ARTICLES

SENSIBLE JUST CAUSE

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ABSTRACT

At-will employment, which gives companies the legal right to fire employees for any reason at all, has allowed employers to abuse the working relationship. Companies face relatively few legal repercussions for this type of worker mistreatment. The legitimate fear of retaliation prevents many workers from complaining, and employment cases are notoriously difficult to prove. Given the inherent weakness in employment law, this Article argues that a worker must not be discharged unless the company can establish just cause to support that termination. The standard developed here—sensible just cause—would provide employees protection from discharge in a workable way, carefully balancing the employment protections offered against the flexibility businesses need to effectively manage their workforce.

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INTRODUCTION

Worker mistreatment has reached unprecedented levels in the last few years. The numerous studies conducted during the #MeToo movement clearly establish that sexual abuse and hostile activity are an ongoing part of workplace culture.[1] Retaliation for complaining of this unlawful conduct persists, and litigation in this area rarely makes it to trial.[2]

Similarly, employer misconduct during the pandemic demonstrates a corporate disregard for the way workers should be treated. This includes an employer's failure to recognize that workers need to attend to parental responsibilities, an unwillingness of businesses to allow workers to adhere to doctor-ordered quarantine measures, and even express corporate retaliation against those raising legitimate health-related issues in the workplace.[3] Some of the more egregious examples are cold and calculating, such as the well-publicized case of management at a Tyson Foods processing plant establishing "a cash buy-in, winner-take-all betting pool for supervisors and managers to wager how many employees would test positive for COVID-19."[4]

There are few, if any, substantive legal repercussions for this type of employer mistreatment, and the remedies for employment claims are notoriously weak and difficult to prove.[5] The trouble in this area can be traced back to the prevailing doctrine of employment-at-will, which holds as its overarching principle that an employee can be fired at any time for any reason (or for no reason at all).[6] This

[1] *See infra* Section II.A (discussing existing research on workplace harassment).

[2] *See id.* (describing how even companies that claim to support #MeToo movement retaliate against employees who complain of sexual abuse and hostile activity).

[3] *See infra* Section II.B (outlining research on employer mistreatment of workers during pandemic).

[4] Katie Shepherd, *Tyson Foods Managers Had a 'Winner-Take-All' Bet on How Many Workers Would Get COVID-19, Lawsuit Alleges*, WASH. POST (Nov. 19, 2020, 5:07 AM), https://www.washingtonpost.com/nation/2020/11/19/tyson-foods-waterloo-bets-covid/ ("In addition to failing to properly prevent the spread of the virus, Tyson Foods managers turned the risk into a game, the amended complaint alleges.").

[5] *See* Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 74-75 (2007) ("Recent empirical work shows that employment discrimination plaintiffs lose a lot, and one widely shared explanation is that their cases are extremely difficult to win because of the enduring rule of at-will employment." (footnote omitted)); *see also* Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 63 (2008) ("[T]he vast majority of employees in the United States are at-will employees, meaning that the employer can terminate the employee for good reason, bad reason, or no reason at all.").

[6] *See* Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404 (1967) ("[T]he law has adhered to the age-old rule that all employers 'may dismiss their employees at will . . . for good cause, for no cause, *or even for cause morally wrong*, without being thereby guilty of legal wrong.'" (omission in original) (quoting Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds by* Hutton v. Watters, 132 Tenn. 527 (1915)) (citation omitted)).

even includes reasons that are illogical, nonsensical, or that are based on unethical motivations.[7] At-will employment is largely an American doctrine, and most other industrialized countries require some showing of cause before a worker can be disciplined.[8] The primary benefit of at-will employment is the flexibility that it provides businesses, and it may (in some instances) even encourage the hiring of employees.[9]

Despite any benefits, employment-at-will results in worker hesitancy to complain of unlawful or unethical employer misconduct, as illustrated in this Article. The powerful impact of employment-at-will is now particularly stark, as an increasing number of workers become subject to this doctrine.[10] Unfortunately, many employers have not used this power responsibly, or even legally. We must explore potential solutions to this abuse, at a minimum building in additional workplace protections for the ultimate adverse action—discharge from employment.

This is not to say there are only a few good employers operating in the economy. Indeed, numerous businesses hold a positive corporate image and seek to encourage and develop their good employees. Unfortunately, however, there are far too few of these employee-friendly organizations.[11] Beholden to corporate profits and shareholder bottom lines, too many employers now neglect the interests of their workers.

This Article advocates for a creative approach to help provide additional employment protections for workers in specified circumstances. This Article outlines a new doctrine that would govern all workplace discharges—*sensible just cause*. The goal of sensible just cause is to provide workers some protection

[7] *See id.* (explaining role of at-will employment for non-unionized employees).

[8] *See, e.g.*, Peter Stone Partee, Note, *Reversing the Presumption of Employment at Will*, 44 VAND. L. REV. 689, 693 (1991) ("Scholars have posited various explanations for the reception granted the at-will doctrine in the United States . . . Over time the Court has abandoned this position and has upheld the constitutionality of statutory exceptions to the at-will doctrine.").

[9] *See* Suk, *supra* note 5, at 97 ("The inability to fire someone without 'just cause' will lead employers to be more selective in hiring . . . ."); Porter, *supra* note 5, at 83 ("Because terminating an employee, even an unproductive or misbehaving employee, is so costly, employers are less likely to hire 'risky' employees.").

[10] *See, e.g.*, Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1447 (1996) ("Partially due to the decline of unionism in this country, workers have little concerted power." (footnote omitted)); Eric Morath, *U.S. Union Membership Hits Another Record Low*, WALL ST. J. (Jan. 22, 2020, 1:19 PM), https://www.wsj.com/articles/u-s-union-membership-hits-another-record-low-11579715320 ("The number of union members fell by 170,000 in 2019—a year when U.S. employers added more than 2.1 million jobs—reducing the share of the workforce in labor unions to 10.3%, the lowest portion on record since 1983 . . . ."); *see also* Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 412 (2020) (describing how "[o]rdinary workers lack significant bargaining power").

[11] *See* Blades, *supra* note 6, at 1405 ("[D]espite the aggravation of this imbalance by the ever-increasing concentration of economic power in the hands of fewer employers, the law has done little, outside the limited and shrinking realm of labor unions, to protect the economically dependent employee from employer power." (footnotes omitted)).

against an unjustified employer termination while maintaining the overall desire to keep as many workers employed in the broader economy as possible.

The doctrine of sensible just cause expressly requires that employers have a valid reason for terminating otherwise good employees. This Article clearly defines sensible just cause, setting out the exact parameters for these additional protections. The Article further proposes five distinct guideposts of sensible just cause that employers must follow before terminating a worker. These guideposts specifically allow an employer to discharge an employee in the face of an economic downturn, thus avoiding the rigid just-cause-type protections that exist in many other countries.[12] And sensible just cause permits a one-year probationary period for new workers, further encouraging job growth in the broader economy.

A sensible just-cause standard would obviate the need for much of federal and state employment discrimination law, thus helping to streamline workplace claims. Terminating a worker for a racially discriminatory reason, for example, would inherently be encompassed by the proposed just-cause standard articulated here. Just cause never exists to discriminate in the workplace, regardless of whether that discrimination takes place on the basis of race, color, sex, national origin, or religion. As described in this Article, the sensible just-cause standard would be accompanied by remedial provisions that are much stronger than what currently exist under antidiscrimination doctrine, thus making pursuit of discrimination claims far more desirable under the standard offered here. This would result in more efficient litigation in the employment discrimination field by replacing a complex patchwork of statutes and policies with a more streamlined sensible just-cause standard, at least in the context of an employee's termination.

The sensible just-cause test articulated here draws from the standards that have been used by arbitrators for decades in the unionized working environment. This Article utilizes that basic arbitration framework as a springboard for establishing a new test for the tens of millions of workers who fall outside of this collective bargaining setting. For these workers, just cause must be carefully crafted and defined—sensibly applied in an individualized way to the industry, employer, and workplace in question. What constitutes just cause cannot be defined with one broad stroke, and some general guideposts are set forth here to assist the parties and the courts in helping to define the term. The proposal in this Article also deviates from the unionized just-cause standard in several meaningful ways, and this Article details how a more narrowly tailored approach to just cause is necessary when applied to the at-will employment environment.

[12] *See* Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 11 (2010) ("Finally, the 1980s witnessed significant economic stagnation in Europe, which was frequently attributed to labor market rigidities resulting in part from employment regulation."); Suk, *supra* note 5, at 96 ("A recent Organization for Economic Co-operation and Development (OECD) study observes that employee protection legislation has contributed to high unemployment levels in France.").

It is worth noting that this Article limits its discussion of sensible just cause to the ultimate employment action of termination. This is not to say that a just-cause standard would not be appropriate for other disciplinary actions taken by an employer, such as a demotion, transfer with significantly different job responsibilities, or reduced pay. As discussed below, however, it is corporate mistreatment in the context of employee discharge that has led to the particularly egregious treatment of the workforce.[13] Protecting workers from ill-supported termination is thus a natural starting point for the development of reasonable standards in this field.

Employers should not be permitted to threaten discharge as a way to bend workers to their will, particularly if that threat is based on illegal acts or unethical conduct.[14] Employers must acknowledge that most workers depend on stable employment to support their families, and these workers should not suffer the indignity of being fired, through no fault of their own, if that discharge can reasonably be avoided. Employment cannot ever be guaranteed, but it should be allowed to continue if a probationary period has been completed, if the employee performs satisfactory work, and if the company does not face a financial downturn. Sensible just cause provides these additional protections and does so in a way that does not harm job growth in the broader economy.

This Article proceeds in six parts. Part I addresses the complicated history of employment-at-will, tracing the origins of this doctrine from medieval England to the present-day working relationship in this country. Part II examines some of the harsh consequences of employment-at-will, focusing on the prevalence of sexual harassment in the workplace, as well as employer mistreatment of workers during the pandemic. Part III proposes a sensible just-cause standard for the employment relationship, providing workers with additional protection from discharge. This standard sets forth five guideposts that employers must adhere to in advance of terminating employees, explaining how sensible just cause could be implemented in the workplace. Part V explores some of the implications of a sensible just-cause standard and situates this proposal within the context of the broader academic discussion on this topic.

I. EMPLOYMENT-AT-WILL

The employment-at-will doctrine evolved over hundreds of years.[15] As employment law changed over the past centuries, the writings of Horace Gay

[13] *See* Blades, *supra* note 6, at 1406 ("It is quite another thing, however, to expect the employee to risk having his present job pulled out from under him, and having the blemish of dismissal reduce his chances of finding another one. It is the fear of being discharged which above all else renders the great majority of employees vulnerable to employer coercion.").

[14] *Cf.* Blades, *supra* note 6, at 1405 ("There are, to be sure, less drastic threats than that of discharge by which an employer might bend the will of his employee to his own.").

[15] *See, e.g.*, J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340-341 (1974) ("While the English rules found some acceptance in early American cases, American law departed from the British tradition during the latter part of the 19th century." (footnote omitted)); J. Wilson Parker, *The Uses of the*

Wood took hold in the United States, forming the backdrop of workplace policy in this country.[16] Employment-at-will, often credited to Wood, stands for the basic proposition that workers can be fired at any time for any reason, even if that reason is not based on any logical rationale.[17] There is nothing to prevent an employer from terminating a worker, for example, because they disapprove of the individual's astrological sign. This theory is symmetrical, however, and employees may quit their jobs at any time for any reason without legal repercussion, even if that reason is poor.[18] This has not always been the case, and workers in early England could be fined or even imprisoned if they left their employment without permission.[19]

Some have credited the rise of capitalism in the United States as the reason for the popularity of employment-at-will in this country.[20] As the theory goes, at-will employment helped keep power with the company or business wielding it.[21] If a worker could be fired without cause, that worker would be hesitant to

Past: The Surprising History of Terminable-At-Will Employment in North Carolina, 22 WAKE FOREST L. REV. 167, 176 (1987) ("The presumption that an indefinite hiring is terminable at will is an American departure from the English common law.").

[16] *See* Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-At-Will Doctrine and Employer-Employee Agreements To Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers*, 73 N.C. L. REV. 443, 457 (1995) ("[I]n nineteenth century America, Wood's Rule quickly gained widespread acceptance and soon supplanted the English presumption."); *see also* Charles A. Sullivan & Timothy P. Glynn, Horton *Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013, 1016 (2013) ("Horace Gay Wood's famous formulation of the at-will rule was drawn from contract claims by employees against their employers." (footnote omitted)). *See generally* HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT. COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES (John D. Parsons Jr. 1877) (elaborating on Wood's theories of employment law, including employment-at-will).

[17] *See* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 8 n.1 (1993) (describing employment-at-will rule).

[18] *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 966 (1984) ("The employer is free to demand whatever he wants of the employee, who in turn is free to withdraw for good reason, bad reason, or no reason at all.").

[19] ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH & AMERICAN LAW AND CULTURE, 1350-1870, at 40 (Thomas A. Green ed., 1991) ("Laborers or artificers who had agreed to work by the task were subject to imprisonment for up to a month if they departed before they had completed their undertakings."); Suresh Naidu & Noam Yuchtman, *Coercive Contract Enforcement: Law and the Labor Market in Nineteenth Century Industrial Britain*, 103 AM. ECON. REV. 107, 107 (2013) ("British Master and Servant law made employee contract breach a criminal offense until 1875.").

[20] *See* Hayford & Evers, *supra* note 16, at 457 ("In America, rapid industrialization and commercial expansion generated economic pressure for more flexibility in the employment relationship.").

[21] *See* Blades, *supra* note 6, at 1405 ("[Employment at will], which forces the non-union employee to rely on the whim of his employer for preservation of his livelihood, is what most tends to make him a docile follower of his employer's every wish.").

protest or create any problems for the employer. Thus, early on, employment-at-will helped keep most employees largely under the thumb of management.

Over the years, numerous exceptions have evolved to the concept of employment-at-will, which have worked to erode some of the policy behind this doctrine. For example, after the Great Depression, the National Labor Relations Act ("NLRA") sought to level the bargaining practices between employees and management by allowing workers to organize and engage in concerted activity.[22] Around the same time, the Fair Labor Standards Act gave most workers a guaranteed minimum wage and right to overtime;[23] it also severely limited any type of child labor.[24] The rise of the civil rights era in the 1960s saw a number of additional limitations to employment-at-will. Title VII of the Civil Rights Act of 1964, for example, prohibits an employer with fifteen or more employees from terminating a worker on the basis of race, color, sex, religion, or national origin.[25] A few years later, Congress would protect older workers by passing the Age Discrimination in Employment Act, which prohibits taking an adverse action against workers forty years of age or older on the basis of their age.[26] In the 1990s, Congress extended these protections to workers with disabilities through the Americans with Disabilities Act ("ADA").[27] More recent statutory protections prohibit larger employers from taking adverse actions against workers who require time off to care for themselves, a family member, or a newborn or adopted child.[28] And federal law now prohibits employers from making employment decisions on the basis of genetic information.[29]

While these federal laws have greatly curbed the employment-at-will doctrine, they are not the only applicable exceptions. Indeed, many state and local laws have created additional protections for when an employer can fire a worker. For example, some state laws protect workers from adverse action on

[22] National Labor Relations Act, 29 U.S.C. § 157 (1935).

[23] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206-07 (1938).

[24] *Id.* § 212.

[25] Title VII Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982).

[26] Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1967).

[27] Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1990); *see also* Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV. 557, 560-61 (2020) ("The last three decades have brought about a significant shift in the legal treatment of Americans with disabilities.").

[28] Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-54 (1993).

[29] Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff-1 (2008).

the basis of marital status or personal appearance.[30] Many cities and other locales have offered even greater worker protections.[31]

In addition, some workers fall outside of employment-at-will. If an individual is covered by a collective bargaining agreement and the employer operates in a unionized setting, that employer will typically need cause to fire the worker.[32] Also, governmental workers usually have some level of civil-service protections,[33] and the federal government (the biggest employer in this country) offers numerous protections for employees against unjust treatment.[34] Some workers (often executives) have negotiated individual employment contracts with their employers, and those businesses must abide by the specific employment terms that have been negotiated.[35] And many workers are

[30] *See, e.g.*, CAL. GOV'T CODE § 12920 (West 2023) ("[I]t is necessary to protect and safeguard the right and opportunity of all persons to . . . hold employment without discrimination or abridgment on account of . . . marital status . . . ."); *see also* D.C. CODE ANN. § 2-1402.11(a) (2023) ("It shall be unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon . . . personal appearance."); DEL. CODE ANN. tit. 19, § 711 (2022) (barring discharge and discrimination on basis of marital status, sex, pregnancy, and gender identity); HAW. REV. STAT. § 378-2 (2021) (defining unlawful discriminatory practice as refusal to hire, bar, or discharge from employment based on race, sex, and gender expression); Mich. Comp. Laws Ann. § 37.2202(a) (West 2023) (effective Mar. 2024) (barring employment discrimination based on height and weight).

[31] *See, e.g.*, D.C. CODE ANN. § 2-1402.11(a) (2023) (prohibiting adverse actions against workers on basis of "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, political affiliation, status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking, credit information, or homeless status of any individual"); MADISON, WIS., CODE § 39.03(1) (2013) ("The practice of providing equal opportunities in . . . employment . . . to persons without regard to sex, race, religion, color, national origin or ancestry, citizenship status, age, handicap/disability, marital status, source of income, arrest record, conviction record, less than honorable discharge, physical appearance, sexual orientation, gender identity, genetic identity, political beliefs, familial status, student status, domestic partnership status, receipt of assistance, unemployment or status as a victim of domestic abuse, sexual assault, or stalking is a desirable goal of the City of Madison and a matter of legitimate concern to its government.").

[32] National Labor Relations Act, 29 U.S.C. §§ 151-69 (1935); *see also* Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty To Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1816 (1980) ("Those covered by collective bargaining agreements and those employed by federal or state governments generally can be discharged only for 'just cause.'").

[33] *See* Edwin Robert Cottone, *Employee Protection from Unjust Discharge: A Proposal for Judicial Reversal of the Terminable-At-Will Doctrine*, 42 SANTA CLARA L. REV. 1259, 1260 (2002) ("Government employees, in sharp contrast to their private sector counterparts, maintain comprehensive legal protection against unjust discharge.").

[34] *See generally id.* (noting additional protections in collective bargaining agreements and antidiscrimination statutes).

[35] *See* Blades, *supra* note 6, at 1411-12 (addressing individual employment contracts).

considered independent contractors, rather than employees, in the eyes of the law.[36]

Despite these limitations, employment-at-will remains a powerful backdrop to the employment laws in this country. Over one hundred million workers are subject to this form of employment, which is the default rule.[37] Unless a worker can point to an unlawful reason for the termination—such as race or gender discrimination—the employer will be permitted to fire the employee. Thus, the burden of proof typically remains with the worker to both identify an exception to employment-at-will and to demonstrate, beyond a preponderance of the evidence, that an unlawful reason motivated the termination.[38] This leaves most employees in this country highly vulnerable to arbitrary adverse action by their employer, and there are few workers who can rely on steady employment, even if they are exceptional employees.[39]

Perhaps the biggest drawback of employment at will is the inability of good workers to have any level of security in their employment. This can make planning difficult, and an untimely or unexpected termination can have a devastating impact on a worker and their family. This is not to say that employment-at-will does not have some benefits, such as providing substantial flexibility to employers.[40] If employers do not have to search for a rationale to fire workers, they may even be more likely to take a chance on employing workers in the first place.[41] Similarly, if economic downturn is a permissible rationale for firing a worker, companies need not worry about having too many

[36] *See, e.g.*, Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 INDUS. L.J. 84, 95 (2007) ("Not only are employers changing the nature of their employment contract with their 'regular' workers, they are also increasingly using non-permanent employees such as temporary employees and independent contractors.").

[37] *See* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997) ("The doctrine merely states a default rule, providing a ready presumption when an employment contract is silent as to its duration.").

[38] *See* McGinley, *supra* note 10, at 1463 ("Placing the burden of persuasion on the employee is particularly problematic because the law requires the plaintiff to prove the employer's discriminatory intent." (emphasis omitted)).

[39] *See Protecting at Will Employees*, *supra* note 32, at 1816 (noting two-thirds of American employees are terminable at will).

[40] *See* BARRY D. ROSEMAN, AM. CONST. SOC'Y FOR L. & POL'Y, JUST CAUSE IN MONTANA: DID THE BIG SKY FALL? 1 (2008), https://www.acslaw.org/wp-content/uploads/2018/07/Roseman_Issue_Brief.pdf ("One of the arguments for employment at will is an economic one, that just cause for termination of employment leads to higher unemployment rates and lower job growth rates.").

[41] *See* Suk, *supra* note 5, at 97 ("The inability to fire someone without 'just cause' will lead employers to be more selective in hiring . . . .").

employees if a recession hits.[42] Thus, at-will employment provides businesses with a great amount of flexibility in addressing hiring needs.[43]

The United States is the only industrialized country that utilizes at-will employment.[44] Most countries require that the employer have just cause—or offer a good reason—before terminating an employee.[45] Throughout Western Europe—including Italy, France, Spain, and England—employers must possess a legitimate rationale for terminating an employee.[46] Additionally, the other countries in North America—Canada and Mexico—also offer employees protections far greater than those provided by at-will employment.[47] These laws offer varying levels of worker protections. France, for example, guarantees a pension to workers even when they have been fired for cause.[48] France also criminalizes certain forms of employer discrimination.[49] Criminal liability for

[42] *See* Porter, *supra* note 5, at 64-65 ("The primary problem with the just cause standard is that it is difficult for employers to prove, which makes it inefficient. Because of this problem of proof, many employers are forced to waste large sums of money litigating terminations or paying very large, and often undeserved, severance payments. Some employers even retain unproductive employees because it is cheaper and easier to continue paying them than it is to terminate them." (footnotes omitted)).

[43] *See* Michael J. Phillips, *Toward a Middle Way in the Polarized Debate Over Employment at Will*, 30 AM. BUS. L.J. 441, 454 (1992) ("[T]he costs created by protecting employees against unjust dismissals may mean greater unemployment.").

[44] Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 68-69 (1988) ("The United States remains the last major industrial democracy that has not heeded the call for unjust dismissal legislation."); Samuel Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMP. L. 310, 311 (1985) ("We seem to stand virtually alone among the nations of the Western industrialized world in not providing general protection against unjust discharge for private-sector employees who either cannot or do not choose unionism.").

[45] *See* McGinley, *supra* note 10, at 1501 ("European workers have much more job security than their counterparts in the United States.").

[46] *See* ROSEMAN, *supra* note 40, at 2 ("Established industrial powers such as France, Germany, Japan and the United Kingdom, and new democracies such as the post-apartheid Republic of South Africa, require that employers have just cause to dismiss non-probationary employees.").

[47] *See* Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 374 (2014) ("Because most Canadian workers are employed outside of the federal sector, provincial law provides the primary source of protection for the majority of the working population. Most of these provincial statutes require some period of notice before an unjust dismissal. However, only two provinces—Nova Scotia and Quebec—currently have statutory bans against unjust dismissals." (footnote omitted)); *id.* at 428 (describing employment model under Mexican law).

[48] *See generally* Joseph A. Seiner, *Understanding the Unrest of France's Younger Workers: The Price of American Ambivalence*, 38 ARIZ. ST. L.J. 1053 (2006) (describing French employment law).

[49] *See* Suk, *supra* note 5, at 86 ("The French prohibition of discrimination in hiring and firing originated in a criminal provision, still in effect, that was passed in 1972 as part of a comprehensive anti-racism statute." (footnote omitted)).

workplace mistreatment is extraordinarily rare in the United States, and it is limited to situations such as financial fraud, or unlawful sweatshop or child-labor-type employment.[50] It is worth noting that many other countries—including those in Western Europe and North America—often lag behind the unemployment rates in the United States.[51]

II. CONSEQUENCES OF AT-WILL EMPLOYMENT

There can be little doubt that at-will employment has numerous benefits, particularly with respect to maintaining employer flexibility. When applied too rigidly, however, this doctrine can have numerous negative consequences on the workforce and society as a whole.

These consequences have only compounded over time, becoming extraordinarily pronounced in recent years between management and individual workers.[52] Reduced organizing rates and a lack of general collective activity in this country[53] have allowed employers to use at-will employment to their advantage. Some of the realities of this doctrine, however, have had sweeping adverse consequences on working culture.

The abuses of at-will employment abound. Two areas of abuse have recently become particularly pronounced, demonstrating clearly the unfair treatment many workers unnecessarily suffer in this country. First, the prevalence of sexual assault and harassment in the workplace, which has long been a problem but only recently come to light as a national issue, shows how at-will employment can leave unfairly treated workers with no real voice as to the terms

[50] *See* TERRI GERSTEIN, ECON. POL'Y INST., HOW DISTRICT ATTORNEYS AND STATE ATTORNEYS GENERAL ARE FIGHTING WORKPLACE ABUSES 1 (2021), https://files.epi.org/uploads/224957.pdf [https://perma.cc/53W3-8YZW] ("Historically wage theft and other crimes against workers have not been prosecuted. Rather, civil enforcement by labor departments, along with private class-action lawsuits, have more commonly been the methods used to enforce crucial workplace protections like the right to be paid wages owed.").

[51] *See* IMF, *Job Creation: Why Some Countries Do Better*, Economic Issues 20 (Apr. 2000), https://www.imf.org/external/pubs/ft/issues/issues20/ ("The unemployment rate has been notoriously higher in Continental Europe (10 percent in the Euro area in 1999) than in the Unites States (4½ percent), but there have also been considerable differences within Continental Europe, where the unemployment rate recently ranged from 4½ percent in Portugal to 16 percent in Spain.").

[52] *See* Seiner, *infra* note 65, at 1324 (explaining over two-thirds of women reported experiencing workplace sexual harassment); FALK ET AL., *infra* note 87, at 1 (noting high unemployment rate during height of pandemic).

[53] *See* Morath, *supra* note 10 and accompanying text; Economic News Release: Union Members Summary, U.S. Bureau Lab. Stats. (Jan. 19, 2023, 10:00 AM), https://www.bls.gov/news.release/union2.nr0.htm ("The union membership rate—the percent of wage and salary workers who were members of unions—was 10.1 percent in 2022, down from 10.3 percent in 2021, the U.S. Bureau of Labor Statistics reported today. The number of wage and salary workers belonging to unions, at 14.3 million in 2022, increased by 273,000, or 1.9 percent, from 2021.").

and conditions of their employment.[54] Second, the events of the pandemic have put a spotlight on the ways in which businesses can abuse the employment relationship.[55] Both of these areas are explored in greater detail below. Both examples demonstrate the immediate need for reform to at-will employment.

A. *Sexual Harassment*

Sexual assault and harassment have long been a problem for workers in the United States.[56] While it has been unlawful for employers to discriminate against workers on the basis of sex since 1964, the Supreme Court did not recognize that hostile work environments can create a cause of action until its decision in *Meritor Savings Bank v. Vinson* ("*Meritor*").[57] This decision highlights the extraordinarily abusive nature of sexually hostile work environments. In *Meritor*, a bank employee testified that the bank's vice president subjected her to egregious and unlawful workplace behavior, including that he "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions."[58] Considering these facts and the applicable law, the Supreme Court held, for the first time, that a worker "may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[59] The case law on sexual harassment generated substantial confusion in the years immediately following *Meritor*, and the Supreme Court stepped in again in 1998 to resolve the question of when it is permissible to impute liability to an employer for a worker's harassing acts. In the well-known decisions in *Faragher v. City of Boca Raton*[60] and *Burlington Industries, Inc. v. Ellerth*,[61] the Court adopted a policy strongly favoring antidiscrimination policies and employer prevention of harassment.[62]

Unfortunately, these Supreme Court decisions did not ultimately prevent sexual harassment, which continues to be a major form of employment discrimination. Only recently, however, has the true extent of this abuse and

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[54] *See* Press, *infra* note 81 (noting implications of reporting workplace sexual harassment).

[55] *See COVID-19 Related Workplace Litigation Tracker: Constructive Termination*, *infra* note 111 (collecting data on types of workplace abuses lawsuits).

[56] *See* Sascha Cohen, *A Brief History of Sexual Harassment in America Before Anita Hill*, TIME (Apr. 11, 2016, 9:00 AM), https://time.com/4286575/sexual-harassment-before-anita-hill/ (describing history of workplace sexual harassment in America).

[57] 477 U.S. 57, 73 (1986) (establishing sexual harassment as a form of sex discrimination actionable under Title VII).

[58] *Id.* at 60.

[59] *Id.* at 66-67.

[60] 524 U.S. 775 (1998).

[61] 524 U.S. 742 (1998).

[62] *Id.* at 765 ("While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the [employer's affirmative] defense.").

hostile employer conduct become known. In 2017, the #MeToo movement helped illustrate the pervasive, egregious nature of sexual harassment in the workplace.[63] People of all genders from around the country and world weighed in to share their experiences with this type of abuse.[64] While these individual experiences are enlightening—and the weight of their voices is both daunting and startling—there is also clear empirical evidence demonstrating the ongoing nature of the problem.

Since the start of the #MeToo movement, there have been numerous studies examining the prevalence of sexual harassment in the workplace. These studies reveal that the presence of this unlawful conduct persists. For example, a study published in the *American Bar Association Journal* surveyed 3,000 workers in companies and law firms across the country to explore the role of sexual harassment in employment.[65] The findings revealed that "68 percent [of the women who responded] indicated they'd experienced sexual harassment at work, but only 30 percent reported the behavior."[66] This underreporting of improper harassing conduct underscores the need for a greater level of worker protection. Indeed, "[r]easons for not reporting included concerns that it would negatively impact their job, and a belief that such behavior was tolerated."[67] While federal law currently contains anti-retaliation provisions protecting those who allege sexual harassment, those protections clearly do not go far enough in curbing harassing behavior and encouraging worker complaints.[68]

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[63] *See, e.g.*, Audrey Carlsen, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel & Zach Wichter, *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html ("A New York Times analysis has found that . . . at least 200 prominent men have lost their jobs after public allegations of sexual harassment."); *#MeToo: A Timeline of Events*, CHI. TRIB. (Feb. 4, 2021) [hereinafter *A Timeline of Events*], https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html (describing events of #MeToo movement); Aisha Harris, *She Founded Me Too. Now She Wants To Move Past the Trauma.*, N.Y. TIMES (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/arts/tarana-burke-metoo-anniversary.html (discussing Tarana Burke's "Me Too" movement in 2006 and tracing later progression).

[64] *See generally* Carlsen et al., *supra* note 63 (identifying men who lost jobs following numerous accusations of sexual harassment and assault during #MeToo movement); *A Timeline of Events*, *supra* note 63 (chronologizing sexual misconduct allegations against public figures); Harris, *supra* note 63 (discussing how #MeToo stories by women of color garner less media attention and respect).

[65] Barbara Frankel & Stephanie Francis Ward, *Little Agreement Between the Sexes on Tackling Harassment, Working Mother/ABA Journal Survey Finds*, AM. BAR ASS'N J. (July 24, 2018, 6:10 AM), https://www.abajournal.com/news/article/tackling_harassment_survey_women_men [https://perma.cc/S8Q2-6STG] (examining prevalence of incidents, what prevented employee reports, and how employers responded to reported incidents). *See generally* Joseph A. Seiner, *Plausible Harassment*, 54 U.C. DAVIS L. REV. 1295, 1326 (2021) (discussing study).

[66] Frankel & Ward, *supra* note 65.

[67] *Id.*

[68] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a).

In another well-known national study of over 6,000 adults conducted by the Pew Research Center,[69] the group reported that close to sixty percent of the women surveyed indicated that they had been subjected to "unwanted sexual advances or verbal or physical harassment of a sexual nature, whether in or outside of a work context," and fifty-five percent of those acknowledging such harassment indicated that it occurred *both* at work and in other settings.[70] The study thus confirms the continued prevalence of sexual harassment in the workplace and further substantiates the weakness of current reporting mechanisms and efforts to resolve the problem. As the study concluded, "[w]hen asked about sexual harassment and sexual assault in the workplace today, half of Americans think that men getting away with this type of behavior is a major problem."[71] The current laws and protections thus seem to be largely failing workers on these important issues.

Another high-profile analysis conducted by the *New York Times*, along with *Morning Consult*, goes a step further, revealing the nature and brazenness of some of the harassing conduct.[72] That study surveyed 615 men about their own conduct in the workplace.[73] The results demonstrated an exact understanding by men of their inappropriate conduct, as "about a third of men said they had done something at work within the past year that would qualify as objectionable behavior or sexual harassment."[74] Drilling down further into the survey results reveals some startling data points. Almost one in five men conceded that they had told sexual stories or jokes in the workplace in the prior year, sixteen percent of men admitted to making sexist or offensive remarks, and two percent of men even acknowledged engaging in sexual coercion in the workplace in the prior year.[75] Around one-in-ten men admitted to giving "unwanted sexual attention: actions like touching, making comments about someone's body and asking colleagues on dates after they've said no."[76] These results go well beyond

[69] Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RSCH. CTR. (Apr. 4, 2018), https://www.pewresearch.org/social-trends/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/ [https://perma.cc/54T7-7FBW] ("The nationally representative survey of 6,251 adults was conducted online Feb. 26-March 11, 2018, using Pew Research Center's American Trends Panel."); *see also* Seiner, *supra* note 65, at 1325.

[70] Graf, *supra* note 69.

[71] *Id.*

[72] Jugal K. Patel, Troy Griggs & Claire Cain Miller, *We Asked 615 Men About How They Conduct Themselves at Work*, N.Y. TIMES (Dec. 28, 2017), https://www.nytimes.com/interactive/2017/12/28/upshot/sexual-harassment-survey-600-men.html (reporting data from online survey conducted Nov. 27 to Dec. 4 2017 of 615 men who work full time). *See generally* Seiner, *supra* note 65 (discussing study).

[73] Patel et al., *supra* note 72 (asking questions about whether respondents told potentially offensive jokes, made sexist remarks, continued asking someone out despite previous rejection, made uninvited physical advances, or offered someone rewards in exchange for sexual behavior).

[74] *Id.*

[75] *Id.*

[76] *Id.*

demonstrating the pervasiveness of the existing problem of workplace harassment. They reflect a clear understanding by the participants that their conduct is simply wrong.

Indeed, current workplace laws have done far too little to dissuade sexual harassment and assault, and the court system recently adopted numerous additional procedural barriers for sex-discrimination litigants.[77] The road to prevailing on these claims is steep as "only an estimated 3 percent to 6 percent of the cases ever make it to trial."[78] And the case law is replete with allegations of egregious, highly offensive sexual harassment and abuse going unpunished.[79] Given the procedural obstacles to bringing a claim and the treatment of these cases in the courts, it is not surprising that women are quite hesitant to make formal complaints of harassment (with only about five-to-fifteen percent of female workers reporting this conduct to their company).[80]

There are numerous reports of backlash against women in the face of the #MeToo era. Perhaps the most high-profile instance of such retaliation occurred at one of the nation's largest companies, Google.[81] Two workers at the technology giant orchestrated a walkout that involved tens of thousands of employees to object to the company's use of mandatory arbitration (rather than the court process) to resolve hostile work environment allegations.[82] They alleged that after the walkout, the company gave them diminished employment duties, and they filed a claim with the National Labor Relations Board as a result of these adverse employment actions.[83] The case against Google is emblematic

[77] *See generally* JOSEPH A. SEINER, THE SUPREME COURT'S NEW WORKPLACE: PROCEDURAL RULINGS AND SUBSTANTIVE WORKER RIGHTS IN THE UNITED STATES (2017) (discussing procedural hurdles implemented by Supreme Court for workplace claimants).

[78] Yuki Noguchi, *Sexual Harassment Cases Often Rejected by Courts*, NPR (Nov. 28, 2017, 7:28 AM), https://www.npr.org/2017/11/28/565743374/sexual-harassment-cases-often-rejected-by-courts [https://perma.cc/6W99-VXKN] (explaining challenges in litigating sexual harassment cases).

[79] *See* Joseph A. Seiner, *Women Frequently Experience Sexual Harassment at Work, Yet Few Claims Ever Reach a Courtroom*, CONVERSATION (Mar. 30, 2021, 7:38 AM), https://theconversation.com/women-frequently-experience-sexual-harassment-at-work-yet-few-claims-ever-reach-a-courtroom-157551 [https://perma.cc/G6QQ-JW48] (discussing cases); *see also* Seiner, *supra* note 65, at 1314-17 (same).

[80] Noguchi, *supra* note 78 ("[O]nly a small fraction—estimates range around 5 to 15 percent of women—report their complaints to their employers, largely due to fear of retaliation.").

[81] *See* Alex Press, *Women Are Filing More Harassment Claims in the #MeToo Era. They're Also Facing More Retaliation.*, VOX (May 9, 2019, 3:50 PM), https://www.vox.com/the-big-idea/2019/5/9/18541982/sexual-harassment-me-too-eeoc-complaints [https://perma.cc/5T3W-KZRX] ("But if there are more people speaking up, there may be more people than ever being fired for doing so. It's hard to quantify the number of people who face retaliation . . . . But retaliation remains the most frequent charge filed with the EEOC, and three-quarters of sexual harassment charges filed with the commission include a charge of retaliation.").

[82] *Id.* (alleging retaliation for diminished work roles after organizing walkout).

[83] *Id.* (reporting workers filed an unfair labor practice complaint with NLRB).

of the much broader problem of retaliation against those who try to share their voice on the important issue of sexual harassment in the workplace. A report in *Forbes* succinctly summarized the challenge: "Once an individual stands up and raises their hand to speak out, they quickly become a target. The same organization or people that applaud them for being brave often turn their backs on them as well. You are pegged as a whistle blower, a nuisance, a troublemaker—the squeaky wheel that will never be oiled again."[84]

The overwhelming empirical and anecdotal evidence for the prevalence of sexual harassment, sexual abuse, and retaliation clearly reveal an immense problem in today's workplace. Even in the face of a popular movement that highlights these workplace inadequacies, harassed and abused employees still face tremendous hurdles.

B. *Terminations During a Pandemic*

The pandemic revealed additional workplace problems. During the onset of the pandemic, and in the months immediately following, there was enormous concern over the potential economic fallout of the health crisis.[85] Much of this concern was well-placed, and many businesses around the country shut their doors for good.[86] In the short term, unemployment rates skyrocketed.[87]

This combination of fear, uncertainty, and high unemployment gave companies an unusual amount of control over the workforce. Many workers were scared they would lose their livelihoods during this economic downturn, and given the high unemployment rates, it was unclear when they would be able

[84] Cate Luzio, *MeToo's Next Frontier: Addressing Backlash After Speaking Up*, FORBES (Apr. 28, 2019, 6:23 PM), https://www.forbes.com/sites/cateluzio/2019/04/28/metoos-next-frontier-addressing-backlash-after-speaking-up/ ("The retaliation that follows [a complaint] is retribution for going against the company or individual and making noise, even though most companies preach that speaking up is part of their values.").

[85] *See* Craig Timberg, Drew Harwell, Laura Reiley & Abha Bhattarai, *The New Coronavirus Economy: A Gigantic Experiment Reshaping How We Work and Live*, WASH. POST (Mar. 21, 2020, 5:06 PM), https://www.washingtonpost.com/business/2020/03/21/economy-change-lifestyle-coronavirus/ (discussing economic impact of pandemic); Philipp Carlsson-Szlezak, Martin Reeves & Paul Swartz, *What Coronavirus Could Mean for the Global Economy*, HARV. BUS. REV. (Mar. 3, 2020), https://hbr.org/2020/03/what-coronavirus-could-mean-for-the-global-economy.

[86] *See* Ruth Simon, *Covid-19's Toll on U.S. Business? 200,000 Extra Closures in Pandemic's First Year*, WALL ST. J. (Apr. 16, 2021, 9:43 AM), https://www.wsj.com/articles/covid-19s-toll-on-u-s-business-200-000-extra-closures-in-pandemics-first-year-11618580619 ("The pandemic resulted in the permanent closure of roughly 200,000 U.S. establishments above historical levels during the first year of the viral outbreak . . . .").

[87] *See* GENE FALK, PAUL D. ROMERO, ISAAC A. NICCHITTA & EMMA C. NYHOF, CONG. RSCH. SERV., R46554, UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC, at ii (2021), https://fas.org/sgp/crs/misc/R46554.pdf [https://perma.cc/V6XF-UTVK] ("In April 2020, the unemployment rate reached 14.8%—the highest rate observed since data collection began in 1948.").

to find other employment if they were laid off.[88] Facing these conditions, workers were not in a position to bargain, either formally or informally, over the conditions of their ongoing employment. Instead, these employees were largely faced with the difficult choice of accepting employment terms as defined by the company or seeking other employment in a difficult job market.[89]

Unfortunately, many businesses abused the control that they had. Though there is no existing empirical evidence on worker treatment during this time, the anecdotal evidence is quite strong. There are numerous cases, detailed news accounts, and other information which reveal some of the startling ways that workers were treated during this pandemic.

Perhaps the best example of an employer's excessive abuse during the pandemic, and an accompanying careless, reckless attitude toward workers, emerged in the meat packing industry. Shortly after the onset of the pandemic, a chicken-processing plant for the country's largest food company delayed in providing full health information to local officials, subsequently revealing that over twenty percent of the workforce had contracted COVID-19.[90] Similarly, just prior to a large-scale COVID outbreak at a South Dakota pork-processing facility, the CEO of another company wrote to the state governor critiquing health measures that had recently been put in place and callously stating that "[s]ocial distancing . . . is a nicety that makes sense only for people with laptops."[91] Indeed, across the entire industry, rather than adopt health measures to protect workers and the broader community, businesses instead "spent crucial early weeks urging officials to keep their plants open."[92] In perhaps the most obscene, well-publicized example of abuse by employers in the industry during the health crisis, one wrongful-death lawsuit alleged that a supervisor at a Tyson Foods processing plant in Iowa actually took wagers on the health of the facility's workers and "organized a cash buy-in, winner-take-all betting pool for

[88] *See id.* at 3 ("The most recent recession exhibited an unprecedented sharp increase in the unemployment rate (10.3 percentage points) from February to April 2020."). *See generally* Abigail Johnson Hess, *The U.S. Economy Has Been Hit Hard by the Coronavirus Pandemic—Here's What It's Like for Job Seekers*, CNBC (Mar. 20, 2020, 3:24 PM), https://www.cnbc.com/2020/03/20/how-coronavirus-is-impacting-job-seekers.html [https://perma.cc/KS7X-4GXV] ("Looking for a new job is uniquely difficult during the coronavirus outbreak . . . .").

[89] Hess, *supra* note 88.

[90] Michael Grabell, Claire Perlman & Bernice Yeung, *Emails Reveal Chaos as Meatpacking Companies Fought Health Agencies over COVID-19 Outbreaks in Their Plants*, PROPUBLICA (June 12, 2020, 2:04 PM), https://www.propublica.org/article/emails-reveal-chaos-as-meatpacking-companies-fought-health-agencies-over-covid-19-outbreaks-in-their-plants [https://perma.cc/E8MB-BRCP] ("[N]early a week after Tyson's testing ended in May, the county health agency had received less than 20% of the results.").

[91] *Id.* (internal quotations omitted).

[92] *Id.* ("But the scores of emails and other records show that best practices to protect workers, such as slowing the processing line to accommodate social distancing, installing plexiglass barriers and having workers wear masks, weren't implemented until outbreaks began to occur.").

supervisors and managers to wager how many employees would test positive for COVID-19."[93] This type of over-the-top, almost unheard-of abuse minimizes the value—and even the lives—of company workers, underscoring the tremendous need for reform in the employer-employee relationship.

In yet another high-profile piece, the *Boston Globe* highlighted employer rigidity and corporate unwillingness to provide the type of flexibility so many workers needed to attend to family responsibilities at the time.[94] This recurring situation was all too common across the economy, with numerous examples of workers filing suit against their employers "after being denied paid leave to look after their children, or being fired or disciplined after taking it."[95]

Similar stories abound. In a further survey of this area, another analysis found that "working parents have filed at least 40 lawsuits accusing employers of illegally denying parental leave or subjecting them to other forms of discrimination" in the face of the pandemic.[96] In one particularly egregious example, a mother of two young children in California was fired from her employment as an account executive for an insurance business.[97] The worker filed suit in state court for gender discrimination, alleging in part that she was admonished by her supervisor for engaging in work calls that were too noisy and that she was expressly told to "take care of your kid situation."[98]

These are not isolated incidents. The ways in which workers have found themselves on the wrong side of an employer's disciplinary action because of a pandemic-related issue are numerous, with hundreds of retaliation complaints filed in courts and thousands of workplace coronavirus safety complaints filed with the federal Occupational Safety and Health Administration.[99] In more

[93] Shepherd, *supra* note 4 and accompanying text.

[94] Katie Johnston, *'No One Should Have To Go Through This': A Fired Employee Sues Wayfair, Accusing It of Caregiving and Age Discrimination*, BOS. GLOBE (Feb. 11, 2021, 9:35 PM), https://www.bostonglobe.com/2021/02/11/nation/fired-software-engineer-sues-wayfair-mistreatment-over-caregiving-age/ (noting Center for WorkLife Law at University of California Hastings College of Law in San Francisco identified "at least 60 . . . lawsuits nationwide" that involve "caregiving during the pandemic").

[95] *Id.* ("Among some employers, a culture shift is starting to emerge as the pandemic continues to shine a glaring light on working parents' needs. But there's still a long way to go.").

[96] David Yaffe-Bellany, *Parents Say Employers Are Illegally Firing Them During Pandemic (1)*, BLOOMBERG L. (Nov. 11, 2020, 11:04 AM), https://news.bloomberglaw.com/coronavirus/pandemic-firings-lead-to-wave-of-bias-claims-from-parents.

[97] *Id.* ("Parents who've lost their jobs during the pandemic are driving a surge of litigation, alleging their employers discriminated against them for taking care of their kids when schools closed.").

[98] *Id.* The worker stated that "I don't know how you keep a 1-year-old quiet. . . . I don't think [my boss] understood what was going on and how hard it was for me to work." *Id.*

[99] *See* Fatima Hussein, *Employers Under Pressure as Covid Retaliation Court Claims Rise,* BLOOMBERG L. (Apr. 2, 2021, 5:31 AM), https://news.bloomberglaw.com/daily-labor-report/employers-under-pressure-as-covid-retaliation-court-claims-rise ("A search of the Bloomberg Law database shows at least 313 Covid-19 retaliation complaints filed in the past

general terms, however, workers have purportedly been discharged for testing positive for the COVID-19 virus,[100] for informing their employers of a doctor-ordered quarantine requirement,[101] and for raising pandemic-related health concerns with their employer.[102] There are countless examples of workers being discharged because of their resistance to come into work and their desire to work from home during the pandemic..[103]

The pandemic has also put some workers in impossible situations, attempting to successfully navigate their employer's wishes with what is in the best interests of public health as well as their own safety.[104] In one high-profile case outlined

year, with roughly 34 filed in the last month, brought by nurses, retail workers, construction workers and a gamut of other occupations across the country.").

[100] City News Service, *Woman Sues Ex-Employer Alleging She Was Wrongfully Fired for Testing Positive for COVID-19*, NBCLA (Nov. 16, 2020, 8:18 AM), https://www.nbclosangeles.com/news/local/woman-sues-ex-employer-alleging-she-was-wrongfully-fired-for-testing-positive-for-covid-19/2462984/ [https://perma.cc/H6V4-K735] ("A former office worker for a Walnut furniture business is suing her ex-employer, alleging she was wrongfully fired this summer because she tested positive for the coronavirus and took time off to recover."); *see* Gavin Hart, *Former Wells Fargo Banker Says She Was Fired After Getting COVID-19*, 2021 LAB. & EMP. DAILY BRIEFING, Mar. 16, 2021, 2021 WL 968782 (describing litigation brought by worker against employer when fired after revealing COVID-19 diagnosis).

[101] David Hodges, *Workers Question Whether They Were Fired Illegally During COVID-19 Pandemic*, WBTV (Mar. 20, 2020, 8:14 AM), https://www.wbtv.com/2020/03/19/workers-question-whether-they-were-fired-illegally-during-covid-pandemic/ [https://perma.cc/6TS3-6AZK] ("An employee at a dental office sent WBTV a doctor's note saying she should be quarantined for 14 days awaiting results from a coronavirus test. When she shared that with her boss text messages . . . show she was fired the next day."); *see also S.C. Nurse Files Lawsuit After Being Fired During COVID-19 Self-Quarantine*, WIS NEWS 10 (Apr. 8, 2020, 1:32 PM), https://www.wistv.com/2020/04/08/nurse-files-lawsuit-after-being-fired-based-covid-leave/ [https://perma.cc/7ATE-9QCL] (alleging worker "was terminated from a nursing home facility two days after telling her supervisor she may have been in contact with her aunt . . . who was quarantined for treating a confirmed case of COVID-19").

[102] Hussein, *supra* note 99 ("[A worker] filed a wrongful termination lawsuit against Valley Presbyterian Hospital . . . claiming he was fired in retaliation for bringing Covid-19 safety issues, including a lack of personal protective equipment, to his now-former supervisors."); *see also* Steven Cohen, *Trader Joe's Lawsuit Claims Employee Fired for Complaining About Lack of Gloves*, TOP CLASS ACTIONS (Apr. 10, 2020), https://topclassactions.com/coronavirus-covid-19/trader-joes-lawsuit-claims-employee-fired-for-complaining-about-lack-of-gloves/ [https://perma.cc/PA5N-DNKC] (discussing COVID-related lawsuit filed by worker against Trader Joe's); Warner v. United Nat. Foods Inc., 513 F. Supp. 3d 477, 480-81 (M.D. Pa. 2021) (explaining worker's allegation he was fired after complaining of employer's failure to follow COVID-19 protocols).

[103] *See generally* Erin Mulvaney, *Office Culture War Escalates as Workers Balk at Return Mandates*, BLOOMBERG L. (July 19, 2021, 5:31 AM), https://news.bloomberglaw.com/daily-labor-report/office-culture-war-escalates-as-workers-balk-at-return-mandates (addressing worker requests to work at home during pandemic).

[104] *See generally* E. Tammy Kim, Opinion, *When You Are Paid 13 Hours for a 24-Hour Shift*, N.Y. TIMES (June 30, 2020), https://www.nytimes.com/2020/06/30/opinion/

by the *New York Times*, a worker was fired after distributing doses of the COVID-19 vaccine to those who were not yet eligible in an effort to make sure that the doses (which were about to expire) did not go to waste.[105] In yet another well-publicized story, health-care workers were praised for the same type of activity: distributing expiring doses to other drivers caught on the road in the midst of a snowstorm.[106] These two incidents, while different, reflect the conflicting approaches employers can take as to what constitutes appropriate worker behavior, even during a pandemic.

An employee's willingness to receive the COVID-19 vaccine, particularly early in the administration of doses, presents additional questions of what constitutes satisfactory worker behavior during a health crisis. While private employers are now largely free to mandate that workers receive the vaccine—and they may even be required to initiate such mandates by certain federal, state, or local laws—these types of requirements can present workers with challenging dilemmas.[107] Employers are not always sympathetic to these workplace challenges. For example, early in the administration of doses, a demonstrated

coronavirus-nursing-homes.html ("Other aides I interviewed were working in multiple patients' homes. Direct caregivers are so poorly paid that they often have to accept whatever shifts are offered, shuttling between private residences, assisted-living units and nursing homes. 'They're putting themselves at risk, going from job to job to job and putting the older adults at risk as well,' Amy York, executive director of the Eldercare Workforce Alliance, told me.").

[105] Dan Barry, *A Houston Doctor Who Was Fired After a Scramble To Use Expiring Vaccine Won't Be Indicted*, N.Y. TIMES (June 30, 2021), https://www.nytimes.com/2021/06/30/us/houston-doctor-indictment-declined.html ("A grand jury in Texas declined on Wednesday to indict a Houston doctor who was accused earlier this year of stealing 10 doses of Covid-19 vaccine—worth a total of $135—and inoculating a few faint acquaintances and finally his wife in a late-night race in December to use the medicine before it expired.").

[106] *Health Workers Stuck in Snow Give Other Drivers Vaccine*, AP NEWS (Jan. 27, 2021, 7:53 PM), https://apnews.com/article/health-workers-stuck-drivers-vaccine-25ce9d23cc314f2b1dc64dae08085aa2 [https://perma.cc/X5NB-Y2YV] ("County Public Health Director . . . said it was one of the 'coolest operations he'd been a part of.'").

[107] *See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 15, 2023), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws [https://perma.cc/KNH8-Q4K7] ("The federal EEO laws do not prevent an employer from requiring all employees to be vaccinated against COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations . . . ."); *see also* Jason Hoffman, *Vaccine Rule for Larger Employers, Federal Contractors and Certain Health Care Workers To Take Effect January 4*, CNN (Nov. 4, 2021, 6:12 PM), https://www.cnn.com/2021/11/04/politics/vaccine-rule-large-employers-federal-contractors-health-care-workers/index.html [https://perma.cc/AJ43-XHRX] (detailing employer vaccine requirements under OSHA); Dan Mangan, *Supreme Court Will Hear Challenge to Biden Covid Vaccine Mandates*, CNBC (Dec. 22, 2021, 10:06 PM), https://www.cnbc.com/2021/12/22/supreme-court-will-hear-challenge-to-biden-covid-vaccine-mandates.html [https://perma.cc/5QRX-WZXL] (addressing Supreme Court litigation over vaccine mandates).

lack of public information on the potential impact of the vaccine on pregnancies left many female workers facing vaccine mandates without any detailed data on how to best proceed.[108] Though subsequent research suggests that the vaccines do not have any such negative impact,[109] the often heavy-handed approach of employers at the time—when the research was still evolving in these areas—again clearly demonstrates the problems that exist in the workplace.[110]

An oft-cited database on COVID-19-related workplace litigation summarizes scores of employee claims that have been filed as a result of the pandemic.[111] This is particularly noteworthy given the various ways the claims are broken down into differing-type violations of the law by employers during the health crisis, including breach of contract, constitutional violations, constructive termination, failure to pay, wrongful termination, misclassification, workplace safety violations, retaliation, violations of the Family and Medical Leave Act, the Worker Adjustment and Retraining Notification Act, whistleblower law, and worker's compensation statutes.[112] A similar database maintained by *Bloomberg Law* reflects the daunting variety of potential employer abuses in this area, with pandemic-related retaliation claims "brought by nurses, retail workers, construction workers and a gamut of other occupations across the country."[113] These are obviously only a sampling of cases and studies, and the research and work in these areas continues.

The examples discussed above of sexual harassment and worker mistreatment during the pandemic highlight the clear need for reform in the working

[108] In one well-known case from February 2021, a waitress was informed by the restaurant that vaccines were available and mandatory for servers, except where "personal health or disability prohibits you from obtaining this vaccination." Emma Colton, *New York City Waitress Expecting To Become Pregnant Fired for Not Getting COVID-19 Vaccination*, WASH. EXAM'R (Feb. 18, 2021, 11:09 AM), https://www.washingtonexaminer.com/news/waitress-fired-nyc-coronavirus-vaccine-pregnancy [https://perma.cc/LQZ7-XXDT%5D]. The waitress, who was trying to get pregnant, expressed her hesitance to her employer on receiving the vaccine based on the lack of "data or research at this point on its effects on fertility" which existed at the time. *Id.* After coming off of a thirteen-hour shift, the server was told that she was being fired by the restaurant, but that the business "respected her choice" not to get the vaccine. *Id.*

[109] *See generally New CDC Data: COVID-19 Vaccination Safe for Pregnant People*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 11, 2021), https://www.cdc.gov/media/releases/2021/s0811-vaccine-safe-pregnant.html [https://perma.cc/5DW3-84HJ] ("CDC encourages all pregnant people or people who are thinking about becoming pregnant and those breastfeeding to get vaccinated to protect themselves from COVID-19 . . . .").

[110] *See, e.g.*, Colton, *supra* note 108 (describing workplace vaccine concerns).

[111] *COVID-19 Related Workplace Litigation Tracker*, BARNES & THORNBURG (Jan. 14, 2021), https://btlaw.com/insights/publications/covid-19-related-workplace-litigation-tracker [https://perma.cc/EDU4-SWXK] ("Our tracker analyzes 772 cases filed in courts around the country from March 27, 2020, to Jan. 4, 2021.").

[112] *Id.*

[113] *See* Hussein, *supra* note 99 (discussing pandemic-related employer abuse claims).

relationship. A new approach is critically important to assure that these abuses do not continue.[114]

The simplest way to restore worker protections is by changing the nature of the employment relationship itself. Employers should no longer be able to wield at-will employment as a sword and should be held to greater accountability for their actions. Some form of cause should be necessary before employers are permitted to take the ultimate adverse action—termination—of an employee. At a minimum, a just-cause standard should be considered in these instances.

III. JUST CAUSE DEFINED

As discussed above, the current dynamics of the workplace suggest that some form of cause should be necessary before a company can outright dismiss a worker. Providing this basic level of protection for workers from the ultimate adverse employment action would go a long way toward preventing further abuse. While this need remains clear, what a just cause standard should look like in the workplace is not as transparent.

The parameters of just-cause termination have been the subject of debate for years, and much has been written in the area on how such cause should properly be defined.[115] Some basic guidelines for evaluating just cause in the employment relationship have emerged, however, particularly in the area of unionized employees.

A. *Just Cause Standard for Unionized Employees*

Many workers are protected by a collective bargaining agreement, which typically enumerates the steps and reasons required for a worker's dismissal.[116] Where these steps or rationales are in dispute, an arbitrator selected by the parties

[114] The recent review of sexual harassment and employer abuses during the pandemic are only two high-profile examples of the problems with at-will employment. A recent analysis and survey from *Bloomberg Businessweek* revealed the core problem with employment-at-will:

> Workers who spoke with [us] say they've been fired for noting that a manager showed up two hours late, for suffering a panic attack on the job after being subjected to racist harassment, and for disclosing to co-workers that they'd contracted Covid-19. In April a federal judge in Alabama ruled that a silicon manufacturer was within its rights to fire a Black employee for refusing to cut his dreadlocks. Firing employees for raising safety concerns is illegal, as is firing them for trying to unionize, or for being Black, pregnant, transgender, old, or Muslim. But at-will employment makes those protections difficult to enforce, and the penalties don't stop companies from canning people.

Josh Eidelson, *Most Americans Can Be Fired for No Reason at Any Time, but a New Law in New York Could Change That*, BLOOMBERG: BUSINESSWEEK (June 21, 2021, 4:00 AM), https://www.bloomberg.com/news/features/2021-06-21/new-york-just-cause-law-is-about-to-make-workers-much-tougher-to-fire.

[115] *See infra* Part IV (discussing scholarship in area of at-will employment and just cause standards).

[116] *See* Blades, *supra* note 6, at 1410-11 (discussing protections found in collective bargaining agreements).

(rather than the state or federal courts) is given the authority to determine whether the employer has satisfied its burden of showing that just cause for termination exists.[117]

When reaching this determination, arbitrators often look to the factors famously outlined by Arbitrator Carroll R. Daughtery in two well-known arbitration decisions, *Grief Bros. Cooperage Corp.*,[118] and *Enterprise Wire Co.*[119] In these decisions, Arbitrator Daughtery provides seven straightforward questions the parties should ask in determining whether just cause exists to discipline a worker. Generally speaking, all questions must be answered in the affirmative for just cause to exist to support worker discipline:

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the company's investigation conducted fairly and objectively?
5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?[120]

Arbitrators often look to these factors as articulated by Daughtery in reaching the just-cause determination, but they are not binding on arbitrators who may find independent approaches to defining these terms.[121] There are many different

[117] David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1559 (2005) (outlining arbitral process).

[118] 42 Lab. Arb. Rep. (BL) 555, 559-60 (1964) (Daugherty, Arb.) (setting out questions to guide decision).

[119] 46 Lab. Arb. Rep. (BL) 359, 364-66 (1966) (Daugherty, Arb.) (using questions to guide analysis).

[120] LAURA J. COOPER, DENNIS R. NOLAN, RICHARD A. BALES, STEPHEN F. BEFORT, LISE GELERNTER & MICHAEL Z. GREEN, ADR IN THE WORKPLACE 309 (West Acad. Publ'g 2020).

[121] *See* Stacy A. Hickox, *Arbitration of Just Cause Claims Benefits Employees with Disabilities*, 20 U. PA. J. BUS. L. 340, 365 (2018) ("Despite its apparent widespread

ways to evaluate and apply these factors. But what Daughtery makes clear in his just-cause questions is that to satisfy the test to discipline a worker in the unionized environment the discipline itself must be fair, the worker must have an opportunity to be heard, and the workplace rule in question must be reasonable in nature and consistently applied.[122] Thus, Daughtery, in defining just cause, looks to an overall sense of fairness by emphasizing the nature of the rule, the disciplinary process, and the application of discipline to the entire workplace.[123]

Others have developed such tests as well. In their seminal work, Roger Abrams and Dennis Nolan provided additional guidance on the question in an article arbitrators often look to on the issue of just cause discipline.[124] Abrams and Nolan come at the issue from a slightly different perspective, examining what it means to be a "satisfactory" worker.[125] They list four factors necessary to establish satisfactory employee performance: "(1) regular attendance, (2) obedience to reasonable work rules, (3) a reasonable quantity and quality of work, and (4) avoidance of any conduct that would interfere with the employer's ability to operate the business successfully."[126]As the authors succinctly summarize this test:

> Just cause . . . embodies the idea that the employee is entitled to continued employment, provided he attends work regularly, obeys work rules, performs at some reasonable level of quality and quantity, and refrains from interfering with his employer's business by his activities on or off the job. An employee's failure to meet these obligations will justify discipline.[127]

Abrams and Nolan superbly and simply set forward the test for just cause in the arbitration context, and their analysis focuses squarely on the nature of the

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acceptance, one study found that only 9.4% of 1,432 arbitration awards concerning employee discharges explicitly utilized [Daugherty's test], but this study may not have captured the unstated influence of the rule." (footnote omitted)); *see also* Timothy J. Heinsz, *Grieve It Again: Of Stare Decisis, Res Judicata and Collateral Estoppel in Labor Arbitration*, 38 B.C. L. REV. 275, 277 (1997) ("Some views have become so embedded in labor arbitration jurisprudence that, although not technically binding precedents, arbitrators almost universally apply these principles.").

[122] Hickox, *supra* note 121, at 365; *see also* Charlotte Garden & Nancy Leong, *"So Closely Intertwined": Labor & Racial Solidarity*, 81 GEO. WASH. L. REV. 1135, 1187-88 (2013) ("According to one study, upwards of ninety-five percent of union contracts contain such clauses [requiring just cause].").

[123] Hickox, *supra* note 121, at 365 (extolling benefits of Daughtery approach).

[124] Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 596 ("This article is a preliminary effort toward the development of a theory of just cause.").

[125] *Id.* at 597 ("This fundamental understanding of the employment relationship can be easily summarized: both parties realize that the employer must pay the agreed wages and benefits and that the employee must do 'satisfactory' work.").

[126] *Id.*

[127] *Id.* at 601.

employee's performance.[128] Under their analysis, at a minimum, a worker must come to work, play by the rules, produce at a basic level (both as to amount and quality), and not do anything else that would hurt the company's operations.[129]

Daughtery, in conjunction with and Abrams and Nolan, provides an excellent framework for examining just cause in the unionized environment. While Daughtery focuses on the process, investigatory nature, and overall fairness of just cause, Nolan and Abrams expressly examine the type of worker who should remain employed by clearly outlining the specific terms of satisfactory work.[130] While these tests are simply guides often looked to by arbitrators, each arbitration is unique and may not fall squarely within the parameters of these tests.

Additionally, these tests were developed specifically for application in the unionized environment, where workers are protected by the terms of a collective bargaining agreement.[131] In such an environment, other considerations come into play, such as questions of seniority, past practice, and the precise terms of the agreement between management and the union.[132] Thus, while these factors are helpful in exploring how just cause can properly be extended to workers without such union protections, these elements must be thoughtfully molded to replace the current lack of protections in the at-will employment context. Nonetheless, the tests articulated by Daughtery, Abrams, and Nolan for just cause in the unionized environment provide an extremely helpful starting point for developing a just-cause standard to replace at-will employment.

Using these tests as a springboard, in the next Part, this Article proposes a just-cause standard for all workers who currently lack any workplace protections. The framework proposed by this Article also draws from the single state in the U.S. that has adopted a just-cause standard for all workers, as discussed below.

B. *The Montana Example*

Forty-nine states use employment-at-will for the working relationship, permitting businesses to terminate workers for any reason (or no reason) at all.[133]

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[128] *Id.* at 611-13 (itemizing their framework for just cause and its application).

[129] *Id.* at 611-12 (listing four components of satisfactory work).

[130] *Compare* Grief Bros. Cooperage Corp., 42 Lab. Arb. Rep. (BL) 555 (1964) (Daugherty, Arb.) (using the Daugherty question framework), *and* Enterprise Wire Co., 46 Lab. Arb. Rep. (BL) 359 (1966) (Daugherty, Arb.) (same), *with* Abrams & Nolan, *supra* note 124, at 597, 611-13 (fleshing out components of "satisfactory work" to be used as just cause determination touchstone).

[131] *See generally* Grief Bros. Cooperage Corp., 42 Lab. Arb. Rep. (BL) 555 (1964) (Daugherty, Arb.); Enterprise Wire Co., 46 Lab. Arb. Rep. (BL) 359 (1966) (Daugherty, Arb.); Abrams & Nolan, *supra* note 124.

[132] *See* Roger I. Abrams & Dennis R. Nolan, *Seniority Rights Under the Collective Agreement*, 2 LAB. LAW. 99, 99-100, 112, 120-21 (1986) (addressing past practice seniority and contract language).

[133] *See* Donald C. Robinson, *The First Decade of Judicial Interpretation of the Montana*

The states have adopted wide-ranging exceptions to this at-will approach, and numerous other exceptions have been created by the federal government. The one jurisdiction that has expressly rejected this at-will approach, opting instead for a just-cause standard, is the State of Montana.[134]

While Montana's approach to just-cause discipline is simply one example of how the parameters of cause can be defined, it is helpful to look to Montana's analysis, legislation, and definitions on the issue because Montana is one of the largest jurisdictions to adopt such an approach.

The Wrongful Discharge from Employment Act expressly enumerates when a claim for wrongful discharge can be brought by a worker.[135] The statute provides three circumstances where wrongful discharge occurs:

(a) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;

(b) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

(c) the employer materially violated an express provision of its own written personnel policy prior to the discharge, and the violation deprived the employee of a fair and reasonable opportunity to remain in a position of employment with the employer.[136]

These provisions make it clear that cause is needed to terminate a worker. The statute further defines what constitutes "good cause," including "failure to satisfactorily perform job duties . . . disruption of the employer's operation . . . material or repeated violation of an express provision of the employer's written policies; or . . . other legitimate business reasons determined by the employer while exercising the employer's reasonable business judgment."[137]

Montana expressly carves out a probationary period, during which time a worker can be fired "at the will of . . . the employer . . . for any reason or for no reason."[138] This probationary period lasts for twelve months, unless an employer expressly specifies a different period "prior to or at the time of hire."[139] The

Wrongful Discharge from Employment Act (WDEA), 57 MONT. L. REV. 375, 376 (1996) ("[N]o state but Montana has chosen to statutorily modify the so-called 'termination-at-will' doctrine of employment law . . . ."); *see also* William R. Corbett, *"You're Fired!": The Common Law Should Respond with the Refashioned Tort of Abusive Discharge*, 41 BERKELEY J. EMP. & LAB. L. 63, 84 (2020) (emphasizing employment-at-will is state law, not federal).

[134] *See generally* Leonard Bierman & Stuart A. Youngblood, *Interpreting Montana's Pathbreaking Wrongful Discharge from Employment Act: A Preliminary Analysis*, 53 MONT. L. REV. 53 (1992) (discussing just cause worker protections).

[135] MONT. CODE ANN. §§ 39-2-901 to -915 (2021) (setting forth Montana's wrongful discharge cause of action).

[136] *Id.*§ 39-2-904.

[137] *Id.* § 39-2-903.

[138] *Id.* § 39-2-904.

[139] *Id.* §§ 39-2-903 to -904, -910. *See* H.B. 254, 67th Leg., Reg. Sess. (Mont. 2021)

statute also provides meaningful damages for wrongful discharge. Workers can seek up to four years of lost wages and any associated fringe benefits (subject to mitigation efforts),[140] as well as punitive damages.[141]

These provisions were changed in 2021 to give the employer more flexibility in the working relationship, in particular good cause was more clearly defined,[142] potential damages were reduced,[143] and the default probationary period was extended from six months to one year.[144] Despite these additional safeguards recently added for employers, the law still provides far more protections for workers than any other jurisdiction. Employers in Montana, following a reasonable probationary period, must have cause to terminate a worker.[145] And, under the law, this cause must be for an objectively good reason.[146] The statute repeatedly references the objective nature of the good-cause inquiry, defining the term to mean "any reasonable job-related grounds for an employee's dismissal based on"[147] an enumerated list of options, including discretion given to "the employer's *reasonable* business judgment."[148]

Much has been written on the use of a just-cause standard in the State of Montana,[149] and there has been no substantive evidence that providing these

(amending Montana law effective March 31, 2021). ("An employer may extend a probationary period prior to the expiration of a probationary period, but the original probationary period together with any periods of extension may not exceed 18 months.").

[140] MONT. CODE ANN. § 39-2-905 (2021) ("If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest on the lost wages and fringe benefits.").

[141] *Id.* (authorizing punitive damages "otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice").

[142] 2021 Mont. Laws 320 (codified at MONT. CODE. ANN. § 39-2-903).

[143] *Id.* at 321 (codified at MONT. CODE. ANN. § 39-2-905).

[144] *See id.* at 320 (codified at MONT. CODE. ANN. § 39-2-910).

[145] MONT. CODE ANN. § 39-2-904 (2021).

[146] *Id.*

[147] *Id.* § 39-2-903.

[148] *Id.* (emphasis added).

[149] *See* Robinson, *supra* note 133, at 377 (describing first decade of judicial interpretation of Montana wrongful discharge statute); ROSEMAN, *supra* note 40, at 11-18 (comparing Montana standard to at-will employment). *See generally* William L. Corbett, *Resolving Employee Discharge Disputes Under the Montana Wrongful Discharge Act (MWDA), Discharge Claims Arising Apart from the MWDA, and Practice and Procedure Issues in the Context of a Discharge Case*, 66 MONT. L. REV. 329 (2005) (investigating claim discharges under MWDA); Marc Jarsulic, *Protecting Workers from Wrongful Discharge: Montana's Experience with Tort and Statutory Regimes*, 3 EMP. RTS. & EMP. POL'Y J. 105 (1999) (analyzing wrongful discharge dispute resolution in Montana between 1983 and 1997); Randall Samborn, *At-Will Doctrine Under Fire: Model Act Divides Employment Bar*, NAT'L L.J., Oct. 14, 1991, at 1 (discussing standard's impact); Bradley T. Ewing, Charles M. North & Beck A. Taylor, *The Employment Effects of a "Good Cause" Discharge Standard in Montana*, 59 INDUS. & LAB. RELS. REV. 17 (2005) (finding good cause standard restored employment growth rate).

additional worker protections in the state has negatively impacted unemployment rates, the expansion of jobs, or the local economy.[150]

C. *Essential Workers in New York City*

In a much more current example, the City of New York recently put in place a local law that provided just-cause protections for fast-food workers.[151] The ordinance is a more targeted form of the Montana law discussed above. The provision, which applies only to fast food workers in the city, allows the discharge of these employees only where a worker has not "satisfactorily perform[ed] job duties" or has engaged in misconduct "that is demonstrably and materially harmful to the . . . employer's legitimate business interests."[152] The code details the type of misconduct and work performance that would fall under these provisions and provides for a short probationary period (thirty days) where just cause would be inapplicable.[153]

The city ordinance also calls for the use of progressive discipline in most instances,[154] places the burden of proof on employers to establish just cause for a wrongful discharge,[155] requires the employer to provide a written explanation to the worker for the termination,[156] and enumerates various forms of relief.[157] This relief can even include "an order to reinstate or restore the hours of the fast food employee."[158]

This city ordinance demonstrates how a local jurisdiction can intervene to provide additional protections to workers, and such protections need not necessarily take place on a state or federal level. This code provision also shows how a city can address a specific problem, in this case because "fast food workers were designated as 'essential workers' not subject to the Governor's stay-at-home orders, the City Council sought to eliminate their fears of job loss and to increase safeguards for raising health and safety concerns in the workplace."[159] Additionally, the code provision shows the promise of starting

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[150] *See* Ewing et al., *supra* note 149, at 17; *cf.* ROSEMAN, *supra* note 40, at 19 (discussing study and analysis of employment in Montana after just-cause statute was enacted). "Montana now has one of the lowest unemployment rates in the United States. Its economy over the last three decades has been driven by factors that have nothing to do with the fact that it has abolished employment at will." *Id.*at 1.

[151] N.Y.C., N.Y., ADMIN. CODE §§ 20-1271 to -1275 (2021).

[152] § 20-1271.

[153] *Id.*

[154] § 20-1272(c) ("Except where termination is for an egregious failure by the employee to perform their duties . . . .").

[155] § 20-1272(e).

[156] § 20-1272(d).

[157] §§ 20-1272 to -1273.

[158] § 20-1272(f).

[159] Jeffrey S. Klein & Nicholas J. Pappas, *NYC Bans At-Will Employment for Fast Food Workers*, N.Y. L.J. (Feb. 2, 2021, 12:30 PM), https://www.law.com/newyorklawjournal/

narrowly and gradually expanding protections to additional workers. The city has already proposed additional, similar protective legislation for all essential workers.[160]

Montana and New York City are just two examples where jurisdictions have been proactive in providing worker protections in employment. Given the diverse geographical disparity between these jurisdictions, it is helpful to examine two different approaches to the topic, both of which ultimately give workers very similar protections from termination. Other local jurisdictions (not on a federal level) have provided workers with other protections from at-will discharge.[161] Clearly, then, some jurisdictions have already waded into this area, and there is no evidence it has negatively impacted local economies.[162] Given the more recent data on employer abuses of at-will employment that occurred during the pandemic and involved sexual harassment, more broad-based, uniform protections from discharge are now necessary. The following Part outlines one such proposed approach.

IV. A PROPOSAL FOR A SENSIBLE JUST CAUSE STANDARD

The recent events of the pandemic and the new information that we now have as a result of the #MeToo era clearly demonstrate the unfair treatment of workers in their employment—even resulting in assault in specific instances. This workplace dynamic cannot go unaddressed, and the basic doctrine of employment law must be revisited.

The most straightforward way to rebalance this inequity is to adopt a sensible just-cause standard for dismissal in the workplace. Such a standard would give workers protection against the ultimate employment action—dismissal—providing them far more substantial flexibility in their day-to-day activities. If a

2021/02/02/nyc-bans-at-will-employment-for-fast-food-workers [https://perma.cc/6W5J-5C94].

[160] *See* Christine Pulfrey, *New York City Weighs Bill To Protect Essential Workers*, BLOOMBERG TAX (May 1, 2020, 12:03 PM), https://news.bloombergtax.com/payroll/new-york-city-weighs-bill-to-protect-essential-workers (noting under proposal, "[e]mployers responsible for hiring essential workers would be prohibited from terminating, suspending, or reducing essential employees' hours without cause").

[161] *See, e.g.*, P.R. LAWS ANN. tit. 29, § 185b (2017) ("Just cause for discharge of an employee shall be understood to be that which is not based on legally prohibited reasons and on a whim of the employer."); V.I. CODE. ANN. tit. 24, § 76 (2009) (enumerating grounds for discharging employees); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 107 n.9 (1997) ("Employment at will is the default rule in every American jurisdiction except Montana, Puerto Rico, and the Virgin Islands."); *see also* PHILA., PA., CODE ch. 9-4700, § 9-4702 (2023) ("A parking employer shall not discharge a parking employee except for just cause or a bona fide economic reason."); N.C. GEN. STAT. § 126-35(a) (2013) ("No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.").

[162] *See* ROSEMAN, *supra* note 40, at 19 (showing Montana did not experience higher unemployment or lower job growth under just-cause standard).

worker knows she will be protected if she is fired for complaining of sexual harassment in the workplace and there will be real remedial damages awarded, that worker will be much more likely to complain in the first instance. Sensible just cause will thus help root out discriminatory and unjust acts in the workplace, and make workers whole where such acts occur. Some might characterize sensible just cause as a "just cause light" approach, but it is more than that. The proposed standard extrapolates from the just-cause factors found in the unionized, arbitration context and applies those factors—sensibly—to workers who are at will and currently have no collective bargaining representation.

Adopting a just-cause standard would not be a unique act in the employment context. During the Great Depression, workers faced enormous pressures to do whatever their employers asked, as they were simply happy to have any employment at all. At the time, this led to a tremendous power imbalance between management and workers,[163] ultimately resulting in the passage of the National Labor Relations Act, which gave employees the right to engage in collective activity.[164] Thus, this would not be the first time that inequities between employers and employees needed to be addressed. As discussed earlier, exceptions have now been placed into federal law for discrimination on a wide range of protected factors, including race, color, gender, national origin, religion, age, and disability.[165]

Developing a sensible just-cause standard is indeed a delicate and difficult task. This Article attempts to draw the lines necessary to begin discussions on such a standard. Much can be learned from the just-cause tests discussed years ago by Daughtery, Nolan, and Abrams.[166] The essence of just cause found in this unionized arbitration context, which should be applied to all workers, is that a satisfactory employee cannot be fired without industrial equal protection and industrial due process.[167] At its core, then, just cause means that a good worker must be treated fairly and can only be fired after a proper investigation and an opportunity to be heard. A sensible just-cause standard attempts to look beyond the union context and answer the simple (yet somewhat loaded) question: what

[163] *See, e.g.*, Blades, *supra* note 6, at 1404-05 ("It is well known that the labor union movement was a response to the imbalance in the relationship of the individual employee to his employer.").

[164] *See Rights We Protect*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect [https://perma.cc/22N8-JHD8] (last visited Aug. 25, 2023).

[165] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination against several protected categories); 29 U.S.C. § 623(a)(1) (prohibiting discrimination on age); The Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a) (prohibiting discrimination based on disability).

[166] *See generally* Grief Bros. Cooperage Corp., 42 Lab. Arb. Rep. (BL) 555 (1964) (Daugherty, Arb.); Enterprise Wire Co., 46 Lab. Arb. Rep. (BL) 359 (1966) (Daugherty, Arb.); Abrams & Nolan, *supra* note 124, at 611-13.

[167] *See, e.g.*, *Grief Bros. Cooperage Corp.*, 42 Lab. Arb. Rep. (BL) 555; *Enterprise Wire Co.*, 46 Lab. Arb. Rep. (BL) 359; Abrams & Nolan, *supra* note 124.

is satisfactory work performance for an employee who currently has only at-will status?

Such a standard can more easily be understood by breaking it down into five basic pigeonholes:

1. Satisfactory work output (through an objective determination).
2. Professional conduct.
3. Timely and regular attendance.
4. Economic downturn.
5. Industrial due process.

This Article will explore each of these five guideposts in more detail, but at the outset it is worth noting that these markers are not always mutually exclusive. There may be various factors that ultimately lead to a worker's discipline, and these reasons may cut across the guideposts listed above. Thus, for example, a worker might be discharged because he is frequently late to work (a violation of the third guidepost), and this tardiness may also contribute to the worker's poor work performance (a violation of the first guidepost). While there may be multiple factors that lead to the employee's termination, however, discharge may often be warranted by any one of these indicia. And, as discussed further below, the employer must engage in industrial due process to support a worker's discharge, regardless of the nature of the employee's violation.

A. *Sensible Just Cause Factors Explained*

It is important to evaluate each of the factors of sensible just cause proposed here, closely considering the parameters of each guidepost suggested. These factors are thus outlined in greater detail below.

Satisfactory work output. A satisfactory level of work output is the first guidepost in the sensible just-cause framework because it is likely the most important factor in the analysis. The quality and quantity of the worker's production is critical to the overall operations of the business. When production suffers, it can put the entire business at risk. Looked at more directly, this factor focuses on whether or not the employee is acceptable in the performance of their work duties. Thus, rather than examining other more tangential parts of the job, such as attitude or dedication, this marker focuses specifically on the employee's level of production.

Defining satisfactory work output can be a difficult endeavor, as it is a task that can vary not only by industry but even within a particular unit of a specific company.[168] It is thus simply impossible to define satisfactory work output with

[168] *See, e.g.*, Schwab, *supra* note 17, at 22 ("Proponents of at will emphasize the unverifiability of the performance standard in many employment contracts."); Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1358 (1988) ("Because of monitoring costs, firms cannot quickly and easily distinguish workers who perform up to standard from workers who shirk

one broad stroke. Rather, it is an individualized inquiry that must be answered by the straightforward question: "what level of worker production, with respect to both quality and quantity of work, should a reasonable employer expect under similar circumstances?" While answering this question may seem somewhat daunting, the company (and broader industry) will likely develop norms and set expectations with respect to worker output over time. In the unionized workplace, these norms are often formalized in a collective bargaining agreement, but that type of contract will not be present in the at-will context.[169] The parties can look to an employee manual in helping to define satisfactory work, but that document is not necessarily definitive on this question.[170]

The issue of a worker's satisfactory level of production is an objective inquiry.[171] The question at issue should not be the employer's subjective happiness with worker output. While most companies will not be satisfied with the status quo and will demand increasingly more from their employees, a satisfactory work performance standard requires just that—*satisfactory* performance. This marker of sensible just cause does not imply or require that a worker be "great" or even above average. Rather, the ultimate inquiry here is whether the reasonable expectations of the employer are being met. If not, then the employer will have just cause to terminate the employment relationship.

Professional conduct. The professional-conduct requirement relates to an employee's overall conduct at work. It is also objective in nature and varies depending upon the particular circumstances of the industry, employer, and workplace in question. It encompasses an obedience to workplace rules, but even more broadly implicates all norms, customs, standards, and rules of the workplace, both formal and informal. In the unionized workplace there is an emphasis on following established, existing rules in the determination of just cause, but such a requirement is too onerous for sensible just cause, which more broadly asks the question of whether the worker is a satisfactory employee.[172] Just because an employer does not have an express policy against profanity

on the job.").

[169] *See, e.g.*, *At-Will Employment—Overview*, NAT'L CONF. STATE LEGISLATURES (Apr. 15, 2008), https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [https://perma.cc/XQ6Q-83Z4] ("The at-will presumption is a default rule that can be modified by contract. . . . Typically, U.S. companies negotiate individual employment agreements only with high-level employees. Collective bargaining agreements usually provide that represented employees may only be terminated for cause.").

[170] Bryce Yoder, *How Reasonable is "Reasonable"? The Search for a Satisfactory Approach to Employment Handbooks*, 57 DUKE L.J. 1517, 1530 (2008) (discussing how employee handbooks can outline clear expectations in workplace but can also change as employer expectations change).

[171] Abrams & Nolan, *supra* note 124, at 615 (stating satisfactory level of production "will vary from case to case").

[172] Robert M. Schwartz, *Using 'Just Cause' To Defend Against Unfair Discipline*, LAB. NOTES (Jan. 15, 2019), https://labornotes.org/2019/01/using-just-cause-defend-against-unfair-discipline [https://perma.cc/MBJ4-UKP5] (highlighting difference in just-cause standard between union and nonunion workers).

should not mean that the employer cannot terminate a worker for using aggressively vulgar, profane language toward a supervisor.

While sensible just cause largely relates to what occurs during traditional hours of employment, there may be circumstances where a worker's unprofessional conduct outside of work can properly result in that employee's discharge when the conduct can damage the employer's overall operations.[173] For example, if a private elementary-school teacher was arrested and convicted while out of town on summer break for possession of cocaine and sentenced to probation, such off duty conduct might not directly impair the teacher's ability to show up to class in the future. However, this off-work conduct would call into question the teacher's judgment and ability to work around young children. Those arbitrators who have found outside issues sufficient to discipline a worker often look for a workplace component, or a way in which the conduct interferes with the employee's ability to perform the job.[174] The better inquiry for the at-will context is the broader question (and objective inquiry) of whether a reasonable employer would discharge an employee for similar off-duty conduct. This test again emphasizes the individualized nature of these inquiries.

Timely and regular attendance. An acceptable attendance record is one of the most straightforward, objectively verifiable elements of satisfactory work.[175] Showing up to work both regularly and without any tardiness issues can present a challenge for some workers, but it is a reasonable requirement for most employers to expect promptness on the part of their workforce. Although, the precise circumstances of an individual's attendance record are contextual.[176] An employee working on an assembly line can impact the plant's overall performance if that single worker shows up only two minutes late to work. In other industries, such minor tardiness may not present any substantial problems to the overall operations of the business.

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[173] Abrams & Nolan, *supra* note 124, at 605 (outlining approach for employee discipline).

[174] *See generally id.*; Am. Arb. Ass'n, 2004 AAA LEXIS 1075, at *19 (2004) (Sugerman, Arb.) ("While Grievant made the threat outside of the workplace, the potential danger in the workplace is what must be considered."); Am. Arb. Ass'n, 2018 AAA LEXIS 140, at *10 (2018) (Henderson Ellis, Arb.) ("The Grievant chose to add his own racist joke to others on a Facebook page; it is irrelevant that the choice took place outside the workplace, given the nexus and impact it had and continues to have within the workplace."). *Cf.* Am. Arb. Ass'n, 2007 AAA LEXIS 164, at *35 (2007) (Buchheit, Arb.) ("I find no basis upon which to impose a penalty upon the Grievant, given that his use of marijuana outside the workplace was not itself a violation of the Policy, and it has not been established that he was under the influence of marijuana while at work.").

[175] *See, e.g.*, Abrams & Nolan, *supra* note 124, at 613 (describing regular attendance as primary element in just-cause determination); 1 EMPLOYMENT DISCRIMINATION COORDINATOR ANALYSIS OF FEDERAL LAW § 6:57 (2021) ("[As a] general rule, some degree of regular, predictable attendance is fundamental to most jobs, and an employee who cannot get to work does not satisfy the essential requirements of her employment.").

[176] *See* 1 EMPLOYMENT DISCRIMINATION COORDINATOR ANALYSIS OF FEDERAL LAW § 6:57, *supra* note 175 (highlighting specific attendance obligations are dependent on factual circumstances and functions of job).

On its face, discharge for poor attendance or tardiness may seem like a justifiable reason for discharge in most cases.[177] While an employer can, and should, expect appropriate worker attendance, it may be necessary to look beyond the surface of an employee's time cards in some circumstances.[178] For example, there may be a legitimate illness of an immediate family member, or a personal medical emergency, that should be excused under state or federal law.[179] Similarly, there may be extenuating circumstances related to one's disability that result in frequent tardiness that should be accommodated if possible.[180] And it is important to make certain that an employer is not simply using tardiness as an excuse to discharge a worker on the basis of race, gender, or some other protected characteristic.[181] For example, if an employer were to fire a Black employee for showing up to work late ten times, but then look the other way with respect to the similar attendance record of a white employee, it would be highly suggestive of discriminatory animus that would not provide just cause for the worker's termination.[182]

Thus, while poor or untimely attendance are typically reasonable factors to consider when discharging a worker, it may be necessary to dig deeper into these justifications in some circumstances. Where covered medical issues or an individual's disability cause the tardiness, it is unlikely that just cause will be present to terminate the worker.[183] And, it may be necessary to determine whether the employer is disparately using attendance in its treatment of workers based on protected characteristics.

Economic downturn. The economic downturn element of sensible just cause is one that sets it apart from the just cause tests applied in the unionized setting. How layoffs are conducted is squarely a matter of bargaining between management and the union, and we must look to the agreement between the parties for guidance on how such layoffs should occur.[184] This is not the case in traditional at-will employment. Indeed, a recession in the broader economy may often be used to justify an employer's decision to terminate an individual

[177] *Id*. (stating general rule "predictable attendance is fundamental to most jobs").

[178] Abrams & Nolan, *supra* note 124, at 613 (explaining "[t]he obligation of regular attendance is not absolute" because good reasons for absences may exist).

[179] *See, e.g.*, Family and Medical Leave Act, 29 U.S.C. § 2601 (allowing reasonable leave for medical reasons).

[180] *See* Americans with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A) (requiring reasonable accommodations be made in workplace for qualified individuals with disabilities).

[181] *See id.* (preventing discrimination on basis of disability); Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e (preventing discrimination in workplace on several protected bases).

[182] *See* 42 U.S.C. § 2000e-2(a)(1).

[183] Abrams & Nolan, *supra* note 124, at 613.

[184] Lisa Guerin, *Union Employees: Are You Protected from Layoffs?*, LAYWERS.COM (Mar. 18, 2020), https://www.lawyers.com/legal-info/labor-employment-law/employment-contracts/can-your-union-save-you-from-a-layoff.html.

worker.[185] Or, an across-the-board reduction in force might result in hundreds or thousands of workers being discharged.[186]

For sensible just cause to work, it is imperative that economic downturn be permitted as a proper rationale for a worker's discharge. This term must be defined broadly to encompass not only an economic downturn in the national economy, but a downturn in a particular industry, or even simply financial problems at a specific company. These financial difficulties may even be self-inflicted, meaning that the root cause might be the company's own mismanagement. The cause of the financial difficulty is not the issue—instead, the question remains as to whether, given a company's current economic situation, a reasonable employer would terminate one or more workers to free up salary and streamline operations.

As noted, the economic guidepost of sensible just cause makes it unique from those tests established to define just cause under a collective bargaining agreement. This distinction is essential to help preserve the most important function and result of at-will employment—employer flexibility.[187] A company will only hire aggressively if that employer knows that it can lay off workers if it encounters financial difficulties.[188] Otherwise, employers may be overly cautious in the hiring process to maintain flexibility in the event of an economic downturn.[189] By permitting such a downturn to independently satisfy a just cause dismissal, the sensible just cause standard will not dissuade employer hiring and it will further help minimize any negative effect on the broader economy.

At the same time, this guidepost cannot be used simply as subterfuge to terminate a worker. The employer must be able to show that the current

[185] *See* Arnow-Richman, *supra* note 12, at 1 ("Companies and workers alike anticipate significant job turnover both in times of economic turbulence, such as the recent downturn, in which employers were forced to shed numerous workers due to financial hardship, as well as during economic bubbles, in which companies lay off workers and reorganize for strategic reasons."); Edwin R. Render, *How Would Today's Employees Fare in a Recession?*, 4 U. PA. J. LAB. & EMP. L. 37, 64 (2001) ("Neither the non-discrimination statutes nor the wrongful discharge doctrine[s] [which ordinarily restrict employers' rights to terminate their employees] prevent[] an employer from laying off employees for valid economic reasons.").

[186] Arnow-Richman, *supra* note 12, at 3 (describing mass layoffs during economic crisis); *see* Michael Sainato, *Major US Airlines To Lay Off Thousands of Workers as Covid-19 Support Expires*, GUARDIAN (Aug. 14, 2020, 6:30 AM), https://www.theguardian.com/business/2020/aug/14/us-airlines-layoffs-covid-19-support-delta-united-american [https://perma.cc/J9MX-H5AA] ("Major US airlines have warned they will lay off tens of thousands of workers in October when the Cares Act payroll support program for the industry expires, raising the prospect of devastation for many workers and their families.").

[187] *See, e.g.*, Gail L. Heriot, *The New Feudalism: The Unintended Destination of Contemporary Trends in Employment Law*, 28 GA. L. REV. 167, 214-15 (1993) ("If American courts were to ban the at-will employment contract, could one expect different results? . . . Ultimately, one could expect fewer employees, more unemployment, and a downward pressure on wages and business activity in general.").

[188] *Id.* at 195 (suggesting elimination of at-will employment would result in decreased willingness to hire employees).

[189] *See id.* at 195-96 (discussing hiring risks for employers without at-will employment).

economic environment necessitates that a worker be laid off or discharged, and that a reasonable employer would make this same determination under similar circumstances. Again, the question is not whether the employer believes that the financial constraints of the company dictate that the worker be discharged, but rather whether such a belief is reasonable.

Industrial due process. Industrial due process is a necessary component of a just-cause dismissal. Due process in the workplace generally means there is a full and fair investigation into the alleged worker wrongdoing, and that the employee has an opportunity to be heard.[190] The hallmark of a full and fair investigation is that the party conducting it is objective, seeks input from all relevant witnesses, and gathers any pertinent documentation.[191] An objective investigator should not have any direct connection to or knowledge of the events in question, and will often be someone from Human Resources or a supervisor from another department.[192] Most importantly, industrial due process requires the worker be given the opportunity to explain their side of the events, and to rebut any witnesses or documents.[193] The disciplinary process must therefore be fair and evenhanded, and the worker must have a say in that process.

Unlike what is typically required in unionized collective bargaining arbitration, however, an employer need not necessarily have provided prior notice or warning that certain employee conduct may result in discipline.[194] If a

[190] *See* Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 93 (1992) (noting industrial due process establishes "a basic principle of fairness, in industrial discipline as well as legal proceedings, that no one should be penalized without opportunity to speak in his own behalf" (quoting *City of Detroit*, 79-2 Lab. Arb. Awards (CCH) ¶ 8533, at 5358 (1979) (Roumell, Arb.))); Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 136 (1995) ("The just cause clause has generated a body of arbitral law known as 'industrial due process.'").

[191] *See* Abrams & Nolan, *supra* note 124, at 612 (outlining various protections included in industrial due process).

[192] *Id.* at 599-600 n.30 ("At . . . investigation the management official may be both 'prosecutor' and 'judge,' but he may not also be a witness against the employee."); *see also* E.L.H., M.L.L., E.H.M., G.E.P. & S.A.S, Comment, *Industrial Due Process and Just Cause for Discipline: A Comparative Analysis of the Arbitral and Judicial Decisional Processes*, 6 UCLA L. REV. 603, 603 (1959) ("The ultimate utility in our society of labor-management grievance arbitration is the institutionalizing of industrial due process. At its optimum operation it is a means whereby employees and supervisors alike may be assured of objective judgment subject . . . only to the vagaries of perception and understanding by an impartial third person . . . ." (omissions in original) (quoting Cannon Elec. Co., 28 Lab. Arb. 879 (1957) (Jones, Arb.))).

[193] *See* Brunet, *supra* note 190, at 93 ("[Arbitration] normally will include an opportunity for the employer [sic], before the Company makes its final decision, to offer any denials, explanations or justifications which may be relevant." (alteration in original) (quoting *City of Detroit*, 79-2 Lab. Arb. Awards (CCH) ¶ 8533, at 5358 (1979) (Roumell, Arb.))); *see also* Abrams & Nolan, *supra* note 124, at 612.

[194] *See* Abrams & Nolan, *supra* note 124, at 607 ("[E]mployees [under collective bargaining] must have actual or constructive notice as to their work obligations."); Alyson Raphael, *Arbitrating "Just Cause" for Employee Discipline and Discharge in the Era of*

worker engages in conduct that objectively warrants dismissal, that employee may be discharged, irrespective of whether the conduct in question was expressly prohibited by the company. This deviation from unionized workplace cases makes sense, as the union and management have typically engaged in bargaining specifically over what the rules of the workplace should look like.[195] In the at-will context, no such bargaining has occurred, and workers may never even have received any type of formal set of rules. From a best practices standpoint, the employer should clearly inform the worker in advance of any workplace rules, regulations, or customs. In practicality, however, this type of notice is frequently never given to the worker. And, this type of notice is not required for a discharge under the sensible just cause standard.

The standard articulated here only references industrial due process, and not industrial equal protection.[196] Again, while industrial equal protection is something typically raised in the workplace arbitration context, such a requirement does not fit as easily in the traditional at-will environment.[197] As noted, unionized workplaces examine work and fair treatment on much more of a collective basis.[198] Thus, industrial equal protection assures that similar workers committing similar offenses are treated in a like manner.[199] This should not be required for at-will employment. Indeed, there may be myriad of legitimate reasons as to why an employer may want to come down more harshly on an offense that it tended to treat more leniently in the past.

Perhaps, for example, falling short of one's production quota had not been seen as a dischargeable offense by a company in prior years. However, changing circumstances, such as worker shortages, new financial constraints, or workers

Covid-19, 34 GEO. J. LEGAL ETHICS 1237, 1246 (2021) (suggesting procedural deficiencies such as lack of notice or lack of progressive discipline can show unjust discipline).

[195] *Employer/Union Rights and Obligations*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employer-union-rights-and-obligations [https://perma.cc/D65V-KPG4] (last visited Aug. 25, 2023) (highlighting mandatory subjects of bargaining between employer and union).

[196] *See* Abrams & Nolan, *supra* note 124, at 609 (recognizing both industrial due process and industrial equal protection as important ways a union seeks disciplinary fairness).

[197] *See id.* (discussing industrial equal protection).

[198] *See id.* at 607 ("The union's real interest in disciplinary matters is fairness."); Mayer G. Freed, Daniel D. Polsby & Matthew L. Spitzer, *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461, 472 (1983) ("The purpose of the union is to improve the lot of the employees in the unit, when those employees are considered collectively.").

[199] *See* Abrams & Nolