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Ending At-Will Employment: A Guide for Just Cause Reform

Kate Andrias

Columbia Law School, kandrias@law.columbia.edu

Alexander Hertel-Fernandez

Columbia University School of International and Public Affairs, ah3467@columbia.edu

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ENDING AT-WILL EMPLOYMENT: A GUIDE FOR JUST CAUSE REFORM

REPORT BY KATE ANDRIAS AND ALEXANDER
HERTEL-FERNANDEZ

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ABOUT THE AUTHORS

Kate Andrias is a professor of law at the University of Michigan. She teaches and writes in the fields of labor law, constitutional law, and administrative law. Her current research focuses on the relationship between these areas of law and economic inequality and on questions of democratic governance. Recent articles include “Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality” (Yale Law Journal, forthcoming 2021, co-authored with Benjamin Sachs) and “The New Labor Law” (Yale Law Journal, 2016).

Alexander Hertel-Fernandez is an associate professor of international and public affairs at Columbia University and a fellow at the Roosevelt Institute. His research focuses on American political economy, especially the politics of business, labor, and inequality. He is the author most recently of *State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States—and the Nation* (Oxford University Press, 2019).

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INTRODUCTION

In the United States, the vast majority of private-sector employers have free rein to discipline or fire workers for good reasons (for harassing other workers), bad reasons (a personal dislike of the worker or a worker's off-duty activities), or even no reason at all so long as the employers' justification is not otherwise barred by law. And even if a worker suspects they have been fired for an illegal reason—for instance, because of their race, ethnicity, or gender—the burden is on the worker, not the employer, to collect the necessary evidence, prove discriminatory intent, and mount a legal challenge.

This sweeping legal principle, called employment “at-will,” is the foundation of American employment relations for nonunion private-sector businesses in every state except for Montana.¹ It is also unusual: In no other rich democracy do private-sector businesses have as much latitude to dismiss workers without justification as in the US (see box). Other countries require employers to spell out clear justifications for terminating a worker, limit firings to those that meet “just cause” standards, or most often, both (ILO n.d.).

American exceptionalism in at-will employment has pernicious consequences for workers and US workplaces. As we explain in this brief, at-will employment corrodes enforcement of workers' labor, employment, and civil rights (e.g., Blades 1967; McGinley 1996). At-will employment also leaves workers vulnerable to arbitrary and unfair treatment by managers and supervisors. Workers already likely to experience discrimination or illegal treatment from their employer—for example, Black and brown workers, workers with lower levels of formal education, and low-wage workers—are especially vulnerable under at-will employment. On a more fundamental level, at-will employment erodes workers' dignity and diminishes the possibility of real workplace democracy.

At-will employment corrodes enforcement of workers' labor, employment, and civil rights.

¹ As we discuss in more detail in the report, Philadelphia has a just cause law protecting parking lot workers, and in December 2020, New York City passed a just cause law for fast-food workers at large national chain restaurants. Puerto Rico and the Virgin Islands also have just cause laws.

The consequences of at-will employment are especially acute in today's economy. Union-bargained contracts, which often include just cause provisions curbing at-will employment, now cover a much smaller proportion of the workforce than in previous decades. A business-friendly judiciary has diminished the scope of workers' civil and labor rights through the expansion of mandatory individual arbitration agreements, which waive workers' access to federal courts or collective arbitration in the case of violations of workplace rights (e.g., Colvin 2018). And in the face of weakened labor standards, employers now possess greater economic clout over their workers (e.g., Bivens, Mishel, and Schmitt 2018). All these developments tilt the at-will employment standard even further in favor of businesses over workers.

Most significantly, the COVID-19 pandemic has revealed how the at-will employment standard undermines workplace health and safety standards—and public health more generally (see Block et al. 2020; Block and Sachs 2020). Facing the prospect of discipline or dismissal under at-will employment, many workers have been fearful of speaking up to report violations of workplace safety and health standards that put them, their coworkers, and their communities at risk of coronavirus infection. As we report in this paper, a number of private-sector employers threatened to retaliate against workers who requested or wore protective equipment like masks and gloves early on in the pandemic. In addition, employers like Amazon, Cargill, McDonald's, Target, and the Cheesecake Factory have barred workers from sharing information about COVID cases in their workplaces as well as speaking out about weak COVID workplace safety standards (Eidelson 2020). By suppressing workers' voices, at-will employment presents a major public health risk—in the COVID-19 crisis and beyond.

In light of the steep cost of at-will employment in the US, we lay out a path for moving away from this legal standard in private-sector employment relations. As we describe in more detail, we believe such a reform would have significant economic, social, and democratic benefits for workers in the US, and for society more broadly. Although ending at-will employment would represent a major shift in US employment law, it is not without strong and long-standing precedents. By adopting a just cause standard for terminations—in which employers could only fire workers for well-documented cases of poor performance, misconduct, or loss of business or profit—the US would join the ranks of its peer democracies.



Closer to home, just cause is a common provision in union collective bargaining agreements and public-sector employment rules. And although the overwhelming majority of rank-and-file private-sector workers outside the labor movement are employed at-will, the top executives of most private-sector businesses are not. Analysis of the employment contracts of CEOs in large, publicly traded businesses reveals that the vast majority are not employed at-will (Schwab and Thomas 2006). Instead, CEOs at most publicly traded companies are protected against arbitrary firings: either they can only be fired for specific reasons, or they receive extra compensation if they are fired without cause. In a sample of CEO contracts from S&P 1,500 firms, over 97 percent of contracts included provisions spelling out grounds for just cause terminations (Schwab and Thomas 2006, Table 3).

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We believe the time has come for all workers to enjoy those same protections already afforded to many top executives, union members, and government employees. Most members of the US public agree. Polling we report below suggests that large majorities of survey respondents, including Democrats and Republicans and union members and nonmembers alike, would support enactment of just cause rights for private-sector workers (see also Hertel-Fernandez 2020b). This very strong support for just cause rights should not come as a surprise given that most US workers think they already hold such rights. In survey after survey, workers overestimate their protections against unfair, unjust, or arbitrary discipline or dismissal until they experience the effects of at-will employment firsthand (Freeman and Rogers 2006; Hertel-Fernandez 2020a; Kim 1997–1998).

Accordingly, we lay out a range of options for ending at-will employment in the US private-sector workforce. While new congressional legislation enacting just cause termination rights for all private-sector workers would be ideal, we present other alternatives for building toward such an effort, including using the procurement authority of the executive branch to introduce just cause standards for government contractors, encouraging states and cities to enact just cause measures, and including just cause provisions in COVID-19 relief legislation



targeting essential workers. Our goal, however, is not to provide definitive legislative language for all of these campaigns. Rather, our hope is that this policy brief can lay out the failings of our current system of at-will employment, as well as key design features and trade-offs that any just cause reform should consider.

EXAMPLES OF JUST CAUSE PROVISIONS IN OTHER RICH DEMOCRACIES

The International Labor Organization Convention 158, Article 4 stipulates that “[t]he employment of a worker shall not be terminated unless there is a valid reason for such termination.” Thirty-six countries ratified the convention, including Australia, Finland, France, Spain, and Sweden. And aside from this convention, nearly all rich democracies have just cause provisions in their employment or labor codes. Below, we summarize some key definitions:

Australia: In general, only fair dismissals of workers are permitted. Fair dismissals are those that are not harsh, unjust, or unreasonable; are consistent with the Small Business Fair Dismissal Code; or are a case of genuine redundancy (i.e., dismissals for economic reasons). The criteria for harsh, unjust, or unreasonable dismissals include whether there was a valid reason for the dismissal related to the workers’ capacity or conduct, whether the worker was notified of that reason and given an opportunity to respond, whether the worker was able to have a support person present to assist in discussions relating to the dismissal, if the dismissal is related to unsatisfactory performance and whether the worker had been warned about the performance before the dismissal, the degree to which the size of the employer’s enterprise would be likely to impact the procedures around dismissal, the degree to which the absence of dedicated human resource management specialists affected the dismissal, and other matters deemed relevant by the relevant labor tribunal.

Canada: In general, workers who have completed 12 consecutive months of continuous employment by an employer and who are not covered by a collective agreement can appeal unjust dismissal, with remedies including reinstatement or compensation. Unjust dismissal does not include lack of work or discontinuance of a job function.

Germany: In general, dismissal must be justified by reasons relating to the worker’s person or conduct or compelling operational requirements.



Netherlands: In general, four categories of dismissal are established: 1) termination via a prior permit from the Employment Insurance Agency or a tripartite committee established by collective agreement for economic redundancy, long-term invalidity, or sickness of a worker; 2) judicial rescission of a contract on reasonable grounds based on the employee's conduct or capacity; 3) termination for urgent causes; and 4) termination by mutual consent.

Sweden: In general, termination must be based on objective grounds linked to economic circumstances or circumstances relating to the worker personally.

United Kingdom: In general, there are six potentially fair reasons for dismissal: 1) the worker's capability or qualifications for performing their job functions; 2) the worker's conduct; 3) the worker's retirement; 4) the worker's redundancy; 5) the worker's inability to continue working in the position without contravention of a statutory duty or restriction; or 6) some other substantial reason.

Source: International Labor Organization Employment Protection Legislation Database

WHY THE AT-WILL EMPLOYMENT DOCTRINE MATTERS

In this section, we describe how the at-will employment doctrine profoundly shapes power relations in the workplace, giving managers and supervisors outsized and arbitrary control over the conditions under which workers do their jobs and even over workers' lives outside of work. We also discuss how at-will employment undermines a host of other policies and protections central to the workplace, including the federal and state rights of workers related to labor organizing, protections against discrimination and harassment, whistleblower laws, health and safety standards, and fair pay and overtime rules. Employment-at-will's role in weakening labor protection for workers is especially significant for workers already vulnerable to employer abuse and misconduct, like women, people of color, LGBTQ+ workers, and workers with weak bargaining power. We conclude by discussing how at-will employment is inconsistent with the values many Americans hold around free speech and participation, and how the doctrine contributes to the "dictatorial" rather than the democratic nature of the US private-sector workplace (Anderson 2017; Dahl 1986).



HOW WORKERS EXPERIENCE AT-WILL EMPLOYMENT AT THEIR JOBS: UNFAIR TREATMENT BY MANAGERS

We begin with evidence from national surveys of workers to understand how at-will employment shapes the relationships and experiences of workers on a daily basis. A nationally representative survey of workers conducted in November 2019 by Data for Progress sheds light on these questions. The survey asked respondents if they had ever been fired for a bad reason or no reason at all, representing the very direct implications of at-will employment (see full analysis reported in Hertel-Fernandez 2020a). This survey item speaks to workers’ subjective perceptions of dismissals, not the specific legality of employer actions or the facts surrounding them. But these subjective experiences ultimately shape how workers think about their jobs, their relationships with their managers and supervisors, and their daily experience of work.

In all, nearly half of workers (47 percent) said they had been fired for no reason or a bad reason. That statistic alone indicates workers’ perception of the broad reach of unfair treatment as a result of the baseline relationship of at-will employment. As Table 1 illustrates, however, experiences with unfair discipline vary by race and education. Black and Hispanic workers of all educational levels reported higher levels of unfair dismissals than white workers, and rates of unfair dismissal were especially high for Black and Hispanic workers with some college education. These gaps indicate that ethnic and racial minorities may be especially affected by the arbitrary authority over dismissal and discipline in the at-will American labor market. They also suggest that higher levels of educational attainment do not necessarily shield workers from unfair discharges, especially for Black and brown workers.

TABLE 1. EXPERIENCES WITH UNFAIR DISMISSAL BY RACE AND EDUCATION				
	White	Black	Hispanic	Total
High school or less	46%	47%	51%	48%
Some college (no BA)	45%	55%	56%	49%
College or more (at least a BA)	44%	52%	51%	45%
Total	45%	50%	52%	



Although the survey did not probe whether perceived unfair discipline or dismissal occurred in response to activity that took place during or outside work hours, American employers have wide latitude to fire or punish workers for their behavior off the clock due to the at-will employment standard. While federal, state, and local statutes increasingly curb employers' oversight of off-work employee behavior—for instance, federal law and numerous state laws now prohibit employers from firing workers for their sexual orientation—many protections are uneven across jurisdictions and generally protect only specific practices (like off-duty employee political speech, Volokh 2011–2012, or particular lifestyle choices like tobacco use, Roberts 2016). Moreover, as we will see in the following section, the burden is generally on the worker, not the employer, to prove that they were wrongly punished or fired for behavior off the job. In practice, the imbalance of power and legal resources between workers and employers erodes the possibilities for workers to claim what few protections do exist against discrimination or mistreatment on the basis of their off-work activities.

HOW AT-WILL EMPLOYMENT ERODES LOCAL, STATE, AND FEDERAL WORKPLACE PROTECTIONS

At-will employment does not just increase unfair or arbitrary managerial influence over workers. It also limits the reach of existing local, state, and federal workplace protections, undermining the safety, health, and civil rights to which workers are legally entitled. The default assumption under at-will employment is that an employer's discipline or dismissal of a worker is legal unless proven illegal. It is up to individual workers to document that their treatment violated the law (or a private contract) and then to present a complaint to either the relevant government agency or an attorney who can represent them in legal proceedings. These barriers to vindicating civil and workplace rights—which we also unpack in more detail below—help to explain why employers continue to engage in unfair or illegal treatment of workers (e.g., McGinley 1996).

Closely related, the doctrine of at-will employment raises the risk of employer retaliation against workers who attempt to exercise their workplace rights. Most US workplace rights—including those covering health and safety standards, antidiscrimination, and collective action—depend on workers taking affirmative steps to report employer violations. But if workers fear retaliation for reporting violations, the law will often go unenforced.



Take the example of the Occupational Safety and Health Administration, tasked with enforcing workplace safety and health standards. With fewer than 900 inspectors in recent years responsible for covering millions of workplaces, there is simply no way the federal agency can ensure compliance on its own (NELP 2020). Instead, the agency depends on workers to report violations, which spur follow-up inspections. Yet an investigation by the federal government into the meat and poultry industry—one of the most dangerous sectors in the economy—found that workers were reluctant to report even egregious violations of federal law, like being denied access to a bathroom or having to work with unsafe equipment, out of fear of being punished by managers (GAO 2017). Some workers even feared visiting on-site medical or first-aid centers with workplace injuries, apparently for good reason: OSHA documented that many workers were fired after seeing doctors for workplace injuries, sometimes even on the same day (GAO 2017, 30).

Beyond the meat and poultry industry, evidence suggests that fear of retaliation is relatively widespread, especially in low-pay industries and occupations. A large-scale 2008 survey of low-wage workers in several large cities found that one in five workers reported that they raised complaints or issues with their employers. Of those workers reporting issues to managers, 43 percent described one or more forms of illegal retaliation, like firing or suspension, threats to call immigration authorities, or threats to cut hours and pay (Bernhardt et al. 2009). Separately, another 20 percent of surveyed low-wage workers said that they did not make a complaint to employers despite experiencing serious workplace problems, like unsafe conditions or wage theft. Half of those who didn't report such violations said that they failed to do so because they were afraid of losing their jobs. A final relevant data point is that half of low-wage workers who reported a workplace injury to their employer for the purposes of workers' compensation experienced illegal employer retaliation, including terminations or instructions from managers to workers not to file for workers' compensation.

Concerns about retaliation also apply to civil rights laws. The Equal Employment Opportunity Commission—the federal agency in charge of enforcing federal civil rights law—reports that over half of the individual charges filed in fiscal year 2019 involved various forms of employer retaliation against workers for exercising their antidiscrimination rights (EEOC n.d.). These included employers allegedly reprimanding workers, giving workers lower performance evaluations, transferring workers to less desirable positions, making threats to contact law enforcement or immigration authorities, and making workers' workplace experience more difficult.



All of these corrosive effects of at-will employment would be worrisome in any context. But they are especially problematic in the contemporary economy because of the erosion of other policies and protections for worker rights, including the decline of unions and the rise of mandatory arbitration (Colvin 2018). As a result, access to civil rights and other workplace protections has been increasingly curtailed, compounding the long-standing effects of at-will employment.

HOW AT-WILL EMPLOYMENT UNDERMINES WORKPLACE VOICE AND DEMOCRACY

The consequences of at-will employment stretch beyond individual episodes of unfair treatment of workers and the erosion of other legal protections. At its core, at-will employment undermines democratic ideals in the workplace—and stymies efforts at making the workplace more responsive and accountable to workers. Under at-will employment, if workers fear the threat of retaliatory discipline or dismissal from managers, they will be less likely to voice their discontent, knowing full well that their employer can easily fire, demote, or otherwise punish them for speaking out. This will tend to push workers toward either working in silence or simply leaving their employer, dampening both the exercise of workplace voice and the opportunities for improving the workplace for that worker and others. In this way, American workplaces become less like a democracy and more like an unaccountable dictatorship (Anderson 2017; Dahl 1986). Removing the presumption of at-will employment could help build greater accountability of managers to workers and foster a greater culture of democracy and free speech in the workplace (Estlund 1996).

We can see empirical evidence for the importance of job security for worker voice in survey data. Considering the pre-COVID November 2019 survey of workers referenced earlier, we find that the workers who say they would be most comfortable raising workplace problems or issues with managers and supervisors are also those who reported on the survey they would have the easiest time finding a new job with comparable pay and benefits. The irony is that the workers with the most bargaining power in the workplace—who therefore *could* speak up at work without fear of losing their jobs—are also those who are most mobile and could leave their job if they face problems; other workers are stuck. As we discuss in more detail below, the COVID-19 crisis has only amplified these inequalities by making it harder for workers lucky enough to remain employed to credibly threaten to leave their jobs.



THE HISTORICAL ORIGINS OF THE AT-WILL EMPLOYMENT DOCTRINE AND THE LIMITS OF RECENT EXCEPTIONS

Whereas most democracies around the world, and several US commonwealths, maintain just cause standards, employment-at-will is the law in 49 of the 50 states and in the District of Columbia (see box; Philadelphia and New York City have passed city-level just cause protections for specific occupations).² The rule that employees can be fired even for bad reasons or no reason at all derives from judge-made “common law” dating to the 1870s (Bodie 2017, 224–5; Bales 2008, 459; Arnow-Richman 2014, 1520–21). During the early 20th century, the Supreme Court gave constitutional significance to the judge-made doctrine, most famously in a case called *Lochner v. New York*, but also in cases like *Adair v. United States* and *Coppage v. Kansas*.³ Invoking the employment-at-will rule, the Court repeatedly struck down democratically enacted legislation that protected workers’ rights on the grounds that such legislation violated the “liberty of contract” (Bagenstos 2020). Freedom of contract during this period also permitted employers to fire or refuse to hire union supporters, African Americans, immigrants, women, and other disfavored classes of employees (Estlund 1996, 1658). The *Lochner*-era cases have long since been overturned: No longer does the law hold that legislation protecting workers’ rights to join unions or to earn minimum wages violates the Constitution. Yet employment-at-will remains the rule in nearly all US jurisdictions.

² See, e.g., RESTATEMENT OF EMP. L. § 2.01, Reporter’s Note to cmt. a (2020).

³ *Lochner v. New York*, 198 U.S. 45 (1905) (declaring that minimum hours law violated the liberty of contract); *Adair v. United States*, 208 U.S. 161 (1908) (declaring that federal ban on “yellow-dog” contracts prohibiting union membership was unconstitutional); *Coppage v. Kansas*, 236 U.S. 1 (1915) (declaring that state ban on “yellow-dog” contracts was unconstitutional).



MONTANA: AN AT-WILL OUTLIER IN THE 50 STATES

There is only one US state—Montana—where at-will employment is not the default employment arrangement for private-sector workers. Yet as we describe in more detail in section 5, the design of Montana's law significantly curtails its potential protections for workers. The history of the law's passage helps to explain its limited reach and ambition. Montana's Wrongful Discharge from Employment Act, passed in 1987, was not championed by worker advocates or labor groups (Schramm 1990). Rather, the law was promoted by employers and insurers concerned about a series of state supreme court cases greatly expanding the right of at-will employees to sue their employers for wrongful discharge. Employers (and insurers making payouts for employers) saw the wrongful discharge legislation as a way of limiting their financial and legal liability. As a result, the legislation had several key features that curbed employee claims, chiefly limited penalties and awards and the imposition of a high burden of proof on the employee, not the employer, to prove the circumstances of the discharge.

Consistent with the law's weak protections, a 1992 survey of Montana attorneys found that about half felt the law did not give adequate incentives to workers to pursue claims under the law, with a number of respondents noting that workers found "proof almost impossible" under the standards spelled out in the legislation (Bierman et al. 1992). Moreover, as a result of limited damages and difficult burdens of proof, well over half of respondents indicated that Montana attorneys did not have strong incentives to represent workers under the law. In fact, nearly half of respondents said they had personally declined to bring a case under the law, with the vast majority stating that their reason was the lack of adequate remuneration.

In short, Montana offers a cautionary tale of why just cause or wrongful discharge legislation needs to be designed carefully—or else workers may wind up with much more limited protections than those promised.

Defenders of the employment-at-will rule contend that the doctrine promotes worker choice because it allows both employers and employees to terminate the relationship at any time, without cause (see Epstein 1984). Because employment-at-will is merely an equally applicable default rule, its defenders argue, the doctrine preserves the ability of workers to contract for greater protections if they wish.



But, in practice, the at-will rule doesn't affect employers and employees equally, nor does it simply serve as a presumption from which employees can easily depart (Bagenstos 2020).

Instead, the at-will rule is fundamentally unequal. In most cases, if workers insisted on an employment contract that protected them from being fired without cause, they simply would not get the job. In contrast, the employer has outsized power to set the terms and conditions of employment when hiring a new worker. The at-will rule also creates inequality between employers and employees after the initial hiring negotiations. The doctrine forces nonunion employees to live in fear of arbitrary termination and therefore to submit to their bosses' wishes, even when the exercise of authority goes beyond the productive mission of the workplace (Blades 1967, 1416–19; Anderson 2017; Bagenstos 2013, 238).

Furthermore, while employers are generally well-counseled about the law, most workers do not know about the employment-at-will rule or the ability to contract around it until they face the risk of arbitrary employer discipline or dismissal firsthand; therefore, they do not affirmatively choose to forgo protection when they fail to negotiate an alternative to employment-at-will (e.g., Kim 1997–1998). Recent surveys suggest that some 70–80 percent of workers believe they have greater federal legal rights than they actually have and believe employers face greater obstacles to firing workers than employers do in practice (Hertel-Fernandez 2020a). These systematic misperceptions show that workers do not understand that the at-will doctrine is the baseline presumption for nonunion private-sector employment until they experience its effects firsthand.

The employment-at-will doctrine also does not operate as a normal default rule, from which parties can easily depart. Rather, it is an unusually “sticky” rule that is difficult to overcome even when workers try to do so (Bodie 2017, 229; Ben-Shahar and Pottow 2006, 677). For example, courts tend to treat employment contracts as embracing an at-will rule unless there is unequivocal or unambiguous evidence to the contrary. In concluding that employment-at-will applies, courts are unlikely to consider contextual evidence or what an employee reasonably believed. Courts also frequently decline to credit oral agreements to depart from the at-will default, even though oral contracts are common and are generally enforceable. Even written statements that an employee will be discharged only for good cause or good reason are typically insufficient to overcome the presumption of at-will employment, unless there is express agreement on what those terms encompass and unless there was “special consideration”—that is, unless the employee gave up something specific in return (Bodie 2017; Bagenstos 2020; Summers 2000; Linzer 1986, 376).



Some critics of just cause law reform argue that common law and statutory employment law protections, which have expanded since the 1960s, have already substantially eroded the employment-at-will principle (e.g., Ballam 2000; Massingale 1990; Muhl 2001). This is simply not the case. In fact, courts have repeatedly held that the employment-at-will rule trumps contrary expressions of legislative intent and other principles in common law. In so doing, they have narrowed employment law protections, leaving the at-will rule stubbornly in place. For example, most states have now recognized a “public policy” exception to the at-will presumption. Under that exception, employers cannot fire workers for reasons that are contrary to public policy. But courts have tended to interpret the exception narrowly, applying it only to employees who exercise a clear legal right, perform a clear legal duty, or refuse to violate the law. Thus, most courts have refused to extend the public policy exception to cases in which an employer retaliates against an employee for the employee’s political speech even if it occurs off the job, or to cases where retaliation occurred after an employee reported concerns to a professional agency. Other courts have required that the employee prove that the employer engaged in an “outrageous violation of a well-established public policy” for the public policy exception to apply (Bagenstos 2020, 47–48; St. Antoine 1988, 58–65).

The public policy exception to at-will employment is the most widely recognized common-law limit on at-will employment. The second-most common exception, recognized in 41 states and the District of Columbia, involves implied contracts of employment (NCSL 2008). If employers create an “implication of a contract”—especially through handbooks, policies, or common practices—workers may be able to argue that they have a legitimate expectation of continued employment unless the employee violates company policies, performs very poorly, or must be laid off for economic reasons. While the implied contract exception initially created a great deal of concern among employers (and especially HR professionals) that even offhanded statements from supervisors could be construed as creating an employment contract (e.g., Edelman, Abraham, and Erlanger 1992), courts quickly adopted an easy workaround for employers. Employers need only provide a clear and unambiguous disclaimer on all employment contracts, handbooks, or other employee materials stating that employees are presumed to be employed at will, that nothing in employers’ materials create an indefinite contract, and that employers reserve the right to modify employment policies and procedures at any time. With such a straightforward escape clause available, most employers quickly began applying such language to their handbooks and other materials to shield themselves against legal liability (Sutton and Dobbin 1996).



A third common-law exception to at-will employment is the implied covenant of good faith and fair dealing—i.e., an implied duty imposed upon both employers and employees to act in a fair manner. This exception would in theory prevent all unreasonable or unfair terminations. While sweeping in principle, the exception is only recognized by courts in a minority of states (11), and there have been very few cases in which employers have actually been found liable under that standard. Where it has been used, this exception typically protects workers only from the most egregious and abusive dismissals (NCSL 2008).

In sum, common-law exceptions to the employment-at-will doctrine are quite narrow and easy for employers to avoid, particularly when dealing with low-wage employees who have little bargaining power and difficulty accessing legal representation.

Antidiscrimination law limitations on the employment-at-will rule are also less extensive and less effective than they seem at first glance. For example, Title VII famously creates an exception to employment-at-will insofar as it prohibits covered employers from taking adverse employment actions because of an employee's sex, race, religion, or national origin. The Americans with Disabilities Act, the Age Discrimination in Employment Act, and a host of state laws create similar antidiscrimination and anti-retaliation protections. In practice, however, antidiscrimination law is eroded by the background rule that employers can discharge workers for no reason at all, a fact that is consistent with the higher reporting rates of arbitrary or unfair dismissals among racial and ethnic minorities. When employees bring an antidiscrimination suit, they bear the burden of proof to show that illegal discrimination was the motivation for the employer's adverse employment act. Because employers are free to discharge workers for other arbitrary reasons or no reason at all, employees must defend against all such other reasons and employers can frequently offer a nondiscriminatory reason to escape liability (Estlund 1996, 1671–72). And the problem goes beyond the burden of proof. In a series of cases, the Supreme Court has interpreted antidiscrimination law narrowly in order to avoid encroaching on the employer's baseline prerogative to discharge workers arbitrarily (Bagenstos 2020; Estlund 1996, 1671–72; Corbett 1996).

The same limitations hold true for Section 7 of the National Labor Relations Act, which prohibits employers from terminating employees for engaging in union activity or other “concerted activity for mutual aid or protection.” Because of the burdens of proof and the background presumption of employment-at-will,



employers can easily hide the true motive for a retaliatory termination (Estlund 1996, 1671–72). Moreover, because remedies under the NLRA are so limited, employers are frequently willing to accept the costs associated with violating the law.

In short, as a result of employment-at-will's far reach into the law, employees are less protected from discrimination and retaliation than policymakers have intended (Estlund 1996, 1691).

OPPORTUNITIES FOR REFORM

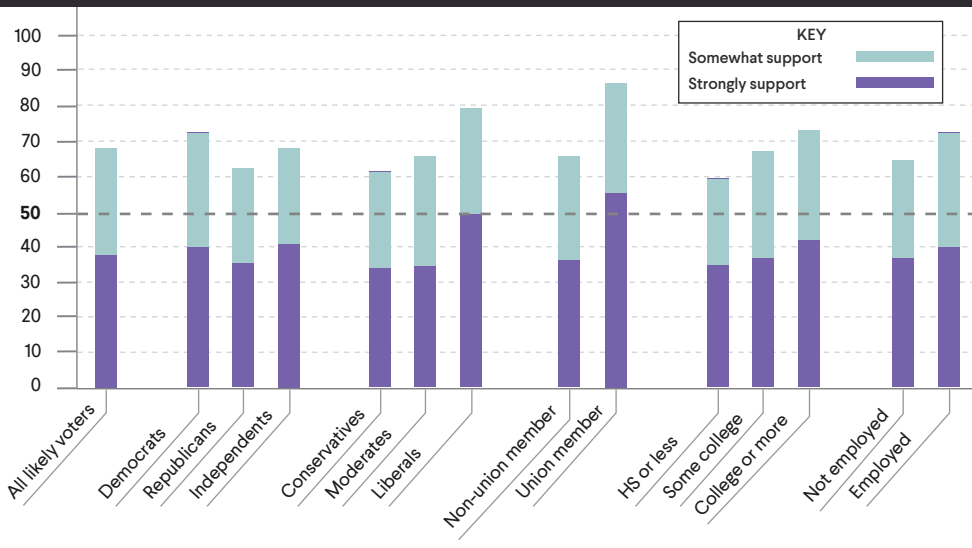
While at-will employment has long undermined workers' standing in the American workplace, we believe that now is an especially promising—and crucial—moment for enacting just cause termination rights for workers.

First, there is broad and deep bipartisan agreement among Americans that employers have too much power over firing their workers. Large majorities of respondents in an April 2020 Data for Progress survey indicated that they supported a just cause termination proposal. As Figure 1 shows, 67 percent of all likely voters, including 73 percent of Democrats and 64 percent of Republicans, said they would either strongly support or somewhat support a policy “preventing employers from firing workers for any reason other than legitimate work performance issues.” Majority support for just cause termination rights was also consistent across gender, age, education, race, and geography.

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FIGURE 1. SUPPORT FOR JUST CAUSE TERMINATION RIGHTS AMONG LIKELY VOTERS (APRIL 2020)



Notes: Source is April 2020 Data for Progress survey of 1,181 likely voters recruited from web panels (see Hertel-Fernandez 2020b for more details).

In addition to broad support for a just cause policy, Americans also believe that such a reform would improve workplace relations and workers' rights. An August 2020 Data for Progress survey of 1,239 likely voters probed what Americans thought the consequences of just cause reform would be. After describing the proposal, the survey asked respondents whether the proposal would “make workers more comfortable speaking up about workplace issues and problems to managers” and “make it harder for employers to discriminate against workers.” Majorities of likely voters—59 percent and 56 percent, respectively—agreed that just cause would have both effects on workers and employers. Crucially, that included large proportions of Democrats (68 percent for both) as well as Republicans (58 percent and 49 percent, respectively).

While we do not have consistent over-time polling data on approval of just case termination, the survey results suggest that Americans are especially attuned to the ways that at-will employment may undermine workers' ability to exercise voice around safety and health standards in the COVID-19 crisis. In the April 2020 Data for Progress poll, 82 percent of likely voters said they agreed with the statement that “employers should not be able to fire workers protesting or striking for health protections during the COVID-19 pandemic,” including 87 percent of Democrats and 78 percent of Republicans.



The popularity of this proposal indicates how ending at-will employment should be part of the ongoing policy response to the COVID-19 pandemic and potential future public health crises. As we have seen throughout the report, the US at-will employment model erodes worker rights. Workplace health and safety standards are no exception. Facing record-high levels of unemployment, many workers fear speaking up even if their jobs put them at risk of COVID-19 infection.

The case of the meat processing and packing industry illustrates the intersecting crises of worker safety and voice in the current pandemic. Even as meat plants became hot spots for infections and deaths, employers were slow to respond with protective equipment, social distancing rules, and regular workplace testing (Hughes 2020). The meatpacking industry is far from the exception. As the pandemic worsened, some companies were actively discouraging or even barring workers from wearing protective equipment on the job, and other employers have threatened to fire workers who speak out about the lack of protective equipment available to them (Carville, Court, and Brown 2020; Corkery and Maheshwari 2020). A nationally representative survey of essential workers conducted at the end of April 2020 found that fully a quarter of respondents had been told by their employer not to wear masks, gloves, or other protective equipment while at work (Hertel-Fernandez et al. 2020).

More recently, a number of large employers continue to bar workers from discussing COVID infections with one another or sharing information about weak safety standards with the public. A recent *Bloomberg Businessweek* review of OSHA complaints found that workers at Amazon, Cargill, McDonald's, and Target, among other companies, alleged that their managers prevented them from talking about coworkers' COVID cases, limiting their ability to understand the risk they face at their jobs and to organize collectively to demand stronger safety standards (Eidelson 2020). The same investigation found that employers have not just restricted discussion but also may have engaged in retaliation; over 600 whistleblowers have filed COVID-related retaliation complaints with OSHA against companies like Burger King, FedEx, General Motors, Halliburton, 7-Eleven, Tufts University, Walmart, and Warby Parker Retail (Eidelson 2020, see also Berkowitz and Thompson 2020).

These acts of retaliation are made possible by an at-will employment system in which the burden of proof rests on workers to prove that they were fired illegally. And because so much of US workplace regulation depends on workers to report suspected violations to officials, workers' reluctance to speak up about poor safety



and health conditions undermines efforts by local, state, and federal government to implement COVID-19 workplace rules. Until workers are relieved of the fear that they could be fired, demoted, or otherwise disciplined for speaking out, the policy response to COVID-19 standards in the workplace is unlikely to be effective. This puts workers—and broader communities—at risk of infection.

Recent research by Matthew Johnson, Daniel Schwab, and Patrick Koval (2020) backs up the intuition that greater job security—and thus worker voice—could contribute to safer and healthier workplaces in the pandemic. Studying protections against employer retaliation for workers' compensation claims and whistleblowing, the authors found that that these exceptions to employment-at-will reduced rates of serious workplace injuries. Equally important, the authors found that such protections mattered most in unionized workplaces. That should not come as a surprise given the important role that unions play in helping workers to recognize their legal rights and bring claims against employers who violate those rights through providing worker education and legal advice and representation (e.g., Weil 1991). The findings thus highlight the importance of worker protections, but also the necessity of pairing them with effective access to counsel, education, and organizing rights.

The good news is that many policymakers are attuned to the need to address the COVID-19 crisis in the workplace and are increasingly aware of the need to ensure that workers can speak out about health and safety problems. As of July 2020, at least five states had either considered or enacted new labor standards in response to COVID-19, with Virginia going the furthest to create new workplace safety rules through its statewide health and safety board (NCSL State Legislation Database; Rosenberg 2020). The COVID-19 crisis has thus helped expose the problems of at-will employment, and ending it could become a component of state and federal responses to the COVID-19 crisis. As we discuss in more detail below, while a new federal just cause termination law would be ideal, until such a national standard is in place, individual states can end at-will employment within their own labor markets.

More generally, a push for ending at-will employment fits well within broader progressive priorities and the current moment, with its growing worker movements and organizing efforts. As made clear in our preceding discussion, at-will employment undermines efforts at labor organizing because it leaves workers afraid to exercise rights at work and therefore is a crucial obstacle to reviving the labor movement. To the extent that an overhaul of labor law will be a part of legislative agendas, ending at-will employment is a critical component.



In a similar vein, recent national movements around sexual harassment and racial inequality have drawn attention to the ways that ethnic and racial minorities and women disproportionately suffer from discrimination and unequal treatment at work. At-will employment is implicated in these inequalities, too, as civil rights protections are undermined by the presumption of at-will termination. Enacting just cause termination legislation would thus speak to these national movements as well, by strengthening workers' protections against unfair or unjust treatment on the job.

Last, enacting just cause legislation could help to address the precarious and vulnerable position of immigrant workers, including undocumented workers. As the prior discussion of the meat processing industry illustrates, employers often take advantage of workers' fears of losing their employment-related visa or of deportation to drive down labor standards. While just cause employment would not solve the systemic problems with the immigration system, nor would it eradicate fears of deportation, to the extent that just cause can raise working conditions for all workers, immigrants included, it could boost standards for undocumented immigrants as well. Especially important is the fact that just cause legislation could help undocumented workers feel more confident in reporting or policing labor violations with a lower threat of retaliation against them by their employers.

For all these reasons, we think the time is ripe for policymakers to address at-will employment, and we are heartened by the recent passage in New York City of just cause legislation covering fast-food chain workers—the largest effort to reform at-will employment in the continental United States to date. In the following section, we consider how the federal government, as well as states and localities, could design similar reforms of their own.

HOW TO DESIGN A JUST CAUSE REFORM PROPOSAL

It is critical that any just cause statute be designed in such a way as to achieve the ultimate goal of protecting against wrongful discharge. The sole US state with a state law that limits at-will employment—Montana—illustrates the potential pitfalls that result when a bill is not well-designed. Legal experts tend



to agree that the Montana law provides protections to workers in theory but not in practice (Robinson 1996; Roseman 2008; see box above). This section tackles legislative design questions first by discussing the different levels of government at which a just cause statute or rule could be enacted or promulgated and then by considering such questions as the scope of the statute, the definition of just cause, the burden of proof, the forum for adjudication, and other procedural questions.

We summarize these design choices in Table 2 at the end of the section, indicating the different options and the pro-worker considerations for each one.

Level of government. Unlike much labor law reform, just cause or due process rights can be enacted at the federal and state *and* local levels. That is, federal law does not generally preempt state or local regulation in this area: The Supreme Court has made clear that states may enact minimum labor standards that “affect union and nonunion employees equally, and neither encourage nor discourage” collective bargaining processes under the NLRA.⁴

Nonetheless, federal legislation would be ideal for several reasons. First, the problems arising from employment-at-will are not limited to any particular jurisdiction, and a federal statute would protect greater numbers of workers than a state-by-state approach. Second, a federal just cause standard would prevent a race to the bottom, wherein less socially responsible employers choose to operate only in states without just cause rights. Third, because so many federal antidiscrimination and anti-retaliation provisions would be supported by a just cause requirement, legislating at the federal level makes sense (Stieber and Murray 1983, 336). And lastly, federal legislation would make it easier for companies with employees in multiple states to comply with the new standard.

As a first step, federal legislation responding to the COVID-19 pandemic could include just cause protections for industries comprised of essential and at-risk workers, including logistics and warehousing, food service, and care work. Legislation could also require that companies accepting relief money agree to provide just cause protections for their employees. Including just cause as part of a pandemic relief package would protect workers’ rights, while also advancing workplace health and safety standards and public health more generally (see Block et al. 2020; Block and Sachs 2020).

⁴ Metro. Life Ins. Co. v. Mass., 471 U.S. 724, 755 (1985); see also St. Thomas—St. John Hotel & Tourism Ass’n v. Virgin Islands, 218 F.3d 232, 246 (3d Cir. 2000) (upholding the Virgin Islands’ just cause statute against a preemption challenge). To reduce the risk of a preemption finding, state and local statutes should not be so comprehensive and far-reaching that they displace the possibility of collective bargaining. Some of the following recommendations therefore may be more appropriate for federal legislation.

Although federal legislation has advantages, state and local just cause reform is crucial as well. In the short term, state and local legislation may be easier to enact than federal legislation, particularly in progressive jurisdictions, and especially for particularly vulnerable classes of workers who are most affected by the intersection of the COVID-19 crisis and the consequences of at-will employment.⁵ Local and state experimentation with just cause rights can also provide an important way to document the social and economic effects of this protection on workers, firms, and local labor markets. And, over the long term, state and local legislation can enhance any federal baseline. That is, federal law should set a floor for just cause requirements, not a ceiling, much like Title VII does for antidiscrimination requirements. This kind of federalist approach can encourage experimentation and local tailoring while ensuring a strong baseline of protections for all workers.

In addition to enacting just cause protections through legislation, the federal executive and some state executives could establish a just cause rule for executive branch contracting, without new legislation. The president has broad authority and flexibility under the Federal Property and Administrative Services Act, 40 U.S.C. § 471 et seq. (the Procurement Act), to issue executive orders that advance economy and efficiency in procurement.⁶ Although the lack of widespread just cause rights in the US prevents definitive statements about the economic effects of such a change, research suggests that, if properly designed, just cause reform in the federal contract workforce could limit costly turnover, potentially creating a more stable and productive workforce (for evidence from the UK, see Marinescu 2009; later in the brief we explore more academic research on this question in detail). Moreover, it could also improve worker safety and health standards by making workers more comfortable speaking out about poor working conditions (for evidence from the US, see Johnson, Schwab, and Koval 2020). Just cause could thus be an especially important reform to federal procurement in sectors where workplace safety is essential, like defense or nuclear energy.

Definition of discharge and standard for just cause. The next questions to consider are which adverse employment actions should be prohibited and how to define just cause. In principle, a case could be made for providing employees with recourse not only against unjust termination but against all unjust discipline.

⁵ The ability of localities to enact just cause provisions will vary depending on the locality's home rule authority and the state's preemption rules (see Huizar and Lathrop 2019).

⁶ See, e.g., *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979); *UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003).

Such a broad scope would track most of the existing antidiscrimination and retaliation statutes, which prohibit any adverse employment action for bad intent. Nonetheless, for administrability reasons, drafters might prefer to limit just cause rights to discharge decisions. In any event, discharge should be defined to include constructive discharge—cases in which an employee quits because of mistreatment or a hostile work environment—indefinite suspension, and large reductions in hours as well as termination of employment.⁷

The question of how to define “just cause” is also critical. One option is for the statute to use general language that permits discharge only where there are “reasonable job-related grounds” or “legitimate business reasons.” For example, under Montana law, an employer’s decision to discharge an employee is unlawful where “the discharge was not for good cause and the employee had completed the employer’s probationary period of employment.” The law goes on to define “good cause” as “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,” but does not seek to enumerate what constitutes reasonable job-related grounds.⁸ The Model Employment Termination Act (META), which emerged in 1991 from a process organized by the Uniform Law Commission, also uses the general standard “good cause.” Official comments to the model bill offered more detail on what drafters intended “good cause” to constitute, defining it as “theft, assault, destruction of property, drug or alcohol use on the job . . . [and] excessive absenteeism,” as well as very broad offenses such as “insubordination” and “inadequate performance.” META commenters further explained that “good cause” was designed to incorporate industrial common law developed through arbitration (see St. Antoine 1994, 371).⁹

The general language approach may be appealing to some legislatures because it allows flexibility. However, even if supplemented with legislative reports and commentary, a very general standard leaves the adjudicators tasked with determining the circumstances of a dismissal a great deal of discretion and power. Given how sticky the employment-at-will default has been (see section 3), an approach that relies on open-ended text and therefore on subsequent judicial or administrative interpretation may result in very limited protections.

⁷ N.Y.C. City Council Int. 1415, 2019, Sess. 2018–2021 (N.Y. 2019); PHILA., PA, CODE §9-4701(3) (2020).

⁸ MONT. CODE ANN. § 39-2-903(5) (2019).

⁹ MODEL EMP. TERMINATION ACT § 1(4), 3(a), U.L.A. EMPLOY TERMS (2019) [hereinafter META].

A better option would be to define “just cause” or “good cause” with more specificity, enumerating what qualifies as just cause, what qualifies as *not* just, and, as important, what process is required for a termination to qualify as just. Industrial common law that has developed through decades of arbitral decisions under collective bargaining agreements and contracts provides a helpful resource for determining how to define just cause and required process.

The recent Clean Slate Project for Worker Power of Harvard Law School’s Labor and Worklife Program, which brought together hundreds of labor lawyers, scholars, policymakers, and organizational leaders, looked to industrial common law in developing its recommendation. Clean Slate recommends defining “just cause” as “failure to provide satisfactory work” including “regular attendance, adherence to reasonable work rules, a reasonable quality and quantity of work, and avoidance of conduct, either at or away from work, which would interfere with the employer’s ability to carry on the business effectively.” The project further recommends language requiring that discipline must further a legitimate employer interest including “rehabilitation of a potentially satisfactory employee”; “deterrence of similar conduct, either by the disciplined employee or by other employees”; and “protection of the employer’s ability to operate the business successfully” (Block and Sachs 2019). Similarly, the International Labor Organization Termination of Employment Convention provides that “[t]he employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service,” and goes on to list what is *not* a just reason for termination (Art. 4, 5).

Other examples for how to define just cause discharges come from Philadelphia, which in 2019 enacted just cause termination rights for parking lot attendants (D’Onofrio 2019; Keystone Research Center 2019);¹⁰ enacted legislation in New York City applying just cause rights to fast-food workers;¹¹ and laws in Puerto Rico and the Virgin Islands, two territories with long-standing just cause laws.¹² These laws are all specific as to what constitutes a just cause discharge, requiring, for example, the work rule at issue to have been reasonable and consistently applied before it can form the basis for a just cause discharge.

¹⁰ PHILA., PA, CODE § 9-4701(5); 9-4703 (2020).

¹¹ N.Y.C. City Council Int. 1415, 2019, Sess. 2018–2021 (N.Y. 2019).

¹² P.R. LAWS ANN. tit. 29, §§ 185a–m (2011); V.I. CODE ANN. tit. 24, §§ 76–79 (2020).



DEFINITIONS OF JUST CAUSE IN PHILADELPHIA, NEW YORK CITY, AND PUERTO RICO STATUTES

The Philadelphia parking lot attendant just cause statute defines a just cause discharge as “a discharge for a parking employee's failure to satisfactorily perform job duties or misconduct that is demonstrably and materially harmful to the parking employer's legitimate business interests.” In evaluating whether a discharge was for just cause, it instructs the fact finder to consider whether:

The parking employee violated the parking employer's policy, rule or practice;

The parking employee knew or should have known of the parking employer's policy, rule, or practice;

The parking employer provided relevant and adequate training to the parking employee;

The parking employer's policy, rule, or practice was reasonable and applied consistently; and

The parking employer undertook a fair and objective investigation prior to discharging the employee.

The recently enacted fast-food statute in New York City similarly defines just cause as “the fast food employee's failure to satisfactorily perform job duties or misconduct that is demonstrably and materially harmful to the fast food employer's legitimate business interests” and instructs the adjudicator to consider whether:

The fast-food employee knew or should have known of the fast-food employer's policy, rule, or practice;

The fast-food employer provided relevant and adequate training to the fast-food employee;

The fast-food employer's policy, rule, or practice was reasonable and applied consistently;

The fast-food employer undertook a fair and objective investigation; and

The fast-food employer utilized progressive discipline methods according to a written policy on such discipline, and the discipline issued to the worker was not more than one year before the purported termination.



Puerto Rico's just cause statute defines a just cause discharge as “not based on legally prohibited reasons and on a whim of the employer” and for “such reasons that affect the proper and regular operations of an establishment.” Those reasons include:

That the employee engages in a pattern of improper or disorderly conduct;

That the employee engages in a pattern of deficient, inefficient, unsatisfactory, poor, slow, or negligent performance (This includes noncompliance with the employer's quality and safety rules and standards, low productivity, lack of competence or ability to perform the work at reasonable levels as required by the employer, and repeated complaints from the employer's customers.); and

That the employee repeatedly violated reasonable rules and regulations established for the operation of the establishment, provided that a written copy thereof has been timely furnished to the employee.

Progressive discipline and notice. Progressive discipline requirements—which require graduated ranges of responsible responses to employee failures or misconduct—are an important part of a just cause statute to ensure that employers in practice respect just cause protections and to ensure that poorly performing employees have an opportunity to improve before being fired, unless their behavior poses an egregious or immediate threat to their coworkers or employer. Clean Slate, for example, recommends that the statute make clear that “discipline must be governed by fairness and due process, including industrial due process, industrial equal protection, requiring the like treatment of like cases, and individualized treatment where there are distinctive facts” (Block and Sachs 2019). The Philadelphia, Puerto Rico, and Virgin Islands laws, as well as the New York City law, all require employers to use progressive discipline. The Philadelphia and NYC laws also require the employer to provide a written explanation to the discharged worker of the precise reasons for the discharge.

In order to ensure that employers do not evade progressive discipline requirements—for example, by issuing multiple warnings to an employee in one day—laws might also specify that employees need adequate time to meet concerns raised by supervisors and to change behavior before the next step of discipline is taken. This is especially important because many low-wage employers are increasingly using automated systems for monitoring and disciplining employees,



which could mean that workers accumulate numerous warnings even in one day (see e.g., Guendelsberger 2019 on the example of Amazon warehouses, fast food, and call centers).

Implicit in the just cause language of the preceding statutes is the principle that workers' off-duty conduct does not form the basis for a discharge, unless there is demonstrable and material connection between the conduct and the employee's job performance or the employer's bona fide business interests. Protection for off-duty conduct could be made express in the statute.

At the same time, the statute can allow for differential treatment for egregious worker conduct. That is, progressive discipline requirements can make exceptions for egregious worker misconduct, including misconduct that poses a severe threat to fellow employees or other persons such as serious harassment, discrimination, or assault. Consistent with this principle, the Puerto Rican courts have generally required progressive discipline, but not in the case of very serious or dangerous employee malfeasance (Farinacci-Férnós 2013, 143).

Judicial interpretation. Even when a statute includes specific language defining just cause and requiring progressive discipline, however, many issues will still be left to interpretation by adjudicators. To that end, statutes can specify that judges must construe the statute liberally to fully protect employees from wrongful discharge, as does the Puerto Rican law (Farinacci-Férnós 2013, 133). The Puerto Rican statute also reinforces the just cause protections by making clear that discharges resulting from “the mere caprice of the employer or without any reason related to the orderly and normal operation of the establishment” are not permitted.¹³

Retaliation. It is important that just cause statutes specifically prohibit retaliation against workers for exercising the rights included in the statute. The Philadelphia statute contains such language. Forms of retaliation that are prohibited by that law including “threatening, intimidating, disciplining, discharging, demoting, suspending or harassing a parking employee; assigning a parking employee to a lesser position in terms of job classification, job security, or other condition of employment; reducing the hours or pay of a parking employee or denying the employee additional hours; and discriminating against a parking employee, including actions or threats related to perceived immigration status or work authorization.”

¹³ P.R. LAWS ANN. tit. 29, § 185b (2011).

Especially notable in that statute is the inclusion of actions or threats related to immigration status or work authorization, which would be important in ensuring that undocumented workers are able to take advantage of just cause rights and that employers do not use fear of retaliation against workers.

Business reasons for discharge. Typically, “just cause” is further defined to allow bona fide business reasons for discharge or layoffs, like discharges that occur because of the closure of an enterprise or reductions in staffing due to a decline in business. Some statutes state generally that discharges for bona fide business reasons are permitted, while others define what constitutes an acceptable business reason or economic reason. For example, the Puerto Rico statute permits discharge in the event of:

- “Complete, temporary, or partial closing of the establishment’s operations”;
- “Changes due to technological development of the establishment, and also due to changes in the type, design, or nature of the product manufactured or handled by the establishment or changes in the services provided to the public”; and
- “Reductions in payroll necessarily resulting from a reduction in the volume of production, sales or profits, whether anticipated or actually occurring at the time of the dismissal.”¹⁴

Those economic justifications track closely with the Philadelphia parking lot law, though that law goes even further to specify that economic justifications must be supported by the employer’s business records showing the closing, technological, or reorganizational changes resulted in a reduction of revenue or profit. To ensure that business reasons are not invoked to justify unjust discharge of workers, statutes can further specify that a discharge shall be presumed not to be based on bona fide business reasons where the employer hires another employee to perform substantially the same work within 90 days of the discharge.

Relationship to other causes of action and contracts. A just cause statute should make clear its relationship to other causes of action and to employment or union contracts. The Montana statute preempts all related common-law causes of action—that is, it prevents employees from bringing cases invoking traditional judge-developed rights like the common-law tort of defamation or intentional infliction of emotional distress. However, it does not preempt statutory causes of action; thus, employees can still pursue rights created by employment discrimination statutes, whistleblower statutes, or other legislation.¹⁵ The META

¹⁴ P.R. LAWS ANN. tit. 29, § 185b(d)–(f) (2011). (Farinacci-Férnós 2013, 142–43).

¹⁵ META, *supra* note 9, at § 2(c)–(e).



model takes a similar approach, extinguishing implied contract action and torts, but not statutory causes of action. The META model also does not prohibit employees from pursuing independent torts like assault or false imprisonment—that is, where facts exist separate and apart from the termination to ground the cause of action (St. Antoine, 374). The Puerto Rican statute leaves employees more options, allowing them to pursue common-law claims as well as statutory claims (Farinacci-Férnós 2013, 145), as do the Philadelphia ordinance and the fast-food NYC ordinance.¹⁶

The best approach in our view is not to preempt existing causes of action, as they all serve important functions, above and beyond just cause protection.¹⁷ In fact, some rights could be incorporated into a just cause statute—for example, by stating that a wrongful termination in violation of public policy or antidiscrimination law lacks just cause. In any event, maintaining statutory causes of action is critical given the long-standing, important, and distinct role played by federal statutes like Title VII and the NLRA, and numerous state antidiscrimination statutes. Without sustaining such independent causes of action, a new regime might not sufficiently protect workers against harassment, discrimination, or antiunion activity and would undermine the law's condemnation of discriminatory and retaliatory behavior. At the same time, a just cause regime might discourage employers from engaging in such discriminatory and retaliatory practices, reducing the need to bring such actions in the first place (Cf. McGinley 1996).

With respect to the relationship between just cause protections and other contracts, one approach is for the just cause statute to give way to any other written, negotiated agreements, but not to contracts of adhesion like employee handbooks that are written by one party and not subject to real bargaining. The Montana statute, for example, does not cover employment relationships that are governed by a collective bargaining agreement or by a written contract. However, a more protective approach would make the statutory scheme a floor above which unions and employers—or individual employees and employers—could negotiate and would not allow just cause to give way to written agreements. The risk of employers using their outsized bargaining agreement to eliminate just cause in written employment contracts makes this a preferred approach.

¹⁶ PHILA., PA, CODE §9-4700-10 (2020); N.Y.C. City Council Int. 1415, 2019, Sess. 2018-2021 (N.Y. 2019).

¹⁷ Of course, the extent to which preemption is even possible depends on which jurisdiction is enacting the law: While a federal statute could preempt state and local causes of action, a state statute could only displace the state's own law or laws enacted by localities within its jurisdiction.

Employer coverage and employee coverage. As a general matter, a just cause statute should be broadly inclusive of all private employers. It could also include public-sector employers. In any event, it should make clear that any exemptions of employers or employees are to be interpreted narrowly (see Farinacci-Férnós 2013, 135).¹⁸ Critically, the law should include industries, like agriculture and domestic work, that were historically excluded from employment laws, in part because they were populated by women and people of color. In addition, a just cause statute should cover all permanent employees, both full- and part-time, as is the case with many discrimination and retaliation statutes. META, by contrast, exempts those working 20 hours or fewer a week, which risks encouraging employers to structure hours to avoid coverage.¹⁹

While broad coverage is essential, some exemptions are worth considering. First, most employment statutes include an exemption for small employers, under the argument that small businesses are less able to accommodate the costs of regulation. META, for example, exempts those with five or fewer employees.²⁰ At the same time, research indicates that employees in relatively small firms have a significant need for protection. Workers are much more likely to experience employer wage and hour violations, for instance, in smaller firms than in larger ones (e.g., Bernhardt, Spiller, and Theodore 2013; Weil 2005). For these reasons, we believe that if just cause legislation were to include a size-based exemption, it should apply only to truly small employers.

Second, many employment statutes exclude supervisors, or at least upper management. These workers often have significant bargaining power and, as we have described with CEOs, are frequently able to negotiate their own written contracts that include just cause protections. META, however, does cover such workers, in part because employers preferred coverage under the just cause statute to allowing high-ranking workers to maintain common-law causes of action under tort and contract (St. Antoine 1994, 373). Moreover, if supervisors are excluded from a just cause statute, there is a risk that employers may misclassify some employees as supervisors to avoid dealing with just cause protections. The experience from other labor regulations, like federal overtime laws, indicate that employers regularly misclassify workers as managers, professionals, and supervisors to avoid these additional costs (e.g., Conti 2014). These experiences suggest the need for as expansive a definition of coverage as possible.

¹⁸ See Part 6 discussing the importance of law reform to limit misclassification and to hold joint employers liable.

¹⁹ META, *supra* note 9, at § 1(1).

²⁰ *Id.* at § 1(2).



Third, nearly all just cause statutes, as well as almost all collective bargaining agreements, include a probationary period, thereby exempting employees who are newly hired so that employers can determine if they will be a good fit for the firm. In a few statutes, the length of the probationary period is set by the employer. Montana law, for example, lets the employer set the probationary period but imposes a six-month probationary period as a default.²¹ Most other jurisdictions with a just cause statute and nearly all collective bargaining agreements, however, fix the maximum probationary period. The Puerto Rican just cause statute, for example, allows a probationary period of three months, which can be extended to six months if the secretary of labor and human resources allows it (Farinacci-Féernós 2013, 140). META sets the probationary period at one year.²² The New York fast-food measure sets the probation period at 30 days from the time of hire. The Philadelphia ordinance for parking lot workers has no probation period at all. Keeping the probationary period relatively short is important to prevent “dumping,” in which the employer hires workers and then discharges them right before just cause rights attach.

The statute should also include a provision to ensure that temporary employment is not abused. One option is to make clear that the statute applies to temporary workers if they are discharged for any reason other than the end of their tenure. The Puerto Rico statute provides an even more sweeping approach, stating that anybody hired as a temporary worker is presumed to be a regular employee, unless the employer proves by a preponderance of the evidence that there is a bona fide temporary work contract and that there is a substantive justification for hiring a person in that fashion, such as the need for a substitute for someone on sick leave or a seasonal worker (Farinacci-Féernós 2013, 137).

Last, just cause legislation should specify that its protections and, to the extent legally possible, its remedies, cover all workers, regardless of their immigration status. Doing so would be consistent with practice under the Fair Labor Standards Act, and would avoid the problem that exists under the NLRA, which has been interpreted by the Supreme Court not to allow backpay remedies for undocumented workers, thereby allowing employers to violate the law with near-impunity when undocumented immigrants are involved.²³ Providing just cause rights to workers regardless of immigration status would thus discourage

²¹ MONT. CODE ANN. § 39-2-904 (2019).

²² META, *supra* note 9, at § 3(b).

²³ *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). Because of federal preemption principles and the interplay of federal immigration law with state and local law, state and local laws may not be able to extend all remedies to undocumented workers.

employers from switching to undocumented labor to drive down labor standards. It would also boost working conditions and protections for undocumented workers: Individual workers in precarious immigration and economic conditions would be at less risk of unjust termination and would be more likely to report and enforce violations of labor standards knowing they could not be easily retaliated against for such actions.

Evidentiary standard; burdens; discovery. A just cause statute should elaborate who bears the burden of proof and how discovery of relevant evidence will work. The META proposal places the burden on the employee to prove lack of good cause by a preponderance of the evidence.²⁴ In contrast, most collective bargaining agreements put the burden on the employer, as do the Puerto Rican statute and the enacted NYC statute.²⁵ The problem with putting the burden on the employee is that it puts them in the difficult position of proving a negative—the absence of cause—and as we have described earlier, is part of the reason why existing statutes, like civil rights laws, fail to offer meaningful protection to workers (Arnow-Richman 2010, 20–21; Hirsch 2008). Accordingly, the strongest just cause regimes would place the burden squarely on employers, rather than workers. In any event, enabling discovery of evidence—where workers can request employer records or testimony—to correct information imbalances is essential. The META proposal, for example, allows discovery and requires the employer to present its case first—i.e., the employer bears the burden of production—even though the employee ultimately bears the burden of persuasion (St. Antoine 1994, 377).²⁶

Enforcement: where and when. The just cause statutes must also make clear how the statute will be enforced and where claims will be adjudicated. Options include private or state arbitration, a new or existing administrative agency, existing courts, or even new courts of specialized jurisdiction. When the META proposal was developed, this was one of the more controversial issues faced by drafters. Union and management advocates supported arbitration as the principal enforcement mechanism. Employee-side law firms preferred to retain the right to access the court system. Others preferred an administrative system, which would have government hearing-officers as the primary adjudicators (St. Antoine 1994, 377–79). The years since META was debated, however, have highlighted the dangers of

²⁴ META, *supra* note 9, at § 6(e). See also MONT. CODE ANN. §39-2-905 (2019) (requiring clear and convincing evidence for punitive damages).

²⁵ P.R. LAWS. ANN. tit. 29, §185k (2011) (the employer must establish just cause by a preponderance of the evidence); N.Y.C. City Council Int. 1415, 2019, Sess. 2018–2021 (N.Y. 2019) (“[T]he fast food employer shall bear the burden of proving just cause by a preponderance of non-hearsay evidence in any proceeding brought pursuant to this chapter.”).

²⁶ META, *supra* note 9, at § 6(e).

private arbitration as a dispute resolution system in the nonunion context (e.g., Colvin 2018) and the importance of private rights of action for vindicating worker rights (Kahlenberg and Marvit 2012).

The most effective enforcement of just cause rights occurs in unionized workforces where workers have a collective voice and access to representation. Accordingly, just cause reform should be accompanied by broader labor law reform that makes it easier for workers to organize. But even absent widespread unionization, design choices can help produce more effective enforcement of just cause rights. A mixed system in which agency enforcement and private civil actions are both available is likely the strongest approach. Under such a system, the chosen governmental agency has power to issue rules and regulations necessary to administer and enforce the statute, as well as the power to adjudicate claims. The Department of Labor (DOL) is likely the most logical choice at the federal level; at the state level, the state DOL might make the most sense, but the Unemployment Insurance (UI) agencies might also be the appropriate enforcers, given their experience adjudicating questions of cause in termination. Indeed, state UI agencies often operate in a similar manner to a just cause regime in that they require employers to demonstrate proof that a worker was fired for cause to deny a benefit claim.²⁷ An advantage of an administrative approach, rather than one that rests solely on the court system, is that it could help ensure access to protection even for low-wage workers who might have difficulty securing adequate private legal representation.²⁸ To function effectively, however, the agency must be adequately funded; it must operate quickly and efficiently; and it must enable workers to access its procedures without a lawyer (or with a government-provided lawyer) and without paying fees.

In addition to enabling a government agency to enforce the law throughout a particular jurisdiction, a just cause statute might permit employees to also pursue a civil action even if a governmental agency chooses not to—that is, employees would have what is known as a private right of action. Ideally, a statute would also allow for qui tam actions, in which a private party (called a relator) brings an action on the government's behalf to enforce the statute. The government, not the relator, is considered the real plaintiff. If the government succeeds, the relator receives a share of the award. Such systems encourage vindication of rights even

²⁷ Of course, if UI agencies were given these additional responsibilities, significant new investment in the UI system would be required (see e.g., Simon-Mishel et al. 2020).

²⁸ Any federal administrative adjudicative scheme would need to be designed consistent with the limitations on Article I courts.

in worksites where workers may have insufficient resources to pursue their own claims. Relatedly, the statute should make it possible for low-wage workers to obtain representation—for example, through attorney’s fee and cost provisions, new funding for dedicated legal services, or other mechanisms. A qui tam system in some ways offers the best of both worlds between government administration and use of the courts: On the one hand, government agencies can establish a baseline level of protection, and on the other, worker organizations and legal representatives can provide additional representation where the state lacks capacity or resources. But low-cost arbitration can be a successful model as well, as long as sufficient protections exist to ensure fair and equitable procedures that guarantee timely relief.²⁹ Whichever procedures are chosen, they must be attuned to the inherent disadvantage that employees have in bringing these claims and should ensure that procedures enable even low-wage employees, lacking resources, to pursue claims.

Further, to make sure employees know about their rights, employers should be required to post a conspicuous notice of the statute’s provisions and to provide new hires with written notice of their rights, as they do with numerous other employment statutes. Government agencies might also work closely with worker organizations to ensure worker knowledge of their just cause rights (Fine and Gordon 2010; Crawford and Tejani 2020). Employers should also be required to keep sufficient records documenting their compliance with any just cause law. In addition, the statute of limitations should be specified and of sufficient length to give workers time to find representation and assemble their case, but not so long as to create uncertainty for employers. Typical statutes of limitations for similar kinds of claims range from one year to three years.³⁰

Remedies and fee shifting. Remedies must be meaningful for the statute to work. Research on the effect of other employment statutes demonstrates that without sufficient penalties, little compliance occurs (e.g., Kleiner and Weil 2012). The NLRA, for example, which provides for backpay (minus wages earned since termination) and reinstatement—but no penalties or compensatory or punitive damages—has low levels of compliance.³¹ META’s proposed penalties were similar to the NLRA’s. For a prevailing employee, META provides for reinstatement, with or without back pay, and for attorney’s fees in almost all cases. When reinstatement

²⁹ See, e.g., N.Y.C. City Council Int. 1415, 2019, Sess. 2018–2021 (N.Y. 2019)

³⁰ Among just cause statutes, for example, Puerto Rico’s statute of limitations is three years; Montana’s is one year; META’s is 180 days (Farinacci-Férnós 2013, 155).

³¹ Requiring workers to mitigate damages by finding new employment, as the NLRA does, is problematic both because it reduces the incentive for employers to comply with the law and because it can be so difficult for fired workers to find new employment.



is impracticable, a severance payment may be granted up to a maximum of 36 months. Compensatory and punitive damages are not available (St. Antoine 1994, 375).³² The Montana statute is slightly stronger: It allows damages of lost wages and benefits of up to four years from discharge; it also allows for punitive damages, but only if an employee can show evidence of actual fraud or malice in violation of public policy (see Hirsh 2008, 101).³³

Most other employment statutes and common-law causes of action afford more substantial remedies and may offer a better model for a new just cause statute. Title VII, for example, allows back pay and reinstatement, but also compensatory damages, which pay the plaintiff for out-of-pocket expenses caused by the adverse employment action (such as costs associated with a job search or medical expenses) and compensate them for any emotional harm suffered (such as mental anguish, inconvenience, or loss of enjoyment of life; albeit with caps). Title VII also provides that punitive damages may be awarded to punish an employer who has committed an especially malicious or reckless act of discrimination.

Like Title VII, the Fair Labor Standards Act provides for more than back pay: It allows for liquidated damages (equal to back pay) for willful conduct and significant civil penalties for certain kinds of violations. Some state wage laws provide for treble damages, as well as compensatory and punitive damages, civil penalties, and injunctive relief at least in cases of egregious or repeat violations. When governmental agencies pursue cases, criminal penalties—and injunctive relief for willful, repeated, or particularly egregious violations—are often also permitted. Experience with these statutes demonstrates that, in addition to back pay and reinstatement, the availability of damages, fines, penalties, and injunctive relief, in appropriate cases, plays an important role in encouraging employers to comply with the law (see especially Galvin 2016). In addition, attorney's fees for a prevailing plaintiff are critical to enable effective representation. Attorney's fees and strong remedies are particularly important in low-wage and nonunionized workforces, where workers often lack power to enforce their rights (see e.g., Farhang 2010; Frymer 2007). Finally, as we discuss further below, any concerns about possible negative economic consequences resulting from such remedies should be assuaged by the fact that a just cause statute would not prevent employers from demoting, disciplining, or firing workers who fail to meet performance standards—or from laying off workers during periods of economic distress.

³² META, *supra* note 9, § 7 (2019).

³³ MONT. CODE ANN. § 39-2-905 (2019).



TABLE 2. DESIGN CONSIDERATIONS FOR JUST CAUSE REFORM

Design Feature	Options	Pro-Worker Considerations
Level of government	<ul style="list-style-type: none"> • Local • State • Federal legislation • Federal contract workforce (by executive order) 	Federal legislation would reach more workers and prevent employers from leaving (or threatening to leave) jurisdictions with just cause protections in place; local and state measures would permit more experimentation (but some limits exist on federal and state capacity to regulate).
Definition of discharge and standard for just cause	<ul style="list-style-type: none"> • Inclusion of constructive discharge, discipline, large cuts in hours alongside conventional discharges • Specificity of types of discharge (both regarding employee behavior and economic/business reasons) • Specificity of process of discharge permitted (requiring written reasons; progressive disciplinary methods) 	More specificity provides more clarity to workers and less discretion for employers and arbitrators; covering employer actions that do not constitute a conventional discharge but that lead an employee to quit their job (e.g., substantial discipline, large cuts in hours, etc.) will prevent employers from attempting to get workers to quit on their own to escape just cause protections.
Relationship to common law, statutory protections	<ul style="list-style-type: none"> • Preemption (or not) of common law, statutory protections 	Just cause protections should ensure that workers retain rights available under other statutes and long-standing common law to preserve alternative remedies and venues.
Relationship to other contracts, collective bargaining agreements	<ul style="list-style-type: none"> • Give way (or not) to existing employment contracts, collective bargaining agreements 	Just cause protections should provide a floor above which employers and workers can bargain to ensure that employers cannot use their labor market power to drive down terms of employment below just cause standard.

TABLE 2. DESIGN CONSIDERATIONS FOR JUST CAUSE REFORM (CONTINUED)

Design Feature	Options	Pro-Worker Considerations
Cover of occupations, sectors, workers	<ul style="list-style-type: none"> • Cover public-and private-sector employees in all sectors • Cover all employees or just full-time/near full-time employment • Cover or exempt supervisors • Cover all firms or exempt smallest firms • Cover workers regardless of immigrant status 	Just cause policy should cover the broadest swath of the workforce to raise standards for the maximum number of workers and to prevent businesses from switching between types of workers or establishment structures to avoid regulation; it should also cover all workers regardless of immigration status.
Probationary period	<ul style="list-style-type: none"> • Set in statute or determined by employer • Length of period 	Allowing employers to set probationary periods will permit employers to weaken protections; in general, longer periods will permit employers to escape regulation and may encourage employers to “dump” workers right before just cause provisions kick in.
Treatment of temporary workers, independent contractors	<ul style="list-style-type: none"> • Cover or exempt independent contractors, temporary workers 	To prevent outsourcing of work to independent contractors or temporary workers, just cause protections should apply to temporary workers or independent contractors doing work typically performed by traditional employees.
Evidentiary standards and discovery	<ul style="list-style-type: none"> • Employer burden of proof/ employee burden proof • Employer burden of production combined with employee burden of proof • Discovery of relevant evidence 	Placing the burden of proof of a discharge on employers (as opposed to employees) recognizes the imbalance of labor market power and information between employers and employees.

TABLE 2. DESIGN CONSIDERATIONS FOR JUST CAUSE REFORM (CONTINUED)

Design Feature	Options	Pro-Worker Considerations
Enforcement: where and when	<ul style="list-style-type: none"> • State, federal courts • Arbitration • Administrative enforcement • Statute of limitations 	<p>Venue needs to be chosen with an eye to several pro-worker considerations, including possibilities of capture by business interests (as with arbitration outside the union context), experience and training in workplace issues (which sometimes is lacking in state and federal courts), and timely adjudication; choice of venue may dictate other design considerations, such as specificity of just cause provisions. Providing a private right of action—i.e., a right of the employee to go to court—as well as agency enforcement, helps ensure robust enforcement. The statute of limitations must be specified—and long enough to allow workers time to find representation to pursue their case.</p>
Remedies and fee shifting	<ul style="list-style-type: none"> • Size of remedies; reinstatement • Attorney’s fees payment for employee 	<p>Larger financial remedies and reinstatement will be necessary to make it financially sensible for businesses to follow just cause protections (especially for low-paid workers); payment of attorney’s fees is necessary for workers to make litigation affordable for all low-income workers.</p>

ADDRESSING ARGUMENTS AGAINST ENDING AT-WILL EMPLOYMENT

Having established what reform of at-will employment could look like at the federal, state, and local levels, we now turn to addressing common objections to our proposals.

Shouldn't we leave workers to negotiate the terms of their employment relationship on their own?

The classic defense of the at-will employment doctrine is that the government should leave workers and businesses alone to negotiate the terms of their own employment contracts. Left to their own devices, workers and managers can hammer out agreements that fit their own individual preferences. Yet this vision of a free, open, and fair individual exchange does not square with the contemporary labor market (e.g., Bowles and Gintis 1990; Edwards 1993)—and it is very questionable whether it ever did (e.g., Naidu and Yuchtman 2016). Labor markets are rife with market failures that undermine the assumption that workers and managers can engage in free exchange with one another.

First, workers lack full information about the rights they hold under federal and state law. As past survey work has made clear (Freeman and Rogers 2006; Hertel-Fernandez 2020a), majorities of workers overstate the legal rights they hold in practice, thinking that many employer practices that are legal are in fact illegal unless they have experienced the effects of at-will employment themselves. This means that workers are not actually able to negotiate terms of their employment that they would want (Kim 1997–1998). The picture is even murkier for workplace-related rights. Most private-sector businesses do not publicize employment rules and practices, and employee handbooks—which spell out employer rules—are often confidential. As a result, workers are not likely to know what standards are in place in a particular business until *after* they start work.

These informational asymmetries are compounded by the fact that workers and managers are not bargaining on equal terrain. On a fundamental level, for all but the smallest businesses, employment decisions are far more consequential for workers than they are for managers. For workers, gaining or losing a job can mean an enormous difference in their economic livelihood, while for managers hiring or firing an individual worker is much less economically significant. While there may be some workers with exceptional bargaining power relative to employers—perhaps because



of market demand for specialized skills—workers generally tend to enter the labor market at a structural disadvantage to employers. That means that even if workers had perfect information about their workplace rights, they would face a difficult time negotiating for those rights with employers. Reflective of this asymmetry, most employers do not negotiate individual contracts with each worker with varying levels of rights and protections. Instead, most workers face a standardized “take-it-or-leave-it” package of workplace rights and policies (Edwards 1993, chapter 3).

In addition to these long-standing features of US labor markets, there is good reason to think that employer labor market power has increased in recent decades, further undermining workers’ abilities to negotiate better working conditions with their employers (e.g., Weil 2014). Policies governing labor standards, such as the minimum wage, have been eroded, weakening workers’ position in the labor market. Most importantly, labor unions, which raise standards for both unionized and nonunion workers alike, have declined in strength and coverage in the face of unfriendly policy and legal changes. The erosion of these labor market institutions is compounded by high levels of baseline employer power in the labor market (what economists have dubbed “monopsony power”; see e.g., Naidu, Posner, and Weyl 2018).

These factors together belie the idea that workers have easy exit options to leave their jobs and mean that the typical worker is less likely to be on equal ground with their employers—and therefore not able to negotiate for the just cause rights that workers might value. As we indicated in previous sections, multiple pieces of survey evidence suggest that these concerns are not just theoretical. American labor markets are failing to deliver the protections that workers want: Large majorities of Americans want workers to have just cause termination rights, yet clearly workers are not receiving these rights from their employers.

Especially telling, we think, is the fact that when workers do have bargaining power and more knowledge about workplace rights, they push for just cause termination rights. Consider the case of unionized workers, who tend to make just cause rights one of their central demands in labor contract negotiations. One analysis of a random national sample of first union contracts in the 1980s and 1990s found that 71 percent of private-sector labor agreements had a just cause clause for discipline and dismissal (Juravich, Bronfenbrenner, and Hickey 2006, 94). An even higher percentage of private-sector contracts—99 percent—included explicit grievance procedures creating third-party review of employer decisions around discipline and terminations.

Consider, as well, workers with a great deal of bargaining power at the top of the corporation: CEOs. As we discussed earlier, the vast majority of CEO contracts are not at-



will even as their rank-and-file workers are subject to at-will standards. Instead, these executives tend to negotiate contracts that either stipulate specific grounds on which they can be fired for cause or else include provisions that compensate CEOs if they are fired without good cause (Schwab and Thomas 2006, Tables 3 and 5).

Would just cause termination rights undermine the organizing power of unions by taking away a key benefit that unions provide?

A second concern starts from the premise that ending at-will employment will make labor unions less appealing for private-sector workers, thereby weakening worker power. It is certainly true that just cause termination rights are an important part of most union contracts, as we saw above. It is also true that labor organizers often use the existence of at-will employment as an argument in favor of unionization.³⁴

While recognizing that the status quo of at-will employment certainly makes unionization more valuable for private-sector workers, we tend to think it is unlikely that just cause termination rights would weaken unions. If anything, ending at-will employment should bolster worker power, including union power. The experience of the public-sector labor movement is instructive: In most states, public-sector workers enjoy civil-service termination rights that afford some degree of just cause protection. This is true whether workers are in a union or not—yet many government employees still join their unions, and membership rates are generally higher in the public sector than in the private sector. Public-sector unions still offer other valuable services and benefits to potential members, such as additional legal support, training and professional development opportunities, and political voice (see e.g., Hertel-Fernandez and Porter 2020).

Even more importantly, the “no-holds barred” approach private-sector businesses take to oppose union drives means that fear of retaliation and dismissal is a mounting obstacle to successful unionization. Although it is illegal for employers to threaten, discipline, or dismiss workers for attempting to unionize, many employers still engage in these practices given the weak and slow remedies afforded workers by the National Labor Relations Act (e.g., Bronfenbrenner 2009; McNicholas et al. 2019). A just cause termination regime would remove these illegal but often effective tools for employers to suppress unionization. In making union and nonunion employers alike subject to the same just cause standards, our proposal might also help dampen employer opposition to unions, in the same way that raising other labor standards makes unionization somewhat less threatening to businesses (similar arguments have been

³⁴ See UAW n.d.

made about sectoral workplace standards, e.g., Andrias 2016, 2019; Dimick 2014). In addition, just cause proceedings could provide an opportunity for unions to represent workers before or during an organizing campaign to show how helpful it can be to have a union.

Beyond aiding unionization drives, just cause termination rights could support already-recognized unions, too. Under variations of the proposed statutes we described above, unions could be free to institute tighter standards or their own grievance procedures apart from those codified in public policy—so long as these standards were at least as protective as those in statute. This floor would let unions tailor their just cause protections to the specific needs they face with particular employers and industries. And to the extent that unions decide to simply work within the public policy standards for just cause, it could relieve unions of the costs associated with running their own internal processes for addressing unfair discipline or dismissal. In short, our proposal gives unions more, not less, latitude for protecting workers' rights and building worker power.

How do just cause termination rights affect workers who are not traditional employees in the increasingly fissured workplace?

A third concern is that our proposal might only be relevant for workers fortunate enough to find themselves in traditional employment relationships. As businesses seek to avoid legal and financial liabilities associated with labor and employment rights (Weil 2014), many firms are misclassifying employees as independent contractors or contracting with other firms to provide services that were once performed in-house. Workers continue to perform the same duties for businesses, but employers have been able to evade their responsibility to comply with minimum wages, overtime regulations, and a host of other workplace protections. The misclassification of workers, along with increasing reliance on outsourcing, franchising, and temporary agencies, has produced a “fissuring” of the workplace that drives down labor standards and worker power.

By increasing the costs of termination, just cause protections might encourage firms to shift even further to alternative employment arrangements that are not covered by just cause rights. Indeed, there is evidence to suggest that firms responded to the increasing wave of state exceptions to at-will employment in the 1980s and 1990s by shifting more employment activity to temporary help agencies to minimize their legal liability (e.g., Autor 2003). As a result, these common-law exceptions may have created the “worst of both worlds” from the worker perspective. These exceptions encouraged



employers to move away from traditional employment relationships, yet as we discussed above, the substantive protections offered by the exceptions are flimsy or nonexistent in practice for most workers.

To address this concern, just cause termination rights ought to be paired with broader reform of labor and employment law that addresses the fissuring of the workplace, including by making it easier to hold companies liable as joint employers with their temporary agencies, subcontracted employers, and franchises, and by making it harder for companies to misclassify workers as independent contractors. For example, under the so-called “ABC” approach, workers would be classified as independent contractors only if: (a) they are free from the control and direction of the hiring entity in connection with the work's performance, both under the contract and in fact; (b) the worker performs work that is outside the usual course of the hiring entity's business; and (c) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed. This test follows the model of California's AB5 law, which develops a robust standard to prevent worker misclassification (e.g., McNicholas and Poydock 2019).³⁵ Another approach is the ABC test, but with a construction that focuses on factors, such as the ability to set price, that are most indicative of the types of workers who are economically independent or in need of workplace protections (Goldman and Weil 2020). Alternatively, in the absence of more comprehensive misclassification legislation, the just cause statute itself could expressly apply to workers who qualify under the ABC test or its variant, in order to help discourage employers from simply reclassifying traditional employees as independent contractors to avoid the just cause protections.

Would just cause termination prevent employers from firing workers who harass others?

A fourth concern relates to how just cause rights intersect with issues of workplace harassment, especially harassment on the basis of sex, gender, race, and ethnicity. Would just cause rights protect workers accused of harassment, making it harder for employers to quickly remove such offenders from the workplace?

The first thing to note is that at-will employment represents an important obstacle to protecting workers against civil rights violations, as we saw previously, and as is exemplified vividly in many of the accounts of assault and harassment shared as part of the recent wave of the #MeToo movement. In many #MeToo stories, people—mostly women—recounted how they were reluctant to pursue legal action against their harassers for fear of retaliation from their managers or supervisors who were either complicit in the abuse or were the harassers themselves. Instituting just cause rights

³⁵ After companies like Uber and Lyft mobilized in opposition to employment rights for their workers, AB5 was recently amended by ballot proposition so that the ABC test no longer applies to app-based transportation and delivery services, but the law otherwise remains in force.

will therefore represent an important step in expanding workers' protections *against* harassment. Nevertheless, harassment and mistreatment of coworkers represents a serious consideration and warrants explicit treatment in legislative language enacting just cause protections.

As we describe in our section on the legislative definition of just cause dismissals, policymakers ought to make clear that employers can terminate or discipline an employee immediately for especially egregious failure or misconduct, including misconduct that poses a threat to other workers, such as harassment, discrimination, abuse, or assault. It would be important for policymakers to make clear that this provision is not a backdoor route through which employers can reinstate at-will employment nor a clause that employers could use as pretext for firing workers for other protected reasons. To that end, employers should be required to document the circumstances surrounding the egregious conduct, and they should bear the burden of proof in establishing the evidence necessary for that dismissal. Together, the combination of these provisions would go far in ensuring that employers retain the ability to quickly dismiss workers who pose a genuine threat to their coworkers while also protecting workers from arbitrary decisions by managers.

Would just cause termination cause undue administrative burdens on employers?

A fifth concern is that a just cause termination regime would require employers to develop and maintain performance standards and records for each employee. When a firm hires a worker, the firm would need to explicitly articulate that employee's job responsibilities and share those expectations with the worker (including updating those expectations as they might change). Over time, the firm would also need to evaluate employee performance and share those evaluation results along with plans for improvement. Those materials would then become the basis for managerial discipline or dismissal cases. Given the standards of evidence we described in our proposal, employers would need to document either a consistent pattern of poor performance or a sufficiently egregious worker violation of company policy to justify discipline or dismissal.

It is true that our proposal would require some employers to invest in more record-keeping, evaluation, and ongoing communications with workers about their job duties and performance. At the same time, these are functions that are already best practice for many employers and recommended by professional associations of HR managers to avoid current legal liabilities (e.g., Feffer 2017). To the extent that a just cause termination statute encouraged more employers to adopt these practices, it could have beneficial effects on both firms and workers alike (e.g., Appelbaum et al. 2001; Arthur 1994; Huselid 1995).



Would just cause termination have negative economic consequences for employment and productivity in US labor markets?

Addressing the question about new employer responsibilities for record-keeping is closely related to a final concern: that making it costlier to fire or discipline workers will make businesses less efficient and therefore hurt employment and productivity. The first thing to note is that nothing in the just cause statute would prevent employers from demoting, disciplining, or firing workers who fail to meet performance standards, or from laying off workers during periods of economic distress. These managerial prerogatives will remain in place. The only difference is that employers will need to document that such decisions were made either because of economic pressure or because of legitimate performance issues.

The behavior of private-sector firms suggests that just cause rights are not a barrier to corporate innovation, leadership, or flexibility. As we have seen, the top executives of major publicly traded companies continue to negotiate contracts that overwhelmingly reject the at-will standard. If at-will employment were necessary for flexible labor markets, we ought to see shareholders pushing corporate boards of directors to abandon such CEO contracts—but we do not.

Nevertheless, the proposals we lay out in this report would expand just cause rights well beyond corporate C-suites. The longer-run economic effects of such broad changes in private-sector employer practices are unclear. To the extent that employers incur greater costs for hiring a worker with a higher standard for termination, employers may choose to hire fewer workers.³⁶ At the same time, those negative economic effects on firms may well be offset if there is less worker turnover—reducing the costs associated with hiring, onboarding, and training—and to the extent that workers with longer tenures are more productive.

In a similar vein, where firing becomes costlier, employers may be more careful with the workers they do hire. This may also increase worker and firm productivity.³⁷ In

³⁶ Some studies suggest that as states recognized more exceptions to at-will employment, employers responded by employing fewer workers, especially for the implied contract exception to at-will employment (Autor, John J. Donohue III, and Schwab 2004, 2006), and that passage of the implied contract exception to at-will employment may have increased labor costs and decreased firm profits (Bird and Knopf 2009).

³⁷ There is some research suggesting that state-level adoption of exceptions to at-will employment reduced employment flows (Autor, Kerr, and Kugler 2007). More rigorous academic research examining changes in dismissal standards within countries with labor markets similar to the US identifies such an effect. A careful analysis of a change in UK just cause standards that increased job security for workers with one to two years on the job found that the reform reduced the odds of termination for affected workers (Marinescu 2009). Just as importantly, the reform also reduced the odds of firing for workers with less than a year of tenure, suggesting that British employers responded to the law by improving their hiring practices so that they needed fewer terminations. In addition, some studies examining the state-level adoptions of exceptions to at-will employment find positive effects on innovation and entrepreneurship, as measured by patent citations and startup employment (Acharya et al. 2014) as well as increased employment in high-skill occupations (MacLeod and Nakavachara 2007).

addition, our earlier discussion of the costs of at-will employment stressed how fear of job loss or discipline discourage workers from raising issues and problems with their employers. To the extent that increasing worker voice might boost firm productivity (e.g., Freeman and Medoff 1984; Kochan 2005; Kochan and Kimball 2019) by improving communication and responsiveness between workers and managers, just cause might also increase firm productivity. Lastly, greater employment security might support labor markets where workers need to invest in firm-specific skills (Hall and Soskice 2001; MacLeod and Nakavachara 2007; Thelen 2004). These competing considerations make it challenging to make a straightforward theoretical prediction about the economic effects of a policy shift.

What is more, all of these economic effects of just cause reform hinge on the nature of labor market competition present in the United States. Where there is more employer power to set workers' wages and working conditions—that is, monopsony power—present in the labor market than previously appreciated, just cause termination might not carry the negative consequences otherwise assumed under more competitive labor markets. A burgeoning literature in economics suggests that US employers have a great deal of labor market power—much more than previously anticipated—and that this power has been magnified by the erosion of countervailing labor market institutions, like robust labor standards and a vibrant labor union movement (e.g., Naidu, Posner, and Weyl 2018).

There are thus unfortunately no easy or direct empirical comparisons to our proposals. Although union contracts often include just cause provisions, it would be a mistake to equate the effect of unions with the effect of a new just cause employment statute because unions have many other effects on workers and employers. Similarly, while public-sector workers enjoy just cause provisions, the context of government employment is sufficiently different from private-sector employment so as to complicate a clear parallel. And while nearly all other peer countries have just cause regimes, those countries also have important differences in other aspects of their labor markets and broader political economies.

A large empirical literature has sought to identify the effects of employment protection on economic outcomes, using variation across and within countries (e.g., Amable and Mayhew 2011; Belot, Boone, and Van Ours 2007; OECD 2016). Existing studies offer very different conclusions, with some pointing to a sharp trade-off between unemployment and employment protections and others finding no effect.

One helpful intervention is a recent high-quality meta-analysis of 75 past studies of employment protection and unemployment (Heimberger 2020). That meta-analysis

could not reject the hypothesis that the average effect of employment protection on unemployment is zero. As the author explains, “there is no robust evidence for an overall adverse impact of employment protection on unemployment . . . In general, employment protection seems to be less important as a factor for explaining unemployment than is often believed” (Heimberger 2020). Instead, the effect is likely to vary depending on the nature of individual labor and product markets in a country, the design and enforcement of employment protections, and their interaction with other aspects of a country’s political economy. With that in mind, what we can say is that countries with political economies broadly similar to that of the United States—like the United Kingdom and Australia—have just cause standards for the dismissal of private-sector workers and maintain rates of unemployment and economic growth comparable to those in the United States. These comparisons suggest that just cause termination does not preclude healthy labor markets, economic innovation, and productivity. These comparisons—and the lack of consistent evidence—also point to the importance of policy experiments within the United States: for instance, at the local or state level, or across particular sectors or occupations that could provide a firmer empirical foundation for federal just cause reform.

CONCLUSION

At-will employment occupies a peculiar position in the American economy. On the one hand, it remains the bedrock of the legal relationship between workers and employers. Yet despite the enormous—and detrimental—implications that at-will employment carries for workers and for society more generally, the at-will standard is not embodied in any law passed by the federal government. Equally strange is that most workers in the United States are unaware of the scope of the at-will employment standard until they encounter its effects on their own lives. But when they are informed about the reach of at-will employment, large majorities of Americans from across the partisan divide agree that it is unjust and support its replacement with a just cause standard.

We think the time has come for elected officials to pass legislation that defines the scope of workplace power in the ways preferred by most workers. Such reform, whether at the local, state, or federal level, would play an immediate role in advancing public health in the ongoing COVID-19 crisis. Over the longer run, it would deepen our country’s commitment to economic dignity—and democracy.



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