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The Future of Employee Job Security in Illinois

DANIEL S. ALCORN*

The at-will employment doctrine is more than a century and a half old. Illinois has long subscribed to the at-will employment doctrine, but the doctrine is dying a slow death. The doctrine has positive and negative aspects, but the lack of employee job security will prove to be a fatal flaw. The doctrine is not so well founded in reason or legal history to save it. Employee job security is becoming increasingly desirable and important. The legislatures and courts are making significant inroads on the doctrine to protect employee job security. A bill to abrogate the doctrine and require cause for discharge has surfaced in Illinois, and while unsuccessful this legislative effort will undoubtedly be revisited. Illinois will need to prepare for the aftermath of the doctrine’s demise. Legislation is the best bet for a quick and durable fix. A simple approach to legislation in this area has the best chances of political viability. A good fix would consist of a concise statute abrogating the at-will doctrine, requiring that any employer have just cause for terminating any non-probationary employee, and affording an aggrieved employee a private right of action for wrongful discharge (with the employee having the burden of establishing a lack of just cause) to be pursued in the Illinois Circuit Courts.

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I. INTRODUCTION

Most Illinoisans are directly and meaningfully impacted by a fundamental tenet of Illinois employment law, the at-will employment doctrine.¹ Let’s acknowledge, however, that the employment at-will doctrine in Illinois is on life support.² Its days are numbered. As Professor Deborah Ballam states in her 2000 article on the subject, “[o]ne of the most important developments in employment law in the first decade of the new millennium will be the express acknowledgment of the death of this doctrine.”³

Professor Matthew T. Bodie, in an essay reviewing the scholarship of Charles Sullivan, states that while employment contracts should be enforced on their own terms,⁴ “[t]he modern status-based or regulatory approach to employment recognizes its contractual nature but believes in the necessity of guardrails on behalf of employees.”⁵ Other contract terms, such as liability waivers, non-compete clauses, and arbitration agreements are often found by the courts to be unenforceable against an employee on the basis of public policy and fairness.⁶

In light of the doctrine’s impending demise, shouldn’t Illinois employment lawyers be turning their attention to crafting a new statute, regulating the fundamentals of the new employment relationship?

We briefly examine the at-will employment doctrine, its exceptions, and related legislation, and we then identify issues that should be addressed in legislation. We submit that the alternative—the status quo—is an overly complex set of competing principles, which currently make the field of employment law in Illinois almost un navigable. As the at-will doctrine fades away, the law will inevitably become even more inscrutable in the absence of legislation simplifying it. The law should be clearer, with outcomes more predictable. That is especially desirable in the context of employment law, which is so ubiquitous and affects so many. This article neither champions nor denigrates the at-will doctrine; but rather, it merely acknowledges that the doctrine is waning and seeks to reinvigorate a discussion of what should follow.

¹ Approximately 66% of employees nationwide are at-will. See J.H. Verkerke, Discharge: Labor and Employment Law and Economics, in 2 ENCYCLOPEDIA OF LAW AND ECONOMICS 447-479 (Kenneth G. Dau-Schmidt, Seth D. Harris, and Orly Lobel, eds., 2nd ed. 2009).
⁵ Id. at 1265.
⁶ Id. at 1269.
Gone are the days, if they ever existed, when satisfactory job performance was rewarded with job security. As a result, the law has steadily been trending away from the presumption of at-will employment. There seems little question but that the age-old doctrine is under assault in Illinois as it is in many jurisdictions. While all U.S. states, with the exception of Montana, embrace the doctrine generally, there are ten other states that have significantly watered down the doctrine, considering exceptions to employment at-will based on the broad principles of good faith and just cause. As the forces of free-market capitalism grapple with the advance of more progressive policies, or what author Mark Levin calls “American Marxism,” it should come as no surprise that institutions such as the employment at-will doctrine are being challenged in a meaningful way. The new and seemingly durable wave of progressivism, at both the Federal and State of Illinois levels, likely portends the end of at-will employment in Illinois.

