statutory response to the unstable status quo would not only clarify the grounds for liability under the various exceptions to the at-will doctrine but would also protect employers from potentially extreme damages. One way to limit damages for wrongful discharge is to bar the recovery of non-economic damages and to limit economic damages to a reasonable amount. These and other such limits on damages will be discussed in detail below. Regardless of its precise form, a statutory

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*Minorities*, 37 U.C. Davis L. Rev. 511, 528 (2003) (discussing The Civil Rights Act of 1990: Hearing on H.R. 4000 Before the House Comm. on Educ. and Labor, 101st Cong. at 109, 127-28 (1990)).

<sup>95</sup> The Civil Rights Act of 1990: Hearing on H.R. 4000 Before the House Comm. on Educ. and Labor, 101st Cong. at 109, 127-28 (1990).

limit on damages would allow both employers and employees to predict with certainty the maximum amount of damages recoverable for a wrongful discharge claim. Employees could assess whether pursuing a claim is worthwhile, and employers could exercise their business discretion without facing unpredictable costs. Damage limits would also free for productive use funds previously earmarked for possible large damage awards.

## **II. MONTANA'S WRONGFUL DISCHARGE FROM EMPLOYMENT ACT: A CASE STUDY**

### **A. INTRODUCTION**

At one time in Montana, as in any other state today, an employee without an employment contract for a definite term or a collective bargaining agreement could be discharged for virtually any reason or no reason at all.<sup>96</sup> Montana bade farewell to the at-will doctrine in 1987 with the passage of the Wrongful Discharge From Employment Act ("WDEA" or the "Act").<sup>97</sup> Under the WDEA, a Montana employer cannot discharge a non-probationary employee without good cause. The formerly at-will employee in Montana is now protected from arbitrary dismissal in essentially the same way as an employee who, individually or collectively, has negotiated for such protection.<sup>98</sup>

To date, Montana is the first and only state to provide good-cause protection for

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<sup>96</sup> See *Gates v. Life of Montana Ins. Co.*, 668 P.2d 213, 219 (Mont. 1983).

<sup>97</sup> See Wrongful Discharge From Employment Act, Mont. Code Ann. §§ 39-2-901 to 914 (1987) [hereinafter "WDEA" or "the Act"].

<sup>98</sup> See *Winslow v. Montana Rail Link, Inc.*, 16 P.3d 992, 994 (2000) (union employee protected by "just cause" term in collective bargaining agreement); *Flanigan v. Prudential Fed. Sav. & Loan Ass'n*, 720 P.2d 257, 261 (Mont. 1986) ("good cause" applies in determining the propriety of an employee's termination under a contract for a specified term).

non-union and non-contractual employees.<sup>99</sup> The WDEA is essentially a species of tort reform, limiting an employer's exposure to damages for wrongful discharge and preempting all such common law claims, in exchange for protecting employees from discharge without good cause. "The essence of just cause legislation is that it protects employees from arbitrary dismissals, while offering employers a reprieve from common law suits. The basic philosophy of such statutes has been described as 'one of compromise.'"<sup>100</sup>

Montana's statutory rejection of the ubiquitous at-will doctrine was a bold move that immediately raises several salient questions: How has the WDEA affected the business climate in Montana? How has it affected employment levels? How has the Act affected employees? Has it reduced or increased wrongful discharge litigation, or has it made no measurable difference? Has good-cause protection increased worker productivity and longevity? This paper will address these questions, by examining the legal, economic, and political components and consequences of the Act. The following discussion is divided into five sections. The first discusses the origins of the WDEA as the brainchild of the business community to limit extreme damage awards. The second section discusses in detail the Act's key provisions. The third section discusses case law under the Act's good-cause provision. The fourth section presents the opinions and critical reactions of members of the Montana bar and academia to the WDEA. The fifth section presents a comparative analysis of Montana's post-WDEA economy and concludes that the WDEA has not harmed, and may have improved, Montana's economy.

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<sup>99</sup> As explained in note 2 *supra*, Puerto Rico also enacted a wrongful discharge statute in 1976.

<sup>100</sup> Marla J. Weinstein, *The Limitations of Judicial Innovation: A Case Study of Wrongful Dismissal Litigation in Canada and the United States*, 14 Comp. Lab. L.J. 478, 502 (1993).

**B. THE WDEA'S ORIGINS: THE BUSINESS COMMUNITY REACTS TO A COMMON LAW FREE-FOR-ALL**

The WDEA arose from the efforts of Montana's defense bar to limit employers' exposure to unpredictable liability and damage awards under an unwieldy patchwork of common law exceptions to the at-will doctrine.<sup>101</sup> The Act also reflected a climate of nationwide tort reform led by the insurance industry to limit recoverable tort damages.<sup>102</sup>

In the years immediately preceding the Act's passage in 1987, the Montana Supreme Court had recognized several exceptions to the at-will doctrine and had affirmed jury verdicts in excess of \$1,000,000 in a few high-profile cases.<sup>103</sup> Employers in Montana were growing concerned about "the specter of large jury awards and high defense costs,"<sup>104</sup> as well as the lack of clear guidelines in making personnel decisions under the regime of judicial exceptions to the at-will doctrine. Montana employers were also concerned that the rising number of wrongful discharge suits and attendant costs would create an anti-business climate that would drive away prospective employers.<sup>105</sup>

Montana's statute was a reaction by business interests to several million dollar-plus punitive damage awards upheld by the state supreme court in wrongful discharge cases litigated under the covenant of good faith and fair dealing. Fearing that business would avoid locating in Montana because of its courts' liberal interpretation of employee job rights, employer groups lobbied

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<sup>101</sup> See Jonathan Tompkins, *Legislating the Employment Relationship*, 14 *Employee Relations L.J.* 387, 392 (1988).

<sup>102</sup> See *id.*

<sup>103</sup> See *id.* See also Flanigan, 720 P.2d at 258 (assistant loan counselor awarded \$1.3 million for punitive damages, \$100,000 for emotional distress, and \$94,170 for economic losses for wrongful discharge); *Farrens v. Meridian Oil*, 1988 WL 79482, at \*2-4 (9th Cir. 1988) (\$1.7 million award for economic damages under Montana wrongful discharge claim).

<sup>104</sup> Tompkins, *supra* note 101, at 392.

<sup>105</sup> See *id.*

successfully for unjust discharge legislation.<sup>106</sup>

In 1986, the business community of Montana formed the Montana Liability Coalition.<sup>107</sup> The Coalition, working with the Montana Association of Defense Counsel to reform wrongful discharge tort law, introduced a bill that would undergo some changes and eventually pass as the WDEA. Representatives of the business community submitted supporting testimony to the Montana Legislature on the damaging consequences of unchecked jury awards in wrongful discharge cases on business growth and employment levels.<sup>108</sup> “The passage of this Act can be attributed to the lobbying efforts of pro-employer groups that were seeking to curb both the uncertainty and magnitude of wrongful discharge awards.”<sup>109</sup> From the outset, the defense bar recognized the common law public policy exception and codified it in the proposed bill.<sup>110</sup> The defense bar also initially proposed a good-cause provision in the bill, which would protect all employees with five or more consecutive years of employment from discharge except for good

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<sup>106</sup> Weinstein, *supra* note 100, at 500 n.138 (quoting Barbara A. Lee, *Something Akin to a Property Right: Protections for Employee Job Security*, 8 Bus. & Prof. Ethics J. 63, 72 (1989) (citations omitted)).

<sup>107</sup> Steven E. Abraham, *Can a Wrongful Discharge Statute Really Benefit Employers*, *Industrial Relations*, Vol. 37, no. 4, Oct. 1998, at 503.

<sup>108</sup> For example, one business representative and a deputy mayor of Billings, Montana, testified:

The Billings Chamber supports [the WDEA] and the positive impact it will have, particularly on the business community in our area. Wrongful discharge has become the favored tort claim in the Billings District and Federal Courts with the number of cases swelling from 2 in 1981 to 89 in 1985. The rising number of claims allowed under present Montana statutes has become a major disincentive to local business development and expansion of employment.

(written testimony of Kay Foster submitted on HB241, submission by the Montana Association of Defense Counsel, Exhibit E, January 28, 1987) *quoted in* Alan B. Krueger, *The Evolution of Unjust-D dismissal Legislation in The United States*, 44 *Indus. & Lab. Rel. Rev.* 644, 647 (1991).

<sup>109</sup> Girshon, *supra* note 2, at 642.

<sup>110</sup> *See* Tompkins, *supra* note 101, at 396.

cause.<sup>111</sup>

The defense bar's inclusion of a good-cause provision is significant, because it suggests a fundamental acceptance by Montana's business community that the at-will doctrine has been irreversibly eroded by many exceptions and shows a balanced effort to achieve greater uniformity and predictability among these many exceptions. The business community indeed could have proposed simply to eliminate or narrow the at-will doctrine's recognized exceptions. Instead, they recognized the need for balance and were willing to afford greater protection to at-will employees than they already had under the common law. The original bill also preempted all common law claims for wrongful discharge and limited the kinds and amounts of recoverable damages.<sup>112</sup>

The proposed bill then underwent various legislative compromises before its passage.<sup>113</sup> Among the most significant changes,<sup>114</sup> the Montana Legislature added a more detailed definition of good cause to replace the defense bar's broadly worded "legitimate business reason," codified the common law handbook exception, extended statutory protections to all employees who have completed the employer's probationary period (rather than a minimum 5-year requirement of consecutive employment), recognized punitive damages in limited circumstances, and increased maximum damages from two to four years' lost wages and benefits.<sup>114</sup> Nevertheless, the Montana Legislature retained the basic elements of the compromise between employer prerogative and employee protection that were already in place from the outset.

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<sup>111</sup> *See id.*

<sup>112</sup> *See id.*

<sup>113</sup> *See id.* at 395-96.

<sup>114</sup> *See id.* at 396.

## C. THE WDEA'S KEY PROVISIONS: A CLOSER LOOK

### 1. WRONGFUL DISCHARGE

The WDEA replaces the common law of wrongful discharge with a three-part statutory definition of wrongful discharge and limits damages for wrongful discharge to a maximum of four years of the discharged employee's wages and fringe benefits.<sup>115</sup>

The WDEA defines "wrongful discharge" as: (1) discharge in retaliation for refusing to violate public policy or for reporting a violation of public policy; (2) discharge in violation of the express provisions of an employer's own written personnel policy; and (3) discharge that was not for "good cause" after the employee has completed the employer's probationary period of employment.<sup>116</sup> "Discharge" under the WDEA includes "constructive discharge," which the Act defines as "the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative."<sup>117</sup> The WDEA expressly excludes from the definition of constructive discharge any "voluntary termination because of an

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<sup>115</sup> See Mont. Code Ann. § 39-2-902. The Act does not preempt other statutory bases for challenging discharge, such as the anti-discrimination laws:

This part does not apply to a discharge:

(1) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. The statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, disability, creed, religion, political belief, color, marital status, and other similar grounds.

Mont. Code Ann. § 39-2-912(1) (exemptions).

<sup>116</sup> See Mont. Code Ann. § 39-2-904.

<sup>117</sup> Mont. Code Ann. § 39-2-903(1).

employer’s refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.”<sup>118</sup>

The WDEA defines “good cause” as a “reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer’s operation, or other legitimate business reason.”<sup>119</sup>

**a. The Handbook and Public Policy Exceptions:  
Something Borrowed**

The first two definitions essentially codify the pre-existing common law public policy and handbook exceptions, with some narrowing modifications. For example, the Act restricts the handbook exception to express promises contained in a written personnel policy. The Act also narrows the public policy exception by defining public policy as “a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by *constitutional provision, statute, or administrative rule.*”<sup>120</sup> The Act therefore excludes judicial decisions as a source of public policy.<sup>121</sup>

One wonders whether preserving these two common law claims in the WDEA is a fair deal for employers in the quid pro quo of a wrongful discharge law. Rather than reducing an employer’s exposure to liability, the statute has effectively increased this exposure by preserving some of the common law exceptions and by adding a new and amorphous basis of liability under the good-cause standard. Preserving common law

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<sup>118</sup> *Id.*

<sup>119</sup> Mont. Code Ann. § 32-2-903(5).

<sup>120</sup> Mont. Code Ann. § 39-2-903(7) (emphasis added).

<sup>121</sup> By contrast, the Montana Supreme Court had, prior to the Act, apparently embraced a broader definition of public policy that included legislation, administrative regulations, and judicial decisions. *See Nye v. Department of Livestock*, 639 P.2d 498, 502 (Mont. 1982) (discussing approvingly sources of public policy set forth in *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 512 (N.J. 1980)).

claims for wrongful discharge arguably could burden employers with too many bases of liability, much like the common law regime that the WDEA was intended to replace. The public policy exception appears especially troubling because, as in the pre-WDEA era, it allows the courts to identify public policy on an ad hoc, case-by-case basis. Moreover, Montana had already based this exception primarily on legislative sources.<sup>122</sup> The Legislature, not the courts, is the appropriate entity to reflect public opinion, define broad public policies, and provide clear notice to potential defendants, such as by adding anti-retaliation provisions to certain statutes and by enacting whistleblower laws.<sup>123</sup>

**b. Good Cause Protection: Something New**

Good-cause protection under the WDEA is a radical departure from the common law of employment at will and sets Montana apart from the other 49 states, which afford no such protection, statutory or judicial. The good-cause standard requires some explanation. First, it does not apply to employees who are already protected by a collective bargaining agreement or individual term contract.<sup>124</sup> Presumably, employees who are already protected by such contracts enjoy equivalent or greater protections than those afforded by the WDEA.

More importantly, good-cause protection applies only to “non-probationary” employees.<sup>125</sup> The Act allows the employer to define the length of the employee’s

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<sup>122</sup> *See id.*

<sup>123</sup> *See supra* note 37 and accompanying text (discussing whistleblower and anti-retaliation provisions in various states).

<sup>124</sup> “This part does not apply to a discharge . . . (2) of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.” Mont. Code. Ann. § 39-2-912(2) (exemptions).

<sup>125</sup> *See* Mont. Code Ann. § 39-2-904(1)(b).

probationary period, without setting a maximum, and provides a default period of six months in the absence of an employer's explicit probationary period.<sup>126</sup> "The employer must define the probationary period at the outset of an employment relationship, and the employer has the burden of showing that a probationary period was in effect at the time of a discharge."<sup>127</sup> These requirements "deter abusive expansion or extension of probationary periods after the fact, thereby avoiding the prospect of nullifying the protections provided to Montana workers by the Act."<sup>128</sup> Nevertheless, an employer could still theoretically defeat the purpose of the Act by creating a lengthy probationary period and making it a practice to discharge employees within the probationary period, thereby preserving the at-will relationship and escaping scrutiny under the good-cause standard. Such an employment practice would defeat the WDEA's purpose of protecting against arbitrary dismissal. To date, there has been no litigation testing the limits of an employer's probationary period under the Act.

It is an unresolved issue in Montana whether the WDEA excludes probationary employees altogether from its coverage, or whether the Act excludes probationary employees from good-cause protection only but affords them the remaining protections of the WDEA.<sup>129</sup> This issue is significant because it determines whether or not probationary employees would be subject to the WDEA's limits on damages.

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<sup>126</sup> See Mont. Code Ann. § 39-2-904(2)(b).

<sup>127</sup> Whidden v. John S. Nerison, Inc., 981 P.2d 271, 275 (Mont. 1999).

<sup>128</sup> Hunter v. City of Great Falls, 61 P.3d 764, 767 (Mont. 2002).

<sup>129</sup> The Montana Supreme Court has left unresolved this issue of statutory interpretation. See *Ritchie v. Town of Ennis*, 86 P.3d 11, 16 (Mont. 2004) ("[A]lthough we have repeatedly considered the WDEA as providing for three separate causes of action[,] . . . we need not reach the issue [whether a non-probationary employee can sue under the WDEA]").

The plain language of the WDEA suggests that the WDEA does not exclude probationary employees entirely from its scope but instead excludes them from good-cause protection only. The WDEA expressly limits good-cause protection to non-probationary employees, but the statute does not provide any such limit for the other protections, i.e., handbook and public policy claims.<sup>130</sup> The Act allows any “employee” to bring these latter claims, and the Act does not restrict the definition of “employee” to non-probationary workers.<sup>131</sup> Probationary employees would thus apparently have recourse to handbook and public policy claims under the WDEA.

However, the WDEA creates some ambiguity on this issue because it also contains a broad provision codifying the at-will doctrine for probationary employees: “During a probationary period of employment, the employment may be terminated at the will of either the employer or the employee on notice to the other *for any reason or for no reason.*”<sup>132</sup> While this provision clarifies the fact that probationary employees have no recourse to the new, statutory good-cause protection, the provision does not limit recourse to the preexisting common law exceptions to the at-will doctrine that the WDEA has codified. This interpretation would be consistent with pre-WDEA Montana precedent, which recognized the applicability of common law exceptions to the at-will doctrine to all employees, including probationary employees.<sup>133</sup> This interpretation of the WDEA would also subject probationary employees to the WDEA’s limits on damages.

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<sup>130</sup> See Mont. Code Ann. § 39-2-904(1).

<sup>131</sup> See Mont. Code Ann. § 39-2-903(3).

<sup>132</sup> Mont. Code Ann. § 39-2-904(2)(a) (emphasis added).

<sup>133</sup> See *Crenshaw v. Bozeman Deaconess Hosp.*, 693 P.2d 487, 495-96 (Mont. 1984) (implied covenant exception applies to probationary at-will employee).

### c. Preemption of Common Law Claims

As part of the quid pro quo for the employer, the WDEA expressly preempts all common law tort and contract claims of wrongful discharge for at-will employees, except for its codification of the handbook and public policy exceptions.<sup>134</sup> Any common law claim that is “inextricably intertwined” with an employee’s termination is preempted by the WDEA.<sup>135</sup> If the employee’s alleged damages are caused by the discharge, then the claim is preempted. However, the WDEA does not preempt claims arising from the employment relationship that are independent of an employee’s discharge, such as an employer’s failure to pay stock options and other benefits in breach of an oral promise that was part of an offer of employment.<sup>136</sup>

By the same token, the WDEA expressly does not apply to a discharge actionable under any other state or federal statute, “includ[ing] those [statutes] that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, disability, creed, religion, political belief, color, marital status, and other similar grounds.”<sup>137</sup> A discharge actionable under another statute precludes a claim under the WDEA.<sup>138</sup>

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<sup>134</sup> “Except as provided in this part, no claim for discharge may arise from tort or express or implied contract.” Mont. Code Ann. § 39-2-913.

<sup>135</sup> See *Kulm v. Montana State Univ.-Bozeman*, 948 P.2d 243, 246 (Mont. 1999) (WDEA preempts university professor’s claims of fraud, negligent misrepresentation, and breach of implied duty of good faith and fair dealing against university for persuading him to resign from prior university position and accept job on promise of four-year term, only to discharge him after one year).

<sup>136</sup> See *Beasley v. Semitool, Inc.*, 853 P.2d 84, 86-7 (Mont. 1993) (WDEA does not preempt claims of breach of contract and breach of covenant of good faith and fair dealing for employer’s breach of compensation-related promises).

<sup>137</sup> Mont. Code Ann. § 39-2-912(1) (exemptions).

<sup>138</sup> See *Fandrich v. Capital Ford Lincoln Mercury*, 901 P.2d 112 (Mont. 1995) (claim of constructive discharge due to sexual harassment actionable under state anti-discrimination law not actionable under

#### d. Damages

The WDEA limits probationary and non-probationary employees' damages in all wrongful discharge cases to a maximum of four years' severance pay, including wages and fringe benefits, plus interest, minus any "[i]nterim earnings, *including amounts the employee could have earned with reasonable diligence . . .*"<sup>139</sup> The WDEA thus codifies the employee's duty to mitigate damages, which Montana has long recognized in the common law.<sup>140</sup> The WDEA expressly bars damages for pain and suffering, emotional distress, and any other form of non-economic damages.<sup>141</sup>

The WDEA allows punitive damages only in narrow circumstances: "if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of [public policy]."<sup>142</sup> Therefore, punitive damages are unavailable in all good-cause and handbook cases of wrongful discharge, and are unlikely in most public policy cases. In fact, there is no published decision under the WDEA that has awarded punitive damages. The WDEA's limited recognition of punitive damages is a dramatic change from the *ancien regime*, when punitive damages were readily available under Montana's generally applicable punitive damages statute in any wrongful discharge tort upon a sufficient showing of fraud or malice.<sup>143</sup>

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WDEA).

<sup>139</sup> Mont. Code Ann. § 39-2-905(1) (emphasis added).

<sup>140</sup> See *Bronken's Good Time Co. v. J.W. Brown & Assoc.*, 661 P.2d 861, 864-65 (Mont. 1983).

<sup>141</sup> See Mont. Code Ann. § 39-2-905(3).

<sup>142</sup> Mont. Code Ann. § 39-2-905(2).

<sup>143</sup> See Mont. Code Ann. § 27-1-221(1); *Flanigan v. Prudential Fed. Savings*, 720 P.2d 257, 258 (Mont. 1986) (awarding \$1.3 million in punitive damages in pre-WDEA wrongful discharge case).

Reinstatement is not an available remedy under the WDEA. Perhaps the absence of this remedy is an implicit recognition that reinstatement is frequently an impracticable and unwelcome form of relief for both employer and employee, especially after an employee has been discharged under unpleasant circumstances. While reinstatement would certainly alleviate the employer's monetary damages for front pay, this benefit may be outweighed by the strain to the work environment of rehiring an unhappy or undesired employee.<sup>144</sup>

**e. Arbitration**

While not requiring arbitration, the WDEA creates significant incentives for both employer and employee to arbitrate rather than litigate a wrongful discharge claim. A valid offer to arbitrate under the WDEA must comply with certain procedural formalities.<sup>145</sup> “[A]rbitration pursuant to [the WDEA] does not require an arbitration agreement prior to the dispute.”<sup>146</sup> It is unclear whether a mandatory arbitration clause in an employment agreement would constitute a valid offer to arbitrate under the WDEA. To date there has been no case addressing this issue.<sup>147</sup> However, the Federal Arbitration Act would most likely preempt the WDEA to the extent that it imposed requirements on

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<sup>144</sup> See Kenneth A. Sprang, *Beware The Toothless Tiger: A Critique Of The Model Employment Termination Act*, 43 AMULR 849, 920 & 924 n.462 (1994) (citing Warren H. Chaney, *The Reinstatement Remedy Revisited*, 32 Labor L.J. 357, 363-64 (1981); Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. Ill. L. Rev. 1, 28-44, 65).

<sup>145</sup> Under the WDEA, a valid offer to arbitrate must be in writing, must provide for the selection of a neutral arbitrator by agreement or as provided under Montana's Uniform Arbitration Act, and must provide that the arbitration be governed by the same Act. See Mont. Code Ann. § 39-2-914(2) (arbitration). A party must make an offer to arbitrate within 60 days after service of the complaint, and the other party must accept the offer in writing within 30 days thereafter. See Mont. Code Ann. 39-2-914(3).

<sup>146</sup> *Burkhart v. Semitool, Inc.*, 5 P.3d 1031, 1035 (Mont. 2000). See Mont. Code Ann. § 39-2-914(2)-(3).

<sup>147</sup> In *Burkhart*, 5 P.3d at 1033, the employment agreement contained a mandatory arbitration clause, but the employer also made an offer of arbitration in compliance with the WDEA after discharging the employee.

arbitration clauses beyond general contract law.<sup>148</sup>

The WDEA awards reasonable attorneys' fees to any employer or employee who makes a valid offer to arbitrate, if the other party rejects the offer and the offeror then prevails in court.<sup>149</sup> The prevailing party is entitled to recover reasonable attorney fees incurred after the date of the offer to arbitrate.<sup>150</sup> The WDEA differs markedly here from other employment and civil rights statutes in two ways. First, these other statutes do not condition an award of attorneys' fees for the prevailing employee on a rejected offer to arbitrate.<sup>151</sup> Secondly, the WDEA awards fees equally to the prevailing employee or employer. Most fee-shifting provisions in employment or civil rights statutes either do not award prevailing employers their fees or do so only if the employee's claim is frivolous or unfounded.<sup>152</sup> The WDEA's fee-shifting provision clearly promotes arbitration as the preferred forum by shifting attorneys' fees to any party that refuses to arbitrate and then loses. This bilateral fee-shifting provision emphasizes the fact that each party shares equally in the cost of not agreeing to arbitrate wrongful discharge claims.

The WDEA also requires an employer to pay the arbitrator's fee and all costs of

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<sup>148</sup> See Federal Arbitration Act ("FAA"), 9 U.S.C.S. § 2 (providing that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (FAA preempts provision of Montana's Uniform Arbitration Act, Mont. Code Ann. § 27-5-114(4), requiring procedural formalities for valid arbitration agreement, because law "conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally").

<sup>149</sup> See Mont. Code Ann. § 39-2-915 (effect of rejection of offer to arbitrate).

<sup>150</sup> See *id.*

<sup>151</sup> See, e.g., 42 U.S.C.A. § 2000e-5(k) (court may award reasonable attorneys' fees to prevailing party in Title VII claim).

<sup>152</sup> See, e.g., *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420-22 (1978) (prevailing employer entitled to fees under Title VII only for claims that are frivolous, unreasonable, without foundation, or brought in bad faith).

arbitration (but not attorneys' fees) if the employee makes a valid offer to arbitrate, the employer accepts, and the employee prevails in the arbitration.<sup>153</sup> Otherwise the Uniform Arbitration Act governs which party pays the costs of arbitration.<sup>154</sup> This asymmetrical cost-shifting measure clearly encourages employees who otherwise may lack the resources to enforce their rights under the WDEA to do so through arbitration rather than litigation.

**f. Exhaustion of Remedies and Limitations Period**

The WDEA requires an employee to exhaust the employer's written internal procedures for appeal of discharges before filing suit.<sup>155</sup> The employee's failure to do so is a defense to an action under the WDEA.<sup>156</sup> However, the employer waives the exhaustion requirement if it fails to notify employees in writing of any available procedures within seven days of termination.<sup>157</sup> If the employer's internal procedure is not concluded within 90 days of termination, the employee is considered to have exhausted her internal remedies. The WDEA has a limitations period of one year from the date of discharge.<sup>158</sup> The WDEA tolls this limitations period for up to 120 days while the employee exhausts her available internal remedies.<sup>159</sup>

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<sup>153</sup> See Mont. Code Ann. § 39-2-914(4).

<sup>154</sup> *Id.* Under the Uniform Arbitration Act § 10, “[u]nless otherwise provided in the agreement to arbitrate, the arbitrators’ expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.”

<sup>155</sup> See Mont. Code Ann. § 39-2-911(2).

<sup>156</sup> See *id.*

<sup>157</sup> See Mont. Code Ann. § 39-2-911(3).

<sup>158</sup> See Mont. Code Ann. § 39-2-911(2).

<sup>159</sup> See *id.*

## **D. GOOD-CAUSE JURISPRUDENCE IN MONTANA**

### **1. INTRODUCTION**

Montana courts have applied the good-cause standard in a fairly balanced way, recognizing the importance of preserving an employer’s discretion in exercising its business judgment, but allowing employees to reach a jury when there is a close issue of fact as to whether the employer acted arbitrarily, erroneously, or unfairly. While some good-cause decisions suggest judicial overreaching into the private realm of an employer’s business judgment, for the most part Montana courts have applied the WDEA with restraint.

The numbers reveal a fairly even match between employers and employees under the WDEA. A survey of 35 published and unpublished<sup>160</sup> good-cause cases shows that 18 decisions were for the employer, while 17 were for the employee. Employers moved for summary judgment in at least 24 of the 35 cases and prevailed in 12 cases, while summary judgment was denied on 12 occasions. Fourteen of the 35 cases went to a jury, with seven verdicts for the employer and seven verdicts for the employee.

### **2. GOOD CAUSE IS AN OBJECTIVE STANDARD REQUIRING AN ACCURATE FACTUAL BASIS FOR DISCHARGE**

As explained above, “good cause” under the WDEA is defined as: (1) unsatisfactory job performance, (2) disruptive job conduct (such as insubordination), or (3) the catch-all category of “any other legitimate business reason.”<sup>161</sup> The employee has

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<sup>160</sup> This study is based in part on summaries of unpublished decisions provided by an extremely helpful Montana employment attorney. Copies of this information are available from the author of this paper.

<sup>161</sup> See Mont. Code Ann. § 32-2-903(5).

the burden of proving the absence of good cause.<sup>162</sup> Montana courts define “other legitimate business reason” as one that “is neither false, whimsical, arbitrary or [sic] capricious, and it must have some logical relationship to the needs of the business.”<sup>163</sup> The issue whether there was good cause for discharge is typically a fact-specific inquiry that can evade summary judgment.<sup>164</sup>

While the Montana Supreme Court has yet to explain fully the different legal theories for proving the absence of good cause, at least one court interpreting the WDEA has extracted three general bases for proving the absence of good cause from the case law: (1) that the employer’s stated reason is, on its face or in context, not a legitimate business reason; (2) that the employer’s reason rests on a mistake of fact and is incorrect; and (3) that the employer’s reason is a pretext masking a reason unrelated to any legitimate business need.<sup>165</sup>

Under the second theory, even if the employer had a good-faith or reasonable belief in the reason for discharge at the time of discharge, the WDEA imposes liability if the employer’s reasons for discharge prove to be incorrect.<sup>166</sup> In fact, some of the cases in which the employee defeated summary judgment, discussed below,<sup>167</sup> turn on a factual

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<sup>162</sup> See *Marcy v. Delta Airlines*, 166 F.3d 1279, 1283 (9th Cir. 1999) (discussing employee’s elements of proof under WDEA).

<sup>163</sup> *Buck v. Billings Montana Chevrolet, Inc.*, 811 P.2d 537, 540 (Mont. 1991).

<sup>164</sup> See *Howard v. Conlin Furniture No. 2, Inc.*, 901 P.2d 116, 120-21 (Mont. 1995); *Guertin v. Moody’s Market, Inc.*, 874 P.2d 710, 715 (Mont. 1994).

<sup>165</sup> See *Marcy*, 166 F.3d at 1284 (identifying three bases for proving absence of good cause under WDEA: “if the reason given for the employee’s discharge: (1) is invalid as a matter of law under the WDEA; (2) rests on a mistaken interpretation of the facts; or (3) is not the honest reason for the discharge, but rather a pretext for some other illegitimate reason”) (interpreting WDEA).

<sup>166</sup> See *id.* at 1283-84 (discussing the same).

<sup>167</sup> See discussion at pp. 49-56, *infra*.

dispute over the accuracy of an employer's reasons for discharge. This standard differs from the one that is often applied in the discrimination context, where the question is the employer's motive rather than the objective correctness of the employer's decision.<sup>168</sup>

This rigorous objective standard under the WDEA suggests that employers in Montana should keep accurate and detailed records of an employee's performance and investigate charges thoroughly before acting on these charges. Conversations with the Montana bar confirm this notion.<sup>169</sup> Perhaps this more rigorous standard of review under the WDEA is ultimately a salutary change ensuring greater accuracy and fairness of decisionmaking in such an important issue as the termination of an employee. Nevertheless, the standard resembles strict liability and subjects even the scrupulous employer to liability if its reasons for discharge, however carefully determined, are later proven to be mistaken in court or before an arbitrator.

The third category of good-cause liability is the familiar pretext theory imported from anti-discrimination jurisprudence and requires the employee to prove "that the given reason for the discharge . . . is a pretext and not the honest reason for the discharge,"<sup>170</sup> and that the real reason does not serve a legitimate business need.

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<sup>168</sup> See *Stover v. Martinez*, 382 F.3d 1064, 1076 (10th Cir. 2004) (in Title VII case, "relevant inquiry is not whether [employer's] proffered reasons were wise, fair or correct, but whether [it] honestly believed those reasons and acted in good faith upon those beliefs"); *Green v. Nat'l Steel Corp., Midwest Div.*, 197 F.3d 894, 899 (7th Cir. 1999) (in ADA claim, "regardless of whether it is correct in its beliefs, if an employer acted in good faith and with an honest belief, we will not second-guess its decisions"). While some courts apply an objective test to an employer's reasons for the adverse employment action under the anti-discrimination laws, this standard is nevertheless tempered by reasonableness and is still more forgiving than the WDEA approach. See, e.g., *Gordon v. United Airlines, Inc.*, 246 F.3d 878, 886 n.9 (7th Cir. 2001).

<sup>169</sup> See discussion at pp. 57-8, *infra*.

<sup>170</sup> *Mysse v. Martens*, 926 P.2d 765, 770 (Mont. 1996).

### 3. GOOD CAUSE JURISPRUDENCE: SOMETIMES YOU WIN . . .

A closer look at some representative good-cause cases suggests that, while the WDEA has made some inroads into management prerogative, courts are inclined to defer to an employer's business needs and grant it summary judgment when the employer has solid and unrefuted reasons for discharge based on the employee's performance or conduct. In a landmark early good-cause case, *Buck v. Billings Montana Chevrolet, Inc.*,<sup>171</sup> an employee argued that the employer's stated reason for discharge was illegitimate under the WDEA. There, the plaintiff was the general manager of a car dealership and was a highly regarded employee. The defendant was a competing dealership that acquired plaintiff's employer and replaced him with its own longstanding employee as general manager, consistent with its established corporate policy.<sup>172</sup>

The Montana Supreme Court affirmed summary judgment for the employer, holding that the employer's policy of placing its own recognized employees in newly acquired dealerships was a legitimate business reason.<sup>173</sup> In *Buck* the court expressed a sensitivity to the needs of the business community that warrants close attention. The court first explained that a meaningful definition of good cause must achieve a reasonable balance between an employer's need to protect its business and an employee's interest in job security.<sup>174</sup> The Montana Supreme Court observed further that "it is inappropriate for

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<sup>171</sup> 811 P.2d 537 (Mont. 1991).

<sup>172</sup> *See id.* at 539.

<sup>173</sup> *See id.* at 541.

<sup>174</sup> *See id.*

courts to become involved in the day-to-day employment decisions of business.”<sup>175</sup> The court explained that the defendant “made a large investment when it purchased the dealership” and had the right to protect its investment by placing “a long term employee, in whom he held great trust, to manage that investment.”<sup>176</sup> The court also noted that the defendant’s policy served the legitimate purpose of placing an employee in a managerial position over a newly acquired business who “held the same business values and philosophies as [defendant] . . . .”<sup>177</sup> The court concluded that to hold otherwise would require an employer to retain an unknown and perhaps undesired employee in a high-profile position.<sup>178</sup>

The Montana Supreme Court in *Buck v. Billings* cautioned, however, that its deferential stance toward the employer’s hiring policy was “confined only to those employees who occupy sensitive managerial or confidential positions,” and that “a company’s interest in protecting its investment and in running its business as it sees fit is not as strong when applied to lower echelon employees.”<sup>179</sup> This language suggests a sliding-scale approach in applying the good cause standard to facial challenges to an employer’s reason for discharge: the greater the employee’s discretion and managerial responsibilities, the greater the deference to the employer’s decision to discharge that employee. However, no case has yet applied or expanded upon this dicta in *Buck*.

Many good-cause cases in this category of well-documented discharges have lent

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<sup>175</sup> *Id.* at 541.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *See id.*

<sup>179</sup> *Id.*

themselves readily to summary judgment for the employer, such as where a drug test indicated the presence of cocaine in an airline employee's system;<sup>180</sup> where an employee failed to follow a regular five-day work schedule despite repeated oral and written warnings;<sup>181</sup> where a transportation director failed to perform job responsibilities, by refusing to create a transportation schedule and drive a bus for senior citizens;<sup>182</sup> where a juvenile detention officer allowed visitors into the facility twice after receiving oral and written warnings that to do so could lead to discharge;<sup>183</sup> and where an employee under investigation for sexual harassment and other misconduct threatened and intimidated his supervisor and managers, such as by threatening to send the manager on a "little trip to hell" in a late-night phone call.<sup>184</sup> Courts also grant summary judgment when the discharge is prompted by the employer's economic needs, such as where an oil executive was discharged due to an anticipated decline in crude oil prices and likely loss in revenue.<sup>185</sup>

#### **4. GOOD CAUSE JURISPRUDENCE: ... AND SOMETIMES YOU LOSE**

It is not surprising that there also appears to be an unavoidable class of good-cause cases that defy summary judgment. These cases typically involve a genuine and irreducibly factual dispute over the accuracy or pretextual nature of an employer's

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<sup>180</sup> See *Baker v. Delta Air Lines, Inc.*, 108 Fed.Appx. 451, 452, 2004 WL 1930289 (9th Cir. Aug. 4, 2004) (applying WDEA).

<sup>181</sup> See *Bourdelaïs v. Semitool, Inc.*, 77 P.3d 555 (Table), 2003 WL 22073274, at \*1 (Mont. Sept. 8, 2003).

<sup>182</sup> See *Mysse v. Martens*, 926 P.2d 765, 770 (Mont. 1996).

<sup>183</sup> See *Fenger v. Flathead County*, 922 P.2d 1183 (Mont. 1996).

<sup>184</sup> See *Koeplin v. Zortman Mining, Inc.*, 881 P.2d 1306, 1311 (Mont. 1994).

<sup>185</sup> See *Cecil v. Cardinal Drilling Co.*, 797 P.2d 232, 235 (Mont. 1990).

reasons for discharge based on an employee's performance or conduct. Summary judgment has been denied where a nurse disputed the nursing home's allegation that she abused a patient by withholding food;<sup>186</sup> where a furniture store manager carefully refuted each of his employer's eight performance-based reasons for discharge and had received a highly favorable job evaluation one year before discharge;<sup>187</sup> where the employee, a bakery/deli manager of a supermarket, refuted each of the employer's performance-based reasons for discharge (such as accusations of violating state sanitation laws) and submitted deposition testimony that she had been hard working and loyal, had received favorable reviews, and had not received previous complaints from her employer;<sup>188</sup> where a Burger King employee disputed her employer's assertions of breach of company policy by submitting deposition testimony that she had made a vacation request according to company policy, and that she "moonlighted" only for a non-competitor in accordance with company policy;<sup>189</sup> and where an employee disputed her employer's assertion that she was discharged for not getting along with other employees and disrupting business operations, by showing that she was discharged after reporting suspected workplace illegal drug activity to federal authorities.<sup>190</sup>

## **5. GOOD CAUSE JURISPRUDENCE: THE PROBLEM CASES**

A brief discussion of some problematic good-cause cases illustrates that the

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<sup>186</sup> See *Ruzicka v. First Healthcare Corp.*, 45 F. Supp.2d 809, 811-12 (D. Mont. 1997).

<sup>187</sup> See *Howard v. Conlin Furniture*, 922 P.2d 1183, 1186 (Mont. 1996).

<sup>188</sup> See *Guertin v. Moody's Market*, 874 P.2d 710, 715 (Mont. 1994).

<sup>189</sup> See *Morton v. M-W-M, Inc.*, 868 P.2d 576, 579-80 (Mont. 1994).

<sup>190</sup> See *Krebs v. Ryan Oldsmobile*, 843 P.2d 312, 316 (Mont. 1992).

standard is sometimes intractable and can yield unpredictable and implausible results, especially when a court apparently allows its sympathies for a plaintiff to determine a result that clashes with the applicable legal standards. In *Arnold v. Yellowstone Mountain Club, LLC*,<sup>191</sup> the Montana Supreme Court held that the plaintiff, a discharged housekeeper with supervisory responsibilities at a private resort, had created a triable issue of pretext defeating summary judgment. Her employer fired her when she uttered “fuck this” and walked out of a meeting where she had just been demoted.<sup>192</sup> The written personnel policy provided that, “depending upon circumstances,” the “insubordination, [or] use of abusive or threatening language” could warrant summary discharge.<sup>193</sup> The employer moved for summary judgment, asserting that the employee’s conduct at the meeting warranted summary dismissal under the written policy and therefore constituted discharge for good cause.<sup>194</sup>

The employee did not dispute her conduct at the meeting but instead argued in effect that there were mitigating facts preceding her discharge that undermined its legitimacy: she had been an exemplary employee with excellent reviews, had made repeated attempts to contact management prior to this meeting to determine her job status as supervisor, including requesting an evaluation, in compliance with the written personnel policy, but was ignored.<sup>195</sup> The court accepted the employee’s position, relying heavily upon language in the written policy that emphasized the circumstances of

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<sup>191</sup> 100 P.3d 137 (Mont. 2004).

<sup>192</sup> *See id.* at 139.

<sup>193</sup> *See id.*

<sup>194</sup> *See id.*

<sup>195</sup> *See id.* at 138-39.

an employee's misconduct, including length of service and overall performance, and concluded that the employee created a triable issue "that [the employer's] stated reason for termination was merely a pretext to avoid facing her concerns and following [its] three-tiered disciplinary process."<sup>196</sup>

The court in *Arnold* effectively second-guessed the employer's application and interpretation of its own personnel policy regarding grounds for discharge. In doing so, the court assumed the mantle of super-personnel department and contravened its own standard, articulated in *Buck v. Billings*, of deferring to an employer's business judgment. The court's reading of the employer's personnel policy is strained and unconvincing, especially where the court isolates and magnifies the use of the term "circumstances" to justify its own sympathies for the employee.

Another interesting decision against the employer is *Delaware v. K-Decorators, Inc.*<sup>197</sup> That case involved a constructive discharge claim in which a sales manager lost his position based on the employer's purported corporate restructuring of the sales department.<sup>198</sup> The court denied the employer's motion for summary judgment because the employee introduced affidavits from other sales staff who stated that, after his departure, they observed few if any changes in the sales department, other than the elimination of his position.<sup>199</sup> The court in *Delaware* carefully distinguished the employee's facial challenge to the employer's reason for discharge in *Buck*.<sup>200</sup> Unlike

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<sup>196</sup> *See id.* at 142.

<sup>197</sup> 973 P.2d 818 (Mont. 1999).

<sup>198</sup> *See id.* at 822.

<sup>199</sup> *See id.* at 829-30.

<sup>200</sup> *See id.*

that case, the employee was not challenging the legitimacy per se of the employer's stated reason of restructuring management and eliminating or consolidating positions. Rather, the employee challenged the truth of the stated reason based on evidence that the employer took no other steps to restructure or reorganize the sales department, other than eliminating his position. This pretext case differs from cases where the employee creates a triable issue on mistake of fact. Here, the theory is that employer knew the stated reason was false.

In *Andrews v. Plum Creek Manufacturing, LP*,<sup>201</sup> the employee defeated summary judgment by creating a triable issue that her employer's reason for discharge, inadequate performance, was effectively mitigated by the employer's failure to provide adequate training and supervision. The employer admitted that the employee received minimal training for the position.<sup>202</sup> Several years after she was hired, an audit revealed that the employee did not match checks and cash with retail sales invoices when she made certain deposits, causing discrepancies between deposit slips and other financial documents.<sup>203</sup> She was then demoted from her accounting position and offered a more routine mill job, with her seniority intact.<sup>204</sup> She declined the offer and sued for wrongful discharge.<sup>205</sup>

The employer moved for summary judgment, arguing that the employee's errors resulted in inadequate job performance under the WDEA's definition of good cause.<sup>206</sup>

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<sup>201</sup> 27 P.3d 426 (Mont. 2001).

<sup>202</sup> *See id.* at 427.

<sup>203</sup> *See id.*

<sup>204</sup> *See id.*

<sup>205</sup> *See id.*

<sup>206</sup> *See id.* at 427-28.

The employee countered with evidence that the employer provided no supervision, no job evaluations, no written job standards and no accounting procedures, and that petty cash and retail sales accounts were accessible to many employees.<sup>207</sup> The employer argued that the employee offered only explanations for her inadequate job performance but did not challenge the performance itself.<sup>208</sup> The court concluded that there was conflicting evidence on whether her job performance was satisfactory.<sup>209</sup> In so holding, the court interpreted the “job performance” prong of the WDEA’s definition of good cause expansively as entailing a joint effort between employer and employee. In denying summary judgment, the court implicitly held that the employer could be responsible, at least in part, for an employee’s inadequate job performance through inadequate training or supervision.

This summary of puzzling cases ends with a bang, not a whimper. One good-cause case in particular is worthy of Lewis Carroll and shows that occasionally, even under the WDEA, an employer may be dragged through the ordeal of a jury trial in order to vindicate its business judgment. In *McGillen v. Plum Creek Timber Co.*,<sup>210</sup> an employee was discharged for playing a practical joke on his supervisor. The employee placed a false classified ad in a local newspaper purporting to be his supervisor’s offer to sell his truck, and asking prospective buyers to call the supervisor’s home late in the

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<sup>207</sup> See *id.* at 428.

<sup>208</sup> See *id.* at 428-29.

<sup>209</sup> See *id.* at 429.

<sup>210</sup> 964 P.2d 18 (Mont. 1998).

evenings.<sup>211</sup> The employee sued for wrongful discharge and the parties cross-moved for summary judgment.<sup>212</sup> The employer argued that it had good cause because the employee's misconduct violated written policy against harassing or intimidating a supervisor and probably violated the law.<sup>213</sup> The trial court denied the employer's motion, holding surprisingly that whether the employee's practical joke constituted good cause was a triable issue of fact for the jury.<sup>214</sup>

The case went to trial and the jury found for the employer.<sup>215</sup> On cross-appeal, the Montana Supreme Court affirmed the trial court's denial of summary judgment.<sup>216</sup> "The court was correct in ruling that whether it was reasonable for Plum Creek to apply the [company] rule prohibiting harassment or intimidation to McGillen's conduct and fire him was an issue for the jury to decide."<sup>217</sup> Here common sense would suggest that the employee's harassment of his supervisor warranted discharge with or without an applicable written company policy.<sup>218</sup>

In sum, good-cause case law does not lend itself to easy generalization and is

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<sup>211</sup> *See id.* at 20.

<sup>212</sup> *See id.* at 21.

<sup>213</sup> *See id.*

<sup>214</sup> *See id.*

<sup>215</sup> *See id.*

<sup>216</sup> *See id.* at 24.

<sup>217</sup> *See id.*

<sup>218</sup> The Court was influenced by the employer's letter to the discharged employee invoking the company policy as the basis for the discharge. Montana law requires an employer to provide the reason(s) for discharge upon the employee's request and binds the employer to this written statement. *See* Mont. Code Ann. § 39-2-801(1). "An employer should be limited to introducing only those reasons itemized in a discharge letter as the reasons justifying termination." *Jarvenpaa v. Glacier Elec. Coop., Inc.*, 970 P.2d 84, 90 (Mont. 1998).

inherently a fact-specific inquiry. While courts frequently reach the right result, be it pro-employee or pro-employer, they occasionally stray when they allow their own sympathies for an employee to determine a decision and then strain to justify the result with an unpersuasive interpretation of the facts or the employer's personnel policy. This risk of rogue decisions is inherent in a general definition of good cause. It is important, however, not to lose sight of the WDEA's overarching quid pro quo, by which the employer is protected from extreme damage awards while incurring the risk of occasional exposure to a non-meritorious nuisance suit that resists summary judgment.

#### **E. THE EFFICACY OF THE WDEA: A VIEW FROM THE BAR**

The consensus from the Montana bar is that the WDEA is a pro-employer statute that has reduced employers' exposure to liability and damages, with minimal compliance costs, but that the WDEA has done little to protect employees from arbitrary discharge.<sup>219</sup> According to interviews with various employment lawyers practicing in Montana, limiting damages to four years' salary generally makes wrongful discharge claims unprofitable, unless the plaintiff is a highly compensated professional or executive-level employee. The WDEA has removed the profit motive from pursuing many wrongful discharge claims in Montana. Most employment lawyers prefer pursuing statutory claims for discrimination and harassment, or the rare public-policy claims under the WDEA (with the prospect of punitive damages), rather than litigating good-cause cases.

Practitioners opined that the number of wrongful discharge suits has declined since the passage of the WDEA. Attorneys attribute this decline not only to the statute's cap on damages but also to Montana's particular demographics. Many employees in

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<sup>219</sup> This section is based on interviews and email exchanges with members of the Montana bar. More detailed information is available from the author.

Montana are in the service industry and hold more than one minimum-wage job at a time. Their low annual wages at any one job reduce their recoverable damages under the WDEA, which affords only severance pay as damages. Moreover, the average employee's recoverable damages are reduced further by the duty to mitigate. Many employees in Montana have fungible jobs. Employees are often able to find a replacement job relatively soon after discharge, thereby offsetting their already de minimis severance-pay damages.

Most employees in Montana cannot afford to retain an attorney on an hourly fee basis. The WDEA does not award attorney's fees to the prevailing plaintiff in litigation unless the employer has refused a valid offer to arbitrate. Apparently the plaintiff's bar has not taken advantage of this procedural device for potentially shifting fees in a successful claim of wrongful discharge. Of course, an employee's offer to arbitrate only secures an award of fees if the employer refuses and is defeated in court. For these reasons, and because the stakes are so low, WDEA cases are mostly unprofitable ventures for attorneys under a contingency agreement.

While some defense attorneys said that arbitration is preferable to avoid a sympathetic jury, apparently arbitration is not widely used within the plaintiff's or defense bar in Montana. Some attorneys expressed the sentiment that there was no proof of a better deal or outcome with arbitration. Moreover, there is apparently a dearth of available arbitrators in Montana. And those few arbitrators who are available are viewed as decidedly partisan to one side or the other, typically more pro-employer than pro-employee. In any event, efforts at agreeing to arbitrate typically break down because the parties cannot agree on an arbitrator and decide to litigate instead.

Apparently the WDEA has not created a sea change in the employment relationship in Montana. The statute has created little, if any, disturbance, confusion, or compliance costs for employers and their business operations. While employers are now more inclined to document an employee's job performance and maintain a disciplinary file to build a potential good-cause defense, these costs are minimal. Employers' attorneys do not perceive any other affirmative duties generated by the WDEA, such as the need to erect internal procedures for progressive discipline akin to those provided under collective bargaining agreements. However, some attorneys believe that the good-cause standard has created a hindrance because it is often a fact-specific standard that survives summary judgment. In these attorneys' opinions, the specter of good-cause review impedes management prerogative when making employment decisions.

Employers are also now more likely to consult their attorneys before discharging an employee to determine whether their reason or reasons are likely to be deemed sufficient under the WDEA. Some attorneys stated that the standard probationary period is one year, but that the employer will extend the period if the employee presents concerns. This latter statement appears inconsistent with the intent of the WDEA, which requires employers to set the probationary period before or at the time of hire.<sup>220</sup>

According to some employee-side attorneys, most workers in Montana still believe that they are employees at will and may be fired without cause. According to these attorneys, the WDEA's cap on damages affords employers de facto free rein over lower-paid workers, because these workers cannot afford to enforce their rights: they cannot afford to pay an attorney at an hourly rate and cannot retain attorneys on a

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<sup>220</sup> See Mont. Code Ann. § 32-2-904(2)(b).

contingency basis with such unprofitable cases. Moreover, Montana apparently has no public-interest legal services to bring such claims, and attempts at class certification have not been successful. However, some attorneys opined that sympathetic juries finding for the employee frequently do not subtract mitigation wages, despite instructions to the contrary, thereby creating a potential for more lucrative verdicts in some instances, subject, however, to a remittitur by the court.

In fact, some attorneys expressed the view that the WDEA has actually made it easier for employers to discharge lower-paid employees than under the common law, because the cap on damages has chilled the filing of these unprofitable claims. One attorney observed that employers can exploit the probationary period to the fullest by terminating employees within the probationary period only to repeat the same practice with new employees.

Other plaintiffs' attorneys stated that employees generally believe that they cannot be discharged unless they fail in their job duties. However, these same attorneys point out that many such employees may have had the same view before the WDEA's passage. Plaintiffs' attorneys generally believe that employees are neither more confident nor more productive as a result of the WDEA's passage.

One attorney predicted that there would be a political effort in 2005 to repeal or modify the WDEA, particularly by targeting its cap on damages. In sum, employee-side attorneys in Montana perceive the cap on damages as providing too little compensation for wrongful discharge, too little a deterrent against wrongful employment practices, and too much of a deterrent against the filing of such claims.

## **F. AN ANALYSIS OF MONTANA'S POST-WDEA ECONOMY**

Leading economic indicators obtained from the U.S. Department of Labor show that Montana's post-WDEA economy has been relatively strong and compares favorably to neighboring states with similar demographic and economic profiles. This positive result suggests that the WDEA, by limiting employers' damages and protecting employees from discharge without good cause, has not had an adverse effect on Montana businesses and may even have played a role in stimulating employment levels and the overall economy.

### **1. FAVORABLE EXPECTATIONS FROM THE BUSINESS COMMUNITY**

Before considering Montana's post-WDEA economic performance in detail, it is worth considering the business community's initial reaction to the passage of the WDEA, a statute that the business community itself was instrumental in drafting and promoting. According to one author applying an "event study" methodology that measured stock prices on the key dates of the WDEA's legislative evolution and ultimate passage, Montana investors perceived legislative efforts to enact the WDEA as an event that would increase the value of Montana businesses.<sup>221</sup> In a nutshell, "event study methodology can be used to assess the effects of legislation. The event study examines changes in stock prices in response to a specific event."<sup>222</sup> The methodology is based on the "efficient market hypothesis," which states that the price of a firm's stock is the

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<sup>221</sup> See Abraham, *supra* note 107.

<sup>222</sup> See *id.* at 506.

market's estimate of the firm's future profitability.<sup>223</sup> Therefore, a change in stock price in response to an event reflects a perceived change in future profitability in response to that event.<sup>224</sup>

According to this study, shareholder returns were significantly higher on the dates of key legislative activity and the ultimate passage of the WDEA than they would have been in the absence of these events.<sup>225</sup> The study analyzed eight major employers in Montana from diverse sectors of the economy and focused on 11 dates on which there was significant legislative activity on the WDEA, starting on January 16, 1987, when the bill was introduced into Montana's House of Representatives, and ending on May 11, 1987, when Montana's governor signed the bill into law.<sup>226</sup> According to the study, shareholder returns rose significantly on these key dates. Under an event-study analysis, this result indicates that Montana investors had the expectation that the WDEA would increase the future profitability of businesses falling within its scope. "This increase in [projected] profitability would have been due to the fact that the Act was [perceived as] beneficial to firms in Montana."<sup>227</sup>

In his event-theory study, the author carefully considered and persuasively eliminated other possible causes that might have explained the rise in stock prices on these key dates coincident with the WDEA's passage. For example, the author noted that the representative companies were deliberately chosen from diverse industries to reduce

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<sup>223</sup> *See id.*

<sup>224</sup> *See id.*

<sup>225</sup> *See id.* at 512-16.

<sup>226</sup> *See id.* at 510-11.

<sup>227</sup> *Id.* at 516.

the possibility that other events affecting the market generally would explain the increase in shareholder returns.<sup>228</sup> The author also determined that there were no other newsworthy or noteworthy events occurring during the same time period, and that there was no other pro-business legislation corresponding to the dates covered by the study.<sup>229</sup> In short, investors in Montana companies had a favorable reaction to the WDEA's passage, consistent with the statute's genesis as a pro-employer measure.

## 2. ANALYSIS OF MONTANA'S ECONOMIC INDICATORS

Economic data for Montana's post-WDEA years bear out the business community's favorable expectations.<sup>230</sup> Montana's post-WDEA economic performance has been relatively robust. Montana's rate of job growth, gross state product, and its decline in unemployment, all compare favorably with its pre-WDEA economy and with neighboring states with similar demographic and economic profiles. This part of the paper examines Montana's economic profile before and after the WDEA's passage, in 1987, and then compares this information to the economic profiles of comparable states during the same time periods. The analysis focuses on three leading economic indicators: size of the labor force; unemployment figures; and available jobs in the various sectors.

The comparator states for purposes of this analysis are Idaho, Wyoming, North Dakota, and South Dakota. These states were selected based on their geographic and demographic similarity to Montana. All are landlocked states located in the western, northern-central region of the country and have in common small, dispersed populations, a relative absence of large urban centers, and similar patterns of education and

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<sup>228</sup> See *id.* at 512.

<sup>229</sup> See *id.* at 512-13.

<sup>230</sup> The data supporting the following analysis can be obtained from the website for the U.S. Department of Labor's Bureau of Statistics, at [www.bls.gov](http://www.bls.gov).

employment.

**a. Labor Force**

Montana's labor force grew from approximately 400,000 to over 475,000 between 1990 and 2003, representing an increase of 18.75%. The labor force had remained at a plateau level of around 400,000 from 1985 until 1990, and increased every year thereafter. The growth rate in the two years preceding the WDEA's passage in 1987 is comparable to the growth rate in the two subsequent years. The passage of the WDEA did not appear to have an adverse affect on employment in Montana and may have raised Montana's employment levels.

During the same time period, 1985 to 2003, Idaho's labor force increased by 42.86%, South Dakota's labor force by 21.4%, Wyoming's labor force by 12%, and North Dakota's labor force increased by 4.5%. Montana's job growth of 18.75% therefore ranks in the middle of these five states. Moreover, unlike Montana, both North Dakota and Wyoming experienced periods of sharp decline in the labor force between 1985 and 2003 (Wyoming from 1987 to 1991, and North Dakota from 1989 to 1992). As with Montana, none of the states experienced significant job growth before 1991. After 1991, the growth of Montana's labor force is comparable to that of the other states, with the exception of Idaho, whose labor force grew at a much faster rate. Therefore, the growth of Montana's labor force did not differ from that of the group as a whole.

**b. Unemployment**

Montana's unemployment rate declined from 7.5% to 4% between 1985 and 2003. While the rate fluctuated between 4% and 8.5% during that time period, it declined significantly, from 8% to 5.5%, in the 1987-1990 period. The WDEA's passage in 1987

thus may have stimulated employment growth in Montana. Montana's unemployment rate apparently declined at a greater rate than all of the other comparator states, except North Dakota.<sup>231</sup>

### **c. Industry Trends**

Between 1980 and 2001, Montana experienced a significant growth in the number of wage jobs, as well as a small growth in the number of smaller businesses. While the number of agricultural employees has not changed significantly, the number of employees in the retail trade and services sectors has increased the most during the time period. In contrast, employment in manufacturing, construction, and financial services has not grown significantly. No industry experienced a significant decline in employment.

These trends in Montana's economy are very similar to those of Idaho, Wyoming, North Dakota, and South Dakota. As previously stated, all these states experienced a growth in overall employment, and the majority of the growth came from all sectors of employment except agriculture. The number of smaller businesses increased in all states, though at a slightly slower pace than in Montana. Like Montana, all states experienced significant growth in employment in the retail trade and service sectors. This fact indicates that Montana's job growth in these sectors was not hampered by the WDEA.<sup>232</sup>

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<sup>231</sup> During the same time period, 1985 to 2003, North Dakota's unemployment rate declined from 6% to 3%. Idaho's unemployment rate decreased from 7.5% to 4.5%. Wyoming's rate decreased from 6.5% to under 4%. South Dakota's declined from 5.5% to 3%. Moreover, Montana's approximate one-third drop in unemployment in the years immediately after the WDEA's passage, 1987-1990, falls in the middle of the comparator states' figures for the same time period. Idaho's unemployment rate declined from 9% to 5%. Wyoming's unemployment rate decreased from 10.5% to 5%. North Dakota's unemployment rate declined from 6% to 4% between 1987 and 1990.

<sup>232</sup> The only significant difference in industry trends appears to be in the manufacturing sector. Montana, along with Wyoming and South Dakota, did not experience any significant growth in this sector, while Idaho and South Dakota experienced slight growth. This difference suggests that the WDEA had little, if anything at all, to do with Montana's stagnant manufacturing sector and, instead, that circumstances unique

The WDEA has therefore had no measurable adverse consequences on Montana's economy and may have even benefited the economy. This result is consistent with the Act's origins in the business community as a species of tort reform, as well as the consensus within the Montana bar that the WDEA benefits employers both by limiting their exposure to damages and by reducing the profitability of such claims for employees.

### **III. THE MODEL EMPLOYMENT TERMINATION ACT**

#### **A. INTRODUCTION: A PAINFUL BIRTH**

In 1991, the Uniform Law Commissioners ("ULCs"),<sup>233</sup> the same body responsible for the Uniform Commercial Code and the Uniform Partnership Act, approved the Model Employment Termination Act ("META"), intended as a flexible blueprint for a wrongful discharge statute for state legislatures to adopt throughout the country. As with the WDEA, META generally preempts all common law wrongful discharge claims and adopts instead a good cause standard for discharge, while also limiting an employer's damages. A brief discussion of META's tortured procedural history illustrates some of the legislative difficulties inherent in crafting a comprehensive statute that will successfully balance the competing interests of preserving employers' prerogative over the size and composition of their workforce, and limiting their exposure to damages, with providing greater job security for the individual employee.

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to Idaho and South Dakota are probably responsible for the difference.

<sup>233</sup> The National Conference of Commissioners on Uniform State Laws ("NCCUSL") was established in 1892, to promote uniform laws throughout the United States. See Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 Wash. L. Rev. 361, 365-66 (1994). ULCs who attend the conference are delegates from all of the United States, the District of Columbia, and Puerto Rico. The ULC typically meet once a year for an entire week to consider proposed uniform or model acts. See *id.* at 366. The NCCUSL has promulgated hundreds of uniform laws, many to great success, including the Uniform Commercial Code, the Uniform Partnership Act, and the Uniform Arbitration Act. See *id.*

Similar to the WDEA's origins, META arose from growing concerns in the mid-1980's "that recent judicial modifications in the doctrine of employment at will had created great uncertainty for both employers and employees."<sup>234</sup> In its summary of META,<sup>235</sup> the ULC echoes the WDEA's origins when it succinctly explains the Act's *raison d'être*: the revolution in the common law created a confusing battleground of exceptions to the at-will doctrine. "The effect is extensive capriciousness in determination of liability and award of damages from jurisdiction to jurisdiction."<sup>236</sup>

As the WDEA implicitly recognizes, the ULC also understood that there was no turning back. Restoring the at-will doctrine to its former monolithic status was neither possible nor desirable. From the outset the ULC drafting committee's efforts were controversial because it typically undertook to codify existing common law principles, and not, as was the case here, to reform or depart from them.<sup>237</sup> Initially the ULC undertook to draft a uniform wrongful discharge act that would bring nationwide uniformity to an increasingly balkanized area of the law, one that is especially troubling in a mobile national economy where many larger employers were doing business in many jurisdictions, and many employees "might be hired in one state, work in another, and be fired in a third . . . ."<sup>238</sup> The ULC invited the participation of several employer and employee groups in the drafting of the proposed uniform act.

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<sup>234</sup> *Id.* at 367.

<sup>235</sup> This summary is available on the ULC's website at: [http://www.nccusl.org/nccusl/uniformact\\_summaries/uniformacts-s-meta.asp](http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-meta.asp).

<sup>236</sup> St. Antoine, *supra* note 233, at 367.

<sup>237</sup> *See id.*

<sup>238</sup> *Id.*

A first reading of the proposed uniform law generated substantial hostility, culminating in “a [narrowly defeated] motion to discharge the drafting committee on the grounds the whole project was a futility and a waste of the commissioners’ time.”<sup>239</sup> Whether this reaction was a pro-employer sentiment directed against the proposed good-cause standard, a pro-employee reaction to the proposed limit on damages, general hostility to the proposed national uniformity of the bill, or a combination of all three features, is unclear. What is clear is that the proposed statute did not pass as a uniform act when it was to put to vote at the 1991 national conference.<sup>240</sup> Instead, the ULC adopted the proposed act as a model statute.<sup>241</sup> As recently as 2002, the ULC has provided commentary to META’s provisions, indicating a sustained institutional interest in promoting META as a significant legislative proposal for wrongful discharge.<sup>242</sup>

The distinction between a uniform and model act is highly significant here. “The designation of ‘uniform’ would have required the act to be adopted verbatim-- that is, without change. The designation ‘model’ does not require it to be adopted verbatim but allows a degree of change.”<sup>243</sup> A model act therefore affords each state the discretion to tailor the act’s provisions to its particular concerns or constituencies.

The ULC’s defeat of the uniform act but passage of the model act reflects the fact that a wrongful discharge law that departs from the common law primarily by mandating

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<sup>239</sup> *Id.* at 369.

<sup>240</sup> *See id.*

<sup>241</sup> *See id.* at 370.

<sup>242</sup> *See, e.g.,* META § 5 (Procedure and Limitations) (2002 main volume).

<sup>243</sup> David Stua, *META: A Proposed Solution to Employment at will*, at <http://home.inu.net/davidstua/META.HTM>.

a good-cause standard and a limit on damages, and by promoting binding arbitration, remains a controversial proposal. The history of META can be read as a cautionary tale against overly ambitious efforts to legislate national uniformity in a highly charged area of the law that implicates many competing policy concerns and elicits emotional reactions from employer and employee groups alike. National uniformity in the law is often a desirable goal and resonates strongly with multi-state businesses. However, national uniformity may be an unrealistic goal when the proposed statute itself is a radical departure from existing norms and not their embodiment.

## **B. GENERAL SIMILARITIES WITH WDEA**

META bears some key similarities to the WDEA, including a good-cause provision, the preemption of common law claims for wrongful discharge, a bar on non-economic damages, a limit on economic damages, and a probationary period. These key provisions warrant closer attention. META defines good cause in similar terms as the WDEA but is more detailed in its definition.<sup>244</sup> META expressly identifies the same three general categories of good cause that the WDEA and Montana courts interpreting the WDEA have established: poor job performance, misconduct, and the employer's good-faith assessment of its economic needs.

As with the WDEA, META does not apply to employees subject to a contract for

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<sup>244</sup> "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. META, § 1(4). (Definitions).

a term.<sup>245</sup> Unlike the WDEA, META does apply to employees subject to a collective bargaining agreement. Unlike the WDEA, META has a minimum size requirement of five employees.<sup>246</sup>

As with the WDEA, META preempts common law wrongful discharge claims arising from the termination, including defamation, intentional infliction of emotional distress, and related torts.<sup>247</sup> META's preemption clause is significantly broader than the WDEA's, which preserves and codifies the public policy and handbook exceptions. META does not preserve these or any other common law exception. However, META expressly preserves work-related torts based on facts apart from the discharge, such as assault, malicious prosecution, and false imprisonment.<sup>248</sup> As with the WDEA, META reminds employers that they are still bound by their duties under other employment-related statutes and administrative regulations.<sup>249</sup> META also expressly preserves parties' obligations under express employment contracts, written or oral.<sup>250</sup>

META mandates a one-year probationary period, with certain minimum-hour requirements.<sup>251</sup> This fixed probationary period differs from WDEA's delegation to the

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<sup>245</sup> See Mont. Code Ann. § 39-2-912(2); META, § 2(b). The only difference here is that META does not apply to employees subject to written or oral contracts for a term, while WDEA exempts only written contracts for a term and does apply to employees subject to an oral contract for a term.

<sup>246</sup> See META, § 1(2).

<sup>247</sup> See *id.* § 2(c).

<sup>248</sup> See *id.* § 2(c) & comment thereunder (2002). As already discussed, courts have similarly interpreted the WDEA to preserve such claims. See note 136, *supra* (discussing *Beasley v. Semitool, Inc.*, 853 P.2d 84, 86-7 (Mont. 1993)).

<sup>249</sup> See META, § 2(c), (e) (scope).

<sup>250</sup> See META, § 2(e).

<sup>251</sup> See *id.* § 3(b).

employer the ability to define the probationary period, with a six-month default period.<sup>252</sup>

### C. META'S OPT-OUT PROVISIONS

Also unlike the WDEA, META allows the employer and employee, by written agreement, to define good cause based on the employee's failure to meet specified business-related standards of performance or the employee's commission or omission of specified business-related acts.<sup>253</sup> That is, the employer can set performance standards for a particular job, qualified only by the employer's duty under META to enforce these standards consistently and not apply them to a particular employee in a disparate manner without justification.<sup>254</sup> META therefore allows each employer to define the specific parameters of good performance for a given job, empowering the employer to clarify and limit the scope of good-cause review to whether the employee adequately performed the employer's requirements. Contrary to the views of certain critics,<sup>255</sup> META does not renounce third-party review here but instead allows the employer to focus and direct the review to its proper subject--the employee's fulfillment of the employer's legitimate business needs.

Unlike the WDEA, META allows the employer and employee to waive the good cause requirement in lieu of severance pay:

By express written agreement, an employer and an employee may mutually waive

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<sup>252</sup> *See id.*: "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."

<sup>253</sup> *See id.* § 4(b).

<sup>254</sup> *See id.*; *see also* St. Antoine, *supra* note 233, at 372.

<sup>255</sup> *See* J. Wilson Parker, *At-Will Employment And The Common Law: A Modest Proposal To De-Marginalize Employment Law*, 81 Iowa L. Rev. 347, 377 (1995) (arguing that META "essentially hand[s] over the tools of statutory construction to the employer--an extremely interested and biased party").

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.<sup>256</sup>

This opt-out provision allows the employer and employee to agree to exchange good-cause protection for a guaranteed severance payment in the event of future discharge.

“[META] notably offers an opt-out provision under which an employer can substitute an automatic severance pay package in lieu of the good cause limitation, thereby essentially rendering the employment ‘at will,’ but at least guaranteeing the employee some form of protection.”<sup>257</sup>

This provision allows the employer to terminate an employee without cause and to know with certainty what damages would ensue. Waiver of good cause may be particularly appropriate in the employment of professionals, high-ranking officials, and management-level employees, whose jobs frequently require the subtle exercise of discretion, expertise, and policy judgments. The performance of such involved and nuanced tasks seems ill-suited for a relatively crude and clumsy “objective” evaluation under the good-cause standard. Moreover, merely exempting such high-level employees from META would have been unwise, because “[w]ell-paid corporate personnel are the very people with those six- and seven-figure claims that employers fear the most.”<sup>258</sup>

META appropriately affords employers the opportunity to limit their damages to a fixed severance-pay formula with professional and high-level employees.

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<sup>256</sup> META, § 4(c).

<sup>257</sup> Weinstein, *supra* note 100, at 504 (footnote omitted).

<sup>258</sup> St. Antoine, *supra* note 233, at 373.

META's waiver provision may raise concerns in employment relationships where the employee has little bargaining power.<sup>259</sup> Review of an employee's waiver of his statutory rights under META should therefore consider whether the waiver was knowing and voluntary and was not coerced.

#### **D. ARBITRATION**

The WDEA encourages private arbitration as the forum to resolve disputes. By contrast, META provides state legislatures with a choice of alternative dispute resolution models, of which the preferred version mandates state-administered arbitration, subject to limited judicial review.<sup>260</sup> Under this preferred method of ADR, a new or existing state agency selects a professional arbitrator on an as-needed basis and theoretically absorbs much of the cost of arbitration, apart from the claimant's filing fee.<sup>261</sup> This method reflects the ULC's concern for the "serious socioeconomic bias" that affected the common law landscape. "Most of the successful cases have involved upper-level management in larger businesses."<sup>262</sup> The ULC concluded that "the expense of litigation mostly precludes seeking a remedy when salaries or wages are not very large." State-administered arbitration would make enforcement of statutory rights against wrongful discharge more affordable to the average employee. Moreover, employers generally tend

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<sup>259</sup> 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[,] giv[ing] great power to management to stack the deck in its favor.

*Id.* at 377.

<sup>260</sup> *See* META, § 6.

<sup>261</sup> *See id.*

<sup>262</sup> *See* META Summary, at [http://www.nccusl.org/nccusl/uniformact\\_summaries/uniformacts-s-meta.asp](http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-meta.asp).

to prefer arbitration because it avoids the wildcard of a jury verdict. Employees generally tend to oppose arbitration for the inverse reason; they lose the opportunity for a sympathetic jury to award large damages. Finally, mandatory arbitration and the preclusion of a jury trial may offend a particular state's constitution, as a matter of due process or of right of access to the courts.<sup>263</sup>

As an alternative to retaining arbitrators on a case-by-case basis, META allows states to use full-time civil service or other government employees as hearing officers to adjudicate wrongful discharge disputes, instead of private arbitrators. META also allows a state to choose, as a third option, the use of traditional judicial enforcement instead of arbitral or administrative agency enforcement, to accommodate any potential due process concern or right of access to the courts that may arise under a state's constitution. Finally, META allows the employer and employee to contract for private arbitration, any other ADR method, or even court litigation, as alternatives to whichever enforcement mechanism a state has adopted in its wrongful discharge law.<sup>264</sup> This polyphony of enforcement procedures reflects considerable debate in META's formative stages on the appropriate means of enforcement among employee and employer advocacy groups.<sup>265</sup> As with the WDEA, META promotes the view that arbitration is desirable over litigation, because it is generally a more affordable, less formal, and more efficient forum than litigation to resolve disputes, involving limited discovery and relaxed rules of procedure and evidence.

META's state-administered arbitration alternatives embody the view that, "[a]s a

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<sup>263</sup> See St. Antoine, *supra* note 233, at 379.

<sup>264</sup> See META, § 4(i)-(j).

<sup>265</sup> See St. Antoine, *supra* note 233, at 377.

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.”<sup>266</sup> Nevertheless, the drafters of META recognized the harsh economic realities facing many state treasuries and accordingly proposed that the parties share the cost of arbitration, as is required under the rules of procedure for the American Arbitration Association.<sup>267</sup> An alternative source of funding for enforcement of a wrongful discharge law could be a special “employment termination tax,” similar to unemployment insurance tax, with a similar experience rating system.<sup>268</sup> In any event, a state legislature should consider carefully the financial consequences of adopting META’s state-sponsored arbitration of wrongful discharge claims. Such an approach would shift the cost of adjudicating disputes primarily from the private parties to the general fund and, ultimately, the taxpayer. Legislatures should consider in particular whether the fiscal and administrative burdens of creating a publicly funded right to the arbitration of these claims are sufficiently outweighed by any attendant benefits, such as employees’ increased access to dispute resolution or a business’s potentially reduced defense costs.

META does not provide detailed procedures for arbitration but instead incorporates the provisions of a state’s uniform arbitration act and directs the designated state agency to promulgate additional rules and regulation as necessary.<sup>269</sup>

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<sup>266</sup> META, 2002 comment to § 6(a).

<sup>267</sup> *See id.*, 2002 comment to § 5(e).

<sup>268</sup> *See* St. Antoine, *supra* note 233, at 380.

<sup>269</sup> *See* META, § 7(d).

## E. DAMAGES

As with the WDEA, META limits available damages. META expressly bars any form of non-economic damages, such as “damages for pain and suffering, emotional distress, defamation, fraud, or other injury under the common law.”<sup>270</sup> Unlike the WDEA, META also bars punitive damages.<sup>271</sup> META allows for the recovery of full or partial back pay (measured from the time of termination until the date of judgment) and severance pay (measured from the date of judgment until a future date certain).<sup>272</sup> A discharged employee who has not waived his META rights could be awarded reinstatement with full or partial back pay (measured from the discharge until reinstatement), offset by the duty to mitigate during that period.<sup>273</sup>

In contrast to the WDEA, reinstatement is an available remedy for wrongful discharge under META. If reinstatement is not ordered, the discharged employee could receive severance pay equivalent to the rate of pay when discharged, and fringe benefits, not to exceed 36 months, and offset by likely earnings and benefits received from future employment. In addition to reinstatement or future pay, the discharged employee may also receive full or partial back pay from the date of termination until the date of the award of severance pay, offset by the duty to mitigate.<sup>274</sup>

Whereas the WDEA provides attorney fees only when the prevailing employee had made a valid offer of arbitration that the employer rejected, META provides

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<sup>270</sup> *See id.*

<sup>271</sup> *See id.*

<sup>272</sup> *See id.* § 7(b).

<sup>273</sup> *See id.*

<sup>274</sup> *See id.*

attorneys' fees in all cases to the prevailing employee.<sup>275</sup> META also allows for the awarding of attorneys' fees when the employer has breached the terms of a severance agreement.<sup>276</sup> Finally, META provides reasonable attorneys' fees to the prevailing employer only if the employee is determined to have filed a complaint that is "frivolous, unreasonable, or without foundation."<sup>277</sup>

## **F. CRITICAL REACTIONS TO META**

### **1. EMPLOYER-SIDE RESPONSE**

META has its share of outspoken critics on both sides of the employment aisle. Management has been critical of the good-cause standard as an unacceptable intrusion upon an employers' prerogative and business judgment that is not sufficiently counter-balanced by the limit on damages. Employers have also expressed the criticism that META would open a new Pandora's box of good-cause lawsuits, thereby increasing litigation and its associated costs.<sup>278</sup>

Employer advocates may have overstated some of their concerns. Based on Montana's experience thus far, it is unclear whether META would invite more lawsuits. A wrongful discharge claim is worth even less under META than under the WDEA. META's 36-month limit on damages is less than the WDEA's maximum 4 years' severance pay, and META also penalizes the employee who brings a frivolous claim with attorneys' fees. META encourages reinstatement as a remedy, thereby precluding

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<sup>275</sup> See *id.* § 7(b)(4).

<sup>276</sup> See *id.* § 7(c)(2).

<sup>277</sup> *Id.* § 7(e).

<sup>278</sup> See Mary Jean Navaretta, *The Model Employment Termination Act -- META -- More Aptly the Menace to Employment Tranquility Act: A Critique*, 25 Stetson L. Rev. 1027, 1032 (1996).

severance pay, and further reducing the desirability of wrongful discharge claims for employees.

Employer-side critics also assert that the good-cause standard asymmetrically imposes duties on the employer without any reciprocal duties on the employee, who is still free to quit without notice.<sup>279</sup> These same critics believe that META would discourage employees from being productive. A non-probationary employee is protected by a good-cause standard, and an employer would now be reluctant to invite litigation by discharging a mediocre or marginal employee. “With the added burden of having to demonstrate to a third party the legitimacy of the termination, an employer may be less willing to terminate a marginal employee.”<sup>280</sup> Employers would be inclined to enter term contracts with employees, to avoid META’s ambit, thereby increasing transaction costs.

The experience in Montana tends to refute these pessimistic concerns. Montana’s economy has not been harmed, and may have been helped, by the WDEA’s passage. Moreover, there is no indication of employers fearing increased exposure to liability in Montana. This argument also ignores the fact that META deters frivolous claims by awarding the employer its attorneys’ fees for defending a claim that is “frivolous, unreasonable, or without foundation.”<sup>281</sup> Moreover, the limit on damages tends to undermine concern for exposure to large damages. An employer’s maximum exposure is now readily predictable and relatively moderate when compared with the common law regime.

Employer-side critics also argue that reliance on arbitration as the preferred

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<sup>279</sup> *Id.* at 1035, 1041.

<sup>280</sup> *Id.* at 1047.

<sup>281</sup> META, § 7(e).

method of dispute resolution undermines META's goal of predictability of result, because arbitral awards are typically unpublished and are without precedential value.<sup>282</sup> META also proposes the expansion or creation of a state-administered bureaucracy to process, oversee and, under one alternative, actually adjudicate wrongful discharge claims. State agencies are frequently subject to delay and inefficiencies, which would undermine the speedy resolution of claims, let alone burden society with the cost of financing the adjudication of these claims. As one critic characterized the issue: "Simply to declare a right to be enforced at public expense is irresponsible. . . . [A] country premised on individuality should not unnecessarily impose broad regulatory regimes which impede enterprise and inhibit free markets."<sup>283</sup>

These criticisms are inconsistent with employers' general preference for arbitration over litigation, precisely because arbitration has no precedential effect, typically remains confidential, and is final, with only limited judicial review. "Employers no doubt prefer the efficiency--both in time and money--that arbitration can offer as compared to traditional litigation. The confidentiality and finality that result from arbitration are also attractive considerations."<sup>284</sup> The criticisms also miss the point that the public already funds the operation of courts of general jurisdiction to adjudicate a wide range of disputes, and that META allows a state legislature or the parties to opt for judicial enforcement instead of arbitration. META's ADR proposals are merely an alternative to traditional litigation that are intended to streamline the process and reduce

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<sup>282</sup> See Navaretta, *supra* note 278, at 1051.

<sup>283</sup> *Id.* at 1059.

<sup>284</sup> Note, *Mandatory Arbitration Agreements of ADEA Claims: An Analysis of Their Validity under the Older Workers Benefit Protection Act*, 16 Ohio St. J. on Disp. Resol. 195, 195 (2000).

the expense, time, and disruption to business inherent in judicial enforcement.

Employer-side critics of META also argue that the good-cause standard is derived from the “just cause” standard of collective bargaining agreements and, as such, is not readily transferable to the individual employee and is a misguided effort at fairness:

Collective bargaining agreements are unique documents. . . . Substantial differences exist between the collective bargaining and law[-]of[-]the[-]shop context and non-union situations. . . . [A] union is a third party which facilitates the oft-imposed remedy of reinstatement. Additionally, collective bargaining agreements are subject to revision and renegotiation by the parties. External law is neither as malleable nor responsive to the respective parties.<sup>285</sup>

What these critics miss is that individual employees do not have the collective bargaining power to negotiate a just-cause clause in an employment contract. Moreover, the criticism rests on the assumption that imposing good cause will transform the at-will employee into a de facto union employee, with all of the attendant, elaborate internal disciplinary and review procedures that are typically part of a collective bargaining contract. But Montana’s experience so far under WDEA defeats this assumption and does not indicate the importation into the private workplace of the many elaborate affirmative duties of management in the labor union context.

## **2. EMPLOYEE-SIDE RESPONSE**

Employee-side advocates have also been critical of META. While they applaud the adoption of a good-cause standard and reliance on arbitration as the preferred forum for adjudicating wrongful discharge claims, they are critical of the limit on damages, which, they argue, will leave many employees inadequately compensated. These critics argue that the cap on economic damages and the exclusion of all non-economic and punitive damages provide too restrictive a remedy, from the standpoint of both

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<sup>285</sup> Navaretta, *supra* note 278, at 1031.

compensating the employee and deterring employer misconduct:

By limiting recovery to reinstatement or back pay, the statute has ‘reduce[d] claims to an affordable business expense.’ Traditionally, compensatory and punitive damages have provided the incentive for employers to refrain from unlawful employment actions. However, META may provoke employers to practice unlawful terminations which they simply assess to their overhead and cost of doing business.<sup>286</sup>

While it is true that, under META, an employee could no longer recover the non-economic damages available under the common law exceptions to the at-will doctrine, the employee would nevertheless now be protected by a broad good-cause standard that arguably affords more extensive and more predictable protection to the employee than the various common law exceptions. Indeed, a limit on damages is part of the statutory bargain under which the employee relinquishes the possibility of large recovery in exchange for a new, unitary, and highly visible legislated standard of job security that arguably has a greater deterrent effect on wrongful employment practices than the shadowy and ad hoc common law exceptions. Thus potential recovery is reduced because job security is increased. META also provides the employee and employer with a clear, predictable basis for calculating damages that is absent in the common law.

Employee-side critics also argue that META provides too many opt-out avenues for the employer, such as by defining good-cause criteria and by conditioning employment on the waiver of good cause in exchange for a limited severance pay in the event of future discharge.<sup>287</sup> However, these criticisms fail to consider that the employee

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<sup>286</sup> Parker, *supra* note 255, at 378-79.

<sup>287</sup> Some of the major flaws of META include the extensive pro-employer “opt-out” provisions of the statute. . . . [E]mployers can avoid liability by firing employees before a year of employment passes, by keeping employees working less than twenty hours per week, or by treating employees as independent contractors. . . . A legitimate fear of META’s opponents is that employers will use the statute to force all employees to agree to opt-out provisions when such agreements are inappropriate.

is still afforded greater protection under META even when the employer exercises these opt-out provisions. The waiver, for example, still ensures the employee under META a guaranteed amount of severance pay for discharge, when the at-will employee may not have negotiated any such pay. Moreover, the employer's determination of the good-cause criteria does not deprive the employee's right under META to seek review of her performance under these criteria. The common law affords no such general right of review that holds the at-will employer accountable to its own standards. Employee-side critics also bemoan the presumptive loss of right to jury trials, apparently losing sight of fact that many discharged employees have always been effectively denied jury trials because they cannot afford the cost of litigating them.

In sum, META, like the WDEA, is an admirable but imperfect effort at achieving a balance of employers' and employees' ostensibly competing concerns by protecting employees from wrongful discharge while preserving an employer's business judgment and limiting its exposure to damages.

#### **G. OTHER STATES' EFFORTS TO PASS A WRONGFUL DISCHARGE LAW**

No state has yet adopted legislation based on META or the WDEA. However, in the wake of the WDEA and META, 16 state legislatures have attempted to pass wrongful discharge laws, beginning in 1990 and as recently as 2004.<sup>288</sup> Many of these state

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*Id.* at 378.

<sup>288</sup> The 16 states, and the years that they have considered wrongful discharge laws, are: Alabama (2003); Hawaii (1995); Indiana (1990, 1991); Maine (1991, 1993, 1999); Massachusetts (1997); Mississippi (1999-2004); Missouri (1990, 1993, 1995, 1996); Nevada (1995); New Hampshire (1993, 2003); New Mexico (1999); Oklahoma (1999); Rhode Island (1997-2000); Texas (1999); Vermont (1991, 1997, 1999); Washington (1993); and Wyoming (1993).

legislatures have considered wrongful discharge laws more than once, sometimes for up to five consecutive years.<sup>289</sup>

It is worth considering the key provisions of these 16 states' most recent bills to trace the influence of META and the WDEA. Some of the bills reflect the influence of META, and have adopted its key provisions, including the good-cause provision and limit on damages.<sup>290</sup> Other states have proposed bills adopting META but have modified some of its key provisions, such as by making arbitration optional,<sup>291</sup> by increasing the cap on severance pay,<sup>292</sup> or by eliminating any damages cap altogether.<sup>293</sup> Other states have apparently used the WDEA as their model, and have included its key provisions,<sup>294</sup> or have adopted most of its provisions but with some significant changes, such as by eliminating the probationary period,<sup>295</sup> or by capping economic damages based on the employer's size rather than a number of years' pay.<sup>296</sup> Still other states have drafted wrongful discharge bills without any clear influence from either the WDEA or META. These bills contain a good-cause provision but typically have no limit on economic damages and even allow non-economic damages.<sup>297</sup> The following sections briefly

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<sup>289</sup> A wrongful discharge bill has been introduced to the Mississippi Legislature from 1999 through 2004.

<sup>290</sup> See wrongful discharge bills for Rhode Island, New Hampshire (1993), Hawaii, Nevada, and Missouri (discussed in Appendix A (chart summarizing bills' damages provisions and probationary periods)).

<sup>291</sup> See Appendix A (discussing Missouri bill).

<sup>292</sup> See *id.* (discussing Vermont bill (1997) (providing up to four years' severance pay), and discussing Maine bill (1999) (up to 86 months)).

<sup>293</sup> See *id.* (discussing Vermont bill (1999), and Missouri bill).

<sup>294</sup> See New Hampshire bill (2003) (discussed in Appendices A and B).

<sup>295</sup> See Appendix A (discussing Wyoming and Missouri bills).

<sup>296</sup> See *id.* (discussing Mississippi bill).

<sup>297</sup> See *id.* (discussing bills for Alabama, Indiana, Maine, Massachusetts, New Mexico, Oklahoma, and

compare and contrast the salient features of these bills. The information summarized below is part of a comprehensive comparison of all 16 bills contained in Appendices A and B to this paper.

### **1. DAMAGES**

Twelve of these 16 states' bills have proposed limiting recoverable damages by barring non-economic damages and by limiting economic damages to three or four years' pay.<sup>298</sup> Only the bills in three states (Massachusetts, Oklahoma and New Mexico) would allow the recovery of unlimited non-economic damages.<sup>299</sup>

### **2. PROBATIONARY PERIOD**

Eleven of the 16 bills have a probationary period, ranging from 90 days (Mississippi) to ten years (Texas).<sup>300</sup> Five of the 16 bills have no probationary period.<sup>301</sup>

### **3. PREEMPTION OF COMMON LAW CLAIMS**

Five of the 16 bills include a preemption clause, modeled after META, that expressly supersedes all common law claims.<sup>302</sup> Two bills follow the WDEA's lead and preempt the common law but also codify the public policy and handbook exceptions.<sup>303</sup>

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Washington (applies to employees over 50 only)).

<sup>298</sup> *See id.* (discussing bills for Hawaii, Maine, Mississippi, Missouri, Nevada, New Hampshire, Oklahoma, Rhode Island, Texas, Vermont, Washington, and Wyoming). Mississippi is the only state whose proposed law would allow, but would also limit, non-economic damages, in a sliding-based schedule imported from Title VII, based on the size of the employer. *See Id.*; n.196 *supra*.

<sup>299</sup> *See id.* New Mexico's bill would also mandate treble damages.

<sup>300</sup> *See id.*

<sup>301</sup> *See id.*

<sup>302</sup> *See* Appendix B (chart summarizing bills' preemption, fees, and arbitration provisions) (discussing bills for Hawaii, Maine, Missouri, Nevada, New Hampshire and Rhode Island).

<sup>303</sup> *See id.* (discussing bills for New Hampshire and Wyoming).

Two bills expressly preserve all common law claims.<sup>304</sup> Seven bills are silent on the issue of preemption.<sup>305</sup>

#### **4. REASONABLE ATTORNEYS' FEES**

Ten of the 16 bills provide for the prevailing employee's recovery of reasonable attorneys' fees: two bills mandate the award of fees,<sup>306</sup> one follows the WDEA and conditions fees on the valid offer to arbitrate,<sup>307</sup> and seven allow the award of fees in the adjudicator's discretion.<sup>308</sup> Seven bills also allow an award of fees to the prevailing employer: five follow META and award the employer's fees only if the employee's complaint is frivolous or unfounded,<sup>309</sup> one allows an award of fees to either prevailing party,<sup>310</sup> and one follows the WDEA and allows an award of fees to either party that has prevailed after making an offer to arbitrate that the losing party had rejected.<sup>311</sup> Six bills do not provide for reasonable attorneys' fees.<sup>312</sup>

#### **5. ARBITRATION**

Five of the 16 bills require the arbitration of wrongful discharge claims.<sup>313</sup>

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<sup>304</sup> *See id.* (discussing New Mexico and Washington bills).

<sup>305</sup> *See id.* (discussing bills for Alabama, Massachusetts, Mississippi, New Mexico, Oklahoma, Texas, and Washington).

<sup>306</sup> *See id.* (discussing bill for Alabama and New Mexico).

<sup>307</sup> *See id.* (discussing New Hampshire bill).

<sup>308</sup> *See id.* (discussing bills for Hawaii, Maine, Missouri, Nevada, Oklahoma, Rhode Island, and Washington).

<sup>309</sup> *See id.* (discussing bills for Hawaii, Missouri, Nevada, Rhode Island, and Washington).

<sup>310</sup> *See id.* (discussing bills for Alabama).

<sup>311</sup> *See id.* (discussing bill for New Hampshire).

<sup>312</sup> *See id.* (discussing bills for Indiana, Massachusetts, Mississippi, Texas, Vermont, and Wyoming).

<sup>313</sup> *See id.* (discussing bills for Hawaii, Missouri, Nevada, Rhode Island, and Vermont).

Arbitration under four of these five bills follows META and is administered by a state's labor relations agency, subject to limited judicial review.<sup>314</sup> By contrast, Vermont's bill allows for de novo review in trial court.<sup>315</sup>

## **6. BEHIND THE SCENES: SOME OF THE BILLS' SPONSORS**

Interviews with sponsors of some of these bills illuminate the impetus for these legislative efforts, as well as the considerable political resistance to securing passage of a wrongful discharge statute. The sponsor of the Mississippi bill explained that he has a close relationship with labor in Mississippi, and that Mississippi is a very pro-business states, with weak unions, and strong managerial opposition to providing workers with any contractual protections. This sponsor believes that the vulnerable workforce in Mississippi needs the protection of a statute that bars discharge unless it is for a good-faith business reason. He opined that both employees and employers would benefit from a wrongful discharge law. Employees would enjoy greater work stability and employers would benefit from a limit on damages. Moreover, the state could benefit from a likely reduction in the number of unemployment claims, as a result of greater job stability. He explained that he has introduced wrongful discharge legislation for five consecutive years and has not been able to advance the bill to the committee stage.

This legislator also noted that Mississippi has enacted a general tort reform law that apparently reaches common law wrongful discharge claims and limits employers' damages. This tort reform statute consequently undermines the statutory quid pro quo of

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<sup>314</sup> *See id.* (discussing bills for Hawaii, Missouri, Nevada, and Rhode Island).

<sup>315</sup> *See id.*

a wrongful discharge law that creates new liability in exchange for preemption of common law claims and a limit on common law claims.

The sponsor of the 2003 New Hampshire wrongful discharge bill explained that the bill was inspired by a public employee in his district who was discharged without cause and had no legal recourse. The bill never advanced beyond the committee stage of the legislative process. He observed that passage of a wrongful discharge bill is extremely difficult in a state that is generally suspicious of any government regulation of business relationships. He also noted that most employers in New Hampshire are small businesses, and they would perceive compliance with a new employment statute as burdensome. He observed that the limit on damages is insufficient to overcome the visceral reaction against a good-cause standard. The at-will doctrine is currently too entrenched to be legislated out of existence in New Hampshire.

These brief anecdotal accounts of legislative efforts to pass a wrongful discharge law highlight the business community's strong opposition to any further legislative interference with their business decisions. The accounts also indicate the fatal absence of political representation and forceful lobbying efforts for the non-union employee. Ironically, the unorganized worker, lacking the collective bargaining power of unions, is most in need of a political voice and statutory protections in the employment relationship.

These accounts differ markedly from the WDEA's genesis, in which the business community forcefully spearheaded efforts for its passage, mostly to protect itself from extreme damages. However, it may not be the case that every state has such a pronounced, high-risk, pro-employee legal climate as Montana's in the days immediately preceding the WDEA's passage. The risk of exposure to large damage awards may

simply be considerably lower in many states, either because few cases are filed or because the cases that are brought do not reach a jury, through settlement or summary judgment.<sup>316</sup>

The common law situation for many employers may resemble a lottery system in reverse, in which the employer is typically the winner but can suffer a substantial loss in the remote chance that its “number” is called by a successful and determined employee.<sup>317</sup> If a state’s common law does not present the same pro-employee problems as Montana’s did, a legislative response akin to the WDEA is less justified and would appear to tilt the balance unnecessarily to the employee, especially with a good-cause standard. In common parlance, if it isn’t broken, don’t fix it.

The earlier discussion of common law damages has hopefully raised awareness of an employer’s risk of exposure to potentially large and wholly unpredictable damages under common law wrongful discharge claims. While there may be a difference in degree between Montana’s pre-WDEA legal climate and that of other states, there may not be a difference in kind: the uncertain liability and exposure to unpredictable damages lurking within the common law exceptions to the at-will doctrine.

The challenge facing proponents of wrongful discharge bills is to overcome employers’ visceral opposition to a good-cause statute by appeal to the business community’s self-interest. The business community will not be inclined to support good-cause statutes unless the bill’s supporters educate employers on the common law problem before presenting the legislative solution. The business community needs to understand

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<sup>316</sup> Other than the California studies discussed at pp. 22-8, *supra*, there is an apparent lack of information from other states summarizing wrongful discharge damages.

<sup>317</sup> See Stua, *supra* note 243, at *META*, <http://home.inu.net/davidstua/META.HTM>.

that the employment-at-will doctrine, while seemingly protective of business interests, is now of questionable benefit to the business community because it has engendered a host of unruly exceptions that expose employers to the risk of unpredictable liability for potentially high damages. Accounts of legislative efforts suggest a response to a singular concern for the vulnerability of at-will employees without considering these interests of the business community. Proponents should emphasize that a well-balanced wrongful discharge law would benefit employers by sweeping away this untidy common law regime of liability and damages and replacing it with a singular good-cause standard and a limit on damages.

## **CONCLUSION**

Both META and the WDEA achieve a significant advancement beyond the current common law morass of employment at will and its myriad exceptions. They both provide a unitary good-cause standard of liability, eliminate the wildcard of non-economic damages, limit employers' economic damages, and encourage arbitration as the primary forum for the prompt resolution of wrongful discharge claims. META is a more comprehensive effort to reform the status quo than the WDEA, by mandating arbitration in two of its three statutory versions, by allowing attorneys' fees to the prevailing employee, by awarding employers reasonable attorneys' fees for defending frivolous claims, and by preempting all common law claims, rather than the WDEA's piecemeal approach of preserving certain claims and discarding others.

Statutory good-cause protection may not be a panacea. Good cause is inherently a fact-specific standard and does not lend itself to a fixed definition with precise categories. A review of Montana's good-cause cases has indicated that application of the standard,

while frequently restrained and reasonable, may not always be predictable or even plausible. Nevertheless, a statutory good-cause provision does limit the basis of an employer's potential liability to a single, legislated standard that is a vast improvement over the many, scattered common law exceptions that emerge or change without warning from case to case.

It would be unrealistic to expect a single statute to eliminate all of the inherent tensions and resulting litigation between employers and employees over the termination of employment. Nevertheless, a well-balanced wrongful discharge statute could limit employers' exposure to liability and damages while reasonably compensating employees and deterring employers. The essential components of a well-balanced wrongful discharge statute are: a unitary good-cause standard of liability based on the employer's legitimate business needs; the preemption of all common law claims for wrongful discharge; a bar on non-economic damages and a reasonable limit on economic damages; fee-shifting provisions, including for an employee's frivolous claims; and arbitration or administrative enforcement as the preferred, if not mandatory, forum for the adjudication of disputes, with the right to limited judicial review. A statute comprised of these basic elements could achieve significant progress in clarifying the respective rights and duties of employer and employee. By removing many points of contention, such a statute would help make the employment relationship a less adversarial and more cooperative enterprise.