II. THE AT-WILL EMPLOYMENT DOCTRINE

Under the basic at-will employment doctrine, “at-will” means that an employer can terminate an employee at any time for any reason, except an illegal one, or for no reason, without incurring legal liability. Likewise, an employee is free to leave a job at any time for any or no reason with no adverse legal consequences. However, “at-will” also means that an employer can change the terms of the employment relationship with no notice and no consequences. For example, an employer can prospectively alter an employee’s pay, modify or terminate their benefits, or reduce or eliminate their paid time off. This leaves employees quite vulnerable to capricious acts by

9. See, e.g., Wilder v. Cody Country Chamber of Com., 868 P.2d 211, 216-22 (Wyo. 1994); McCullough v. Golden Rule Ins. Co., 789 P.2d 855, 858 (Wyo. 1990) (“All contracts of employment in Wyoming contain an implied covenant of good faith and fair dealing, but we limit actions upon such covenants to those rare and exceptional cases where a special relationship has been demonstrated between employer and employee.”). The implied covenant of good faith and fair dealing may, upon demonstration of a special relationship, serve to redress the inherent imbalance between corporations and individual employees. Wilder, 868 P.2d at 221.
12. Id.
their employers. Of course, employees are always subject to the actions of
their employers reasonably taken due to common, microeconomic and mac-
roeconomic forces, like market pressures, shifting consumer demand, busi-
ness cycles, and recessions. Most employees now have very little job secu-
rit y—and therefore financial security—as many live paycheck to paycheck.

According to a Forbes article in January of 2019, 78% of U.S. employees live
this way.14

III. HISTORICAL DEVELOPMENT OF THE DOCTRINE

The origin of the at-will employment doctrine is rather inauspicious.
One thing is sure, it is a creature of common law. The at-will employment
doctrine likely results from an erroneous understanding of U.S. law on the
part of a single commentator: Horace C. Wood, who n 1877 legal treatise
on employment law, mischaracterized four cases from around the country—
wrongly asserted they supported the principle that an employer could dis-
charge an employee at any time for any reason.15 Many legal scholars and
judges agree that Wood’s statement of the doctrine was not supported by the
authority upon which he relied and that he did not accurately describe the law
as it then existed.16 This erroneous understanding of the law, which by the
way ran against the grain when compared with the law in much of the West-
ern world,17 was nevertheless adopted by the courts and quickly became a
widely accepted doctrine governing the employment relationship.18 Other

14. Zack Friedman, 78% of Workers Live Paycheck to Paycheck, FORBES (Jan. 11,
paycheck-government-shutdown/?sh=7e7c0dbf4f10 [https://perma.cc/YS2S-UV9F].
15. See Deborah A. Ballam, The Development of the Employment at Will Rule Revis-
ted: A Challenge to its Origins as Based in the Development of Advanced Capitalism, 13
(Mich. 1980).
17. At-Will Employment – Overview, NAT’L CONF. OF STATE LEGIS.,
[https://perma.cc/9BPY-2GH3]. By way of example, in Canada, the employer has a right to
terminate a contract of employment of indefinite hiring upon providing reasonable notice to
the employee of its intention, unless just cause for the termination exists, in which case no
notice is required. See S.R. BALL, CANADIAN EMPLOYMENT LAW, Vol. 1, §8:30 (March 2003)
(citing Henderson v. Canadian Timber & Saw Mills Ltd. (1906) 12 B.C.R. 294 (S.C.); Arm-
strong v. Tyndall Quarry Co. (1910) 16 W.L.R. 111 at p.113 (Man. Q.B.)). At-will employ-
ment is not the law in either Canada or England. Id.
18. See Magnan v. Anaconda Indus., Inc., 479 A.2d 781, 783 n.8 (Conn. 1984)
(“Scholars and jurists unanimously agree that Wood’s pronouncement in his treatise, Master
and Servant § 134 (1877), was responsible for nationwide acceptance of the rule.”); see also
McCullough Iron Co. v. Carpenter, 11 A. 176, 178-179 (Md. 1887) (“[Wood’s treatise] is an
American authority of high repute . . . .”); E. Line and Red River R.R. v. Scott, 10 S.W. 99,
Pl. 1894); Martin v. New York Life Ins. Co., 42 N.E. 416, 417 (N.Y. 1895) (“[W]e think the
commentators believe that the doctrine’s development was somewhat more natural. Indeed, Robert Gordon explains the development of the doctrine this way:

“Freedom of contract” in practice was not a laissez-faire regime in which the parties were left at large to bargain out the content of their contracts. It was rather a regime in which the legal system supplied implied terms largely favoring employers and in other ways threw its weight behind employers’ power to impose contract terms, backed up by the sanctions of dismissal and even (in some periods and situations) criminal prosecutions and injunctions.

In any event, the doctrine is not so firmly planted in reason or legal history so as to withstand the progressive forces at work today.

IV. THE AT-WILL DOCTRINE IS THE LAW IN ILLINOIS

Whatever its origin, it is clear that the basic at-will presumption has been embraced in Illinois, but that is coming to mean less and less each year. When I began practicing employment law thirty years ago, I would usually begin my discussion with clients regarding the nature of the legal environment surrounding the employment relationship by explaining the employment at-will doctrine. I would describe the doctrine as a vast ocean covering most of the territory with the exception of a few islands interspersed here and there, some bigger than others, which represented exceptions to the doctrine. If your case fell into the vast ocean, you were safe discharging your employee for any reason or no reason at all. However, if your case landed on an island, you might be regulated in your decision-making and need to be able to establish cause or a legitimate, non-discriminatory rationale for that rule is correctly stated by Mr. Wood and it has been adopted in a number of states.”); Greer v. Arlington Mills Mfg. Co., 43 A. 609, 610 (Del. Super. Ct. 1899) (“Wood, in his Law of Master and Servant, Sec. 134, very clearly states the difference between the rule which obtains in this country and the one in England, and I can find it nowhere more intelligently and satisfactorily stated.”); Harrod v. Wineman, 125 N.W. 812, 813 (Iowa 1910) (“[I]n this country it is held by an overwhelming weight of authority that a contract of indefinite employment may be abandoned at will by either party without incurring any liability to the other for damages.”).


termination. The first trick was of course in discerning whether the case landed on an island, and if so, it became necessary to identify what restrictions that island imposed. What I found was a fairly user-friendly approach to explaining the doctrine to lay people is probably no longer a viable analogy.

Frankly, it is now easier to divorce a spouse in Illinois with less litigation than attends terminating an employee. Imagine if you had to go to the Equal Employment Opportunity Commission (EEOC) or the Illinois Department of Human Rights to “exhaust your administrative remedies” before you could sue for a divorce. Imagine if you had to come up with a list of comparators to justify your desire to end your marriage. Imagine if the divorce courts could deny your divorce on grounds that it violated a clearly mandated public policy. In Illinois, it used to be hard to get a divorce and easy to discharge an employee. The trends have definitely reversed. At best, the employment at-will doctrine seems to have become the exception rather than the rule in Illinois.

V. EROSION OF THE DOCTRINE

For many decades, and at least since the 1960s, the state and federal courts and legislatures have been chipping away at the doctrine. From legislation like the Civil Rights Act of 1964,\(^22\) the Americans with Disabilities Act,\(^23\) the Age Discrimination in Employment Act,\(^24\) the Family and Medical Leave Act of 1993,\(^25\) the Genetic Information Nondiscrimination Act of 2008,\(^26\) the Fair Labor Standards Act of 1938,\(^27\) the Worker Adjustment and Retraining Notification (WARN) Act of 1988,\(^28\) and whistleblower statutes,\(^29\) to the common law tort law claims of retaliatory discharge,\(^30\) the forays into the doctrine have been significant and many. There is now an extremely long list of reasons that are prohibited for terminating an employee in Illinois. The pace of erosion seems to be increasing. The once vast ocean has become overwhelmed by its islands.

\(^{23}\) Americans with Disabilities Act, 42 U.S.C. § 12101.
The following is a representative, although not comprehensive, list of reasons that are prohibited by law for firing an employee\textsuperscript{31} in Illinois:

1. Serving jury duty\textsuperscript{32}
2. Voting\textsuperscript{33}
3. Military leave\textsuperscript{34}
4. Military status\textsuperscript{35}
5. Refusal to take a lie detector test\textsuperscript{36}
6. Engaging in protected off-duty activities (i.e., use of lawful products)\textsuperscript{37}
7. Alien status\textsuperscript{38}
8. Citizenship status\textsuperscript{39}
9. Work authorization status\textsuperscript{40}
10. Certain forms of retaliation for engaging in protected conduct\textsuperscript{41}
11. Race\textsuperscript{42}
12. Gender and gender identity\textsuperscript{43}
13. Sex\textsuperscript{44}
14. Unfavorable military discharge\textsuperscript{45}
15. Ancestry\textsuperscript{46}

\textsuperscript{31} These apply to private employment, and jurisdiction and eligibility vary for different statutes. Public employees have additional protections against discharge not mentioned here, such as civil service statutes and Constitutional protections against governmental employer actions like discharge for exercising speech rights.
\textsuperscript{32} Jury Act, 705 ILL. COMP. STAT. 305/4.1(b) (2022).
\textsuperscript{33} 10 ILL. COMP. STAT. 5/17-15 (2022).
\textsuperscript{34} Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 2002.
\textsuperscript{35} Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/2-102 (2022).
\textsuperscript{37} Illinois Right to Privacy in the Workplace Act, 820 ILL. COMP. STAT. 55/5 (2022).
\textsuperscript{39} Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/2-102 (2022).
\textsuperscript{40} Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/2-102 (2022).
\textsuperscript{41} Kelsay v. Motorola, Inc., 384 N.E.2d 353 (ILL. 1978); Illinois Workers Compensation Act, 820 ILL. COMP. STAT. 305/4(h) (2022).
\textsuperscript{44} Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/2-102 (2021).
\textsuperscript{45} Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/2-102 (2022).
\textsuperscript{46} Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/2-102 (2022).
16. Color
17. To frustrate rights under employee benefit plan
18. Order of protection status
19. Exercising rights as a victim of domestic abuse
20. Bankruptcy
21. National origin
22. Disability
23. History of disability
24. Perceived as disabled
25. Religion
26. Genetic information
27. Age over forty
28. Pregnancy
29. Medical condition related to pregnancy
30. Childbirth
31. Marital status
32. Sexual orientation

48. Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140. See Tolle v. Carroll Touch, Inc., 977 F.2d 1129, 1134 (7th Cir. 1992) (purpose of Section 510 is to “prevent persons and entities from taking actions which might cut off or interfere with a participant’s ability to collect present or future benefits or which punish a participant for exercising his or her rights under an employee benefit plan”).
33. Concerted activity
34. Union participation
35. Complaining about OSHA violations
36. Employee refused to commit an illegal act
37. Employee complains about illegal conduct
38. Taking leave under the Family and Medical Leave Act
39. Violation of the federal Equal Pay Act
40. Arrest record
41. Certain conviction records not substantially related to the position
42. Conscientious refusal to receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer, or participate in any way in any particular form of health care services contrary to conscience
43. As part of a mass layoff, relocation, or employment loss, without adequate notice (unless exempted)

VI. POSITIVE ASPECTS OF THE DOCTRINE

The elegance of the doctrine is primarily in its even-handedness or bilateral application. The fact that an employee can quit his or her job at any time without advance notice or cause seems to justify an employer’s unfettered co-equal right to terminate the relationship as well without notice or cause. There is a certain commonsense fairness about it. Besides this, the doctrine has several positive policy attributes. For example, the doctrine promotes freedom of contract and freedom in the employment market. It allows employers to terminate poor-performing employees without experiencing

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bureaucratic delays and unwarranted transaction costs. It has historically been seen to comport with the *laissez-faire* American belief that both employees and employers prefer to have an at-will relationship versus increased job security. From the field of law and economics, Richard Epstein defended the at-will employment doctrine as helping sort workers into their most productive positions. Epstein argued that the at-will rule allows employers to discharge unproductive workers without the expense required in a just-cause regime and this prevents inefficiencies caused by low effort or low ability workers. He argued that good workers are protected by the profit-maximizing incentives of employers to keep productive workers. Likewise, Judge Richard Posner has praised the doctrine for its positive effect on the economy. A number of other commentators have expressed positive aspects of the doctrine.

VII. **NEGATIVE ASPECTS OF THE DOCTRINE**

The doctrine has been harshly criticized. The obvious downside to the doctrine is the lack of employment security it provides to both parties, but particularly to the employee. Because of the significant differential in bargaining power between large employers and individual employees, employees are very often in a “take-it-or-leave-it” predicament in their employment regarding the terms and conditions of that employment. Corporate employers, bound to maximize returns for their shareholders, are not primarily concerned with the welfare of employees or the community in which they do business. Employees cannot plan and make investments on a promise that they will maintain their employment for their careers. The ever-changing economic circumstances cause restructuring, layoffs, downsizing,
outsourcing, offshoring, and other adverse impacts on employees. Most important, an unfettered right to discharge an employee allows for cruelty, favoritism, invidious discrimination, and violation of important, well-recognized public policies. For these reasons, most countries throughout the world allow employers to dismiss employees only for cause.84

Finally, there are many misconceptions regarding the doctrine among employees. The vast majority of at-will employees wrongly believe that they have far more job protections than they do.85 According to a study by Professor Pauline Kim, 89% of workers incorrectly believe they are protected from being fired for a boss “personally disliking” them; 82.2% believe hiring someone else for less is illegal; 79.2% believe being fired in retaliation for reporting another employee’s theft is illegal; and 87.2% believe being fired on belief of theft when the employee could prove their innocence is illegal.86 In my private practice of employment law, I found that most at-will employees believed that their employer needed to have a good reason for firing them. I found that most employees were dumbfounded to learn that they could be fired merely because their boss was in a bad mood or wanted to replace them with a friend, family member or favorite person.

VIII. THE IMPORTANCE OF EMPLOYEE JOB SECURITY

According to surveys conducted by the Society for Human Resource Management (SHRM), employees consistently ranked “job security” as the most important contributor to job satisfaction.87 Why is employee job security important? It seems self-evident, but employee security is important because, first and foremost, employees deserve basic human dignity. They deserve the peace of mind that comes from knowing that their jobs—their means of financial support—cannot be arbitrarily and capriciously pulled out from under them. They deserve the ability to plan and take reasonable economic risks, like investing in a home, without fear of economic ruin or serious economic setbacks. They deserve the right to “earn a livelihood.”88

86. Id. at 133-34.
88. See Fellhauer v. City of Geneva, 568 N.E.2d 870, 876 (Ill. 1991) (quoting Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981)) (In Palmateer, the Illinois Supreme Court explained the policy underlying the tort of retaliatory discharge as seeking to achieve “a proper balance . . . among the employer’s interest in operating a business efficiently
The legal and cultural trend in this area is away from radical individualism and free market capitalism, and toward a society that values a "morally sound social structure," the collective and employee rights. One example of the cultural shift toward morally sound social structure and employee financial security is echoed by former Democratic Presidential candidate, entrepreneur, and author, Andrew Yang, in his book *The War on Normal People.* Yang argues that mass unemployment will result from automation at such a fast pace that it will devastate the American middle class. Yang proposes an unconditional, monthly transfer payment (universal basic income) to everyone to help compensate for the loss of financial security caused by that unemployment. Yang’s proposal involves the government promoting that security, but American employers are also commonly called upon by law to provide for certain aspects of social welfare like health insurance, unemployment insurance, workers compensation insurance and other benefits. It would not be a stretch for employers to be required by law to provide additional job security.

IX. **Employee Job Security is Elusive**

Employment contracts have not proven to be the answer to the societal ills caused by the doctrine. While the at-will presumption may be modified by express contract, given the differential bargaining positions between employees and employers, employees are seldom able to garner an employment contract consisting of a term of years or containing a “for cause” termination provision. Contracts of this nature are typically found only in employers’ relationships with executives and high-level employees. Most states recognize that employment contracts may be implied. An implied contract may be created in several ways. Oral assurances by a supervisor or employer’s representative may give rise to an implied contract. Likewise, the employers’ handbooks, policies, practices, or other written assurances may create an

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91. See Duldulao v. St. Mary of Nazareth Hosp. Ctr., 505 N.E.2d 314, 318 (Ill. 1987) ("The majority of courts, however, interpret the general ‘employment-at-will rule’ as a rule of construction, mandating only a presumption that a hiring without a fixed term is at will, a presumption which can be overcome by demonstrating that the parties contracted otherwise. We agree with the latter interpretation.").
92. Forty-one plus the District of Columbia.
93. See Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); Duldulao, 505 N.E.2d at 318.
implied contract.\textsuperscript{95} Nevertheless, establishing an implied contract providing refuge from the at-will doctrine is a tall order.

Neither has collective bargaining through unions been a durable answer. Union representation has been waning greatly, and today fewer than 14% of private sector employees are represented by a union in Illinois.\textsuperscript{96} According to the “State of the Unions 2022” report, private sector workforce unionization rates have been declining since 2012.\textsuperscript{97} By 2021, the unionization rate had fallen to 13.9% in Illinois and 10.3% in the United States.\textsuperscript{98}

A minority of states recognize an implied covenant of good faith and fair dealing in employment relationships.\textsuperscript{99} “The implied covenant of good faith and fair dealing may, upon demonstration of a special relationship, serve to redress the inherent imbalance between employers and individual employees.”\textsuperscript{100} Judicial interpretations of this covenant have varied from requiring just cause for termination to prohibiting terminations made in bad faith or motivated by malice. An example of a bad faith termination would be firing a salesman just before a large commission on a completed sale is payable. However, there have been relatively few cases in which employers were found liable under an implied covenant of good faith and fair dealing theory.

Some states allow employees to avoid the harsh application of the at-will doctrine by resorting to promissory estoppel,\textsuperscript{101} but this is certainly no reliable bulwark for employees against the type of arbitrary discharge or alteration of the terms of employment allowed by the at-will doctrine.

\textsuperscript{95}. See Duldulao, 505 N.E.2d at 318.
\textsuperscript{97}. Id.
\textsuperscript{98}. Id.
\textsuperscript{99}. Garcia v. UniWyo Fed. Credit Union, 920 P.2d 642, 646 (Wyo. 1996) (citing Wilder v. Cody Country Chamber of Com., 868 P.2d 211, 220-22 (Wyo. 1994)) (“All contracts of employment in Wyoming contain an implied covenant of good faith and fair dealing, but we limit actions upon such covenants to those rare and exceptional cases where a special relationship has been demonstrated between employer and employee.”).
\textsuperscript{100}. Garcia, 920 P.2d at 646 (citing Wilder, 868 P.2d at 221; McCullough v. Golden Rule Ins. Co., 789 P.2d 855, 858 (Wyo.1990)).
As in many states, the Illinois courts recognize a very narrow exception to the at-will employment doctrine for retaliatory discharge. To state a valid retaliatory discharge cause of action under Illinois law, an employee must allege that: (1) the employer discharged the employee, (2) in retaliation for the employee’s activities, and (3) that the discharge violates a clear mandate of public policy. The Illinois courts have kept a very tight leash on this exception.

Finally, market forces have not resulted in significant increases in employee job security. While job security is said to promote retention and

102. See Fellhauer v. City of Geneva, 568 N.E.2d 870, 875 (Ill. 1991); Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981); Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978). The Illinois Supreme Court in Palmateer catalogues cases from other jurisdictions:


Palmateer, 421 N.E.2d at 879.

103. See Fellhauer, 568 N.E.2d at 875.

attraction of talent, among other positive outcomes for employers, this has not induced many employers to embrace meaningful job security for their rank-and-file employees.

X. LEGISLATIVE FIXES

Not surprisingly, states have begun to legislate in this area. The Montana Wrongful Discharge from Employment Act of 1987 (WDEA) created a cause of action for employees who believe that they were terminated without good cause. Although similar legislation has been introduced elsewhere, Montana is so far the only state to have passed a law with such far-reaching effects. Under the Montana statute:

(1) A discharge is wrongful only if:

(a) it was in retaliation for the employee’s refusal to violate public policy or for reporting a violation of public policy;
(b) the discharge was not for good cause and the employee had completed the employer’s probationary period of employment; or
(c) the employer materially violated an express provision of its own written personnel policy prior to the discharge, and the violation deprived the employee of a fair and reasonable opportunity to remain in a position of employment with the employer.

(2) 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.

(3) The employer has the broadest discretion when making a decision to discharge any managerial or supervisory employee.

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108. See infra text accompanying notes 113-120.
The discharged employee bears the burden of proving that the discharge was wrongful.\textsuperscript{110} The Act defines “good cause” as “reasonable job-related grounds for an employee’s dismissal based on: (a) the employee’s failure to satisfactorily perform job duties; (b) the employee’s disruption of the employer’s operation . . . or (d) other legitimate business reasons . . .”\textsuperscript{111} Under Montana law, a “‘legitimate business reason’ is ‘a reason that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business.’”\textsuperscript{112}

The State of Illinois has also attempted a legislative fix. In February 2021, the Illinois House (HB 3530) (with 11 co-sponsors in the House) and Senate (SB 2332) respectively introduced twin bills titled the Employee Security Act.\textsuperscript{113} If passed, the Employee Security Act would have abrogated the long-standing doctrine of at-will employment in Illinois, effective January 1, 2022.\textsuperscript{114} The proposed legislation would have imposed at least two new significant obligations on employers when terminating Illinois employees, including: (1) only allowing employers to terminate employees for just cause and (2) requiring employers to provide mandatory severance to employees upon termination.\textsuperscript{115} The synopsis of the House Bill as introduced was as follows:

\begin{quote}
Creates the Illinois Employee Security Act. Establishes a framework for employee discipline and discharge. Prohibits the unjust discharge of an employee. Requires employers to utilize progressive discipline measures. Limits the use of electronic monitoring. Provides for severance pay. Directs the Department of Labor to adopt rules and administer the Act. Provides statutory remedies for wrongfully discharged employees and authorizes the recovery of damages. Creates the Wrongful Discharge Enforcement Fund as a special fund in the State
\end{quote}


treasury. Applies to disciplinary and discharge actions occurring one year after the Act’s effective date.¹¹⁶

These bills were very lengthy and extensive, attempting to regulate many aspects of Illinois employment law in a heavy-handed fashion. They did not survive the legislative process and did not become law.¹¹⁷ Referred to the Rules Committee for a second time on March 27, 2021, HB 3530 is dead.¹¹⁸ Referred to Assignments in the Senate on April 16, 2021, SB 2332 is dead as well.¹¹⁹ Nevertheless, this failed legislative effort is certainly not the end of this issue. Some employment lawyers viewed this legislation as poorly conceived and drafted, but have expressed that a cleaner, better drafted bill may have political legs in Illinois, especially in light of the current political environment.¹²⁰

Many commentators have predicted the demise of the at-will doctrine.¹²¹ Some have discussed model acts eviscerating the doctrine.¹²² In 1991, after years of wrangling, a committee of the National Conference of Commissioners on Uniform State Laws (NCCUSL) proposed a model act—the Model Employment Termination Act.¹²³ The primary tenet of this Model Act was that an employer should not be able to fire a non-probationary employee without good cause.¹²⁴ It would seem that this proposition better suits the modern employment environment in Illinois.

Perhaps the Montana statute or the Model Act would be a good starting point for drafting a new Illinois law addressing the fundamental aspects of the employment relationship for Illinois employers and employees.

XI. CONCLUSION AND PROPOSAL FOR LEGISLATION IN ILLINOIS

Of course, legislation may not be the answer. In a 1967 law review article, one pessimistic commentator concluded:

¹²⁰ A discussion of these bills by members of the Illinois State Bar Association Labor & Employment Law Section Council in 2021 suggested that the concept of Illinois legislation being successful in abrogating the doctrine was not far-fetched.
¹²¹ See, e.g., Deborah A. Ballam, Employment-at-will: The Impending Death of a Doctrine, 37 AM. BUS. L. J. 653 (2000).
¹²⁴ Id.
The problem [of abusive dismissal of employees] does seem to be one suited to legislative inquiry and solution. As a practical matter, however, the prospects for any kind of general legislative reform in this area are dim. The obstacles which commonly hinder legislative reforms of this sort have been commented upon elsewhere. Suffice it to say that general statutory limitations on the employer’s right of discharge are unlikely to be enacted so long as there is no strong lobby to promote them. Employees having diverse job specialties and working at varying echelons of employment simply are not equipped to form a cohesive group with enough power to influence legislators. The unlikelihood that such legislation will be enacted in the foreseeable future is enhanced by the strong interest groups to be counted on to oppose it. Nor could organized labor be expected to favor laws which would give individual employees a means of protecting themselves with need of a union. Therefore, it appears that protection of all employees from the abusive exercise of employer power will have to originate, if it is to be established at all, in the courts.\textsuperscript{125}

Indeed, a legislative fix has so far eluded Illinois employees. That said, legislation appears to be the only reasonable option for promptly introducing meaningful employee security in the context of the shifting economic sands that define the present employment relationship in Illinois. As the at-will employment doctrine fades from view, it will likely be replaced with a more coherent legal scheme governing the employment relationship, and some modicum of meaningful employee security will inevitably be part of the balance. At least from a separation of powers perspective, it is the legislature that should be the vehicle for bringing about some semblance of employee job security in Illinois.

The legislation necessary to remedy this situation will require that certain issues be addressed. These include, but are not limited to, the following:

1. Should an employee be required to have a particular tenure (a probationary period) before becoming entitled to require cause or notice for dismissal?

2. What type of “cause” should be required for discharge?
3. Should a list of reasons be articulated by the legislation, or should the courts be allowed to construe terms like “just cause” or “good cause”?
4. Should the legislation identify reasons for discharge that do not constitute just or good cause?
5. If required, what kind of notice is reasonable and appropriate?
6. When should notice be dispensed with?
7. Should a severance payment entitlement be added?
8. Should the courts be replaced by some sort of commission, like the Illinois Human Rights Commission, the Illinois Industrial Commission, or the Department of Employment Security, to adjudicate employment discharge cases?
9. Should an employee be obligated to exhaust administrative rights before filing suit?
10. What about an employee’s obligations to the employer—should the law impose any sort of notice or cause requirement on the employee to terminate a job?
11. What Illinois statutes will need to be amended in light of the elimination of at-will employment?
12. How will legislation of this type dovetail with the Illinois Human Rights Act, the Right to Privacy in the Workplace Act, the Whistleblower Act, and other Illinois statutes affording protections from wrongful discharge?
13. Should the legislation preempt common law and define wrongful discharge, including where the employee is terminated without good cause, or in retaliation for the employee’s refusal to violate public policy or for reporting a violation of public policy, or if the employer fails to follow its own personnel policies when it discharges the employee?
14. Should the legislation provide a limitations period?
15. Should the legislation provide a private right of action or empower the State to enforce it?

126. For example, a failure to satisfactorily perform job duties, disruption of the employer’s operation, egregious misconduct, or other legitimate business reasons.
16. Should the legislation prescribe the available remedies, and if so, what should those remedies be?
17. Should the legislation include the concept of constructive discharge?
18. Should the legislation include the concept of constructive discharge in the context of retaliatory discharge, despite current Illinois law on that subject?
19. Should the legislation apply to all employers regardless of size or the number of employees?
20. Should the legislation apply to all employees?
21. Should the legislation require progressive discipline, training, investigation, consistent application of policies, or written rationale for discharge?
22. Who should bear the burdens of proof: employee, State, or employer?
23. Should employer recordkeeping requirements be included?
24. Should an employer and employee be allowed to waive or increase the protections of the legislation by contract?

When it comes to legislation in this area, simpler is better. Legislators should be careful not to bite off more than can be chewed. Legislation that attempts to codify the entirety of Illinois employment law seems less likely to be politically viable. One simple statute should suffice.

First, the law should clearly abrogate the at-will doctrine, requiring that any employer have just cause for terminating any non-probationary employee. Second, the statute should afford an aggrieved employee a private right of action for wrongful discharge to be pursued in the Illinois Circuit Courts. Third, the protections provided by the statute should be subject to modification by express contract between the parties, but only to the extent those modifications increase the protections afforded to the employee—the protections should not be subject to waiver. Finally, the employee should have the burden of establishing the employer lacked just cause for the discharge. The courts can fill in the interstices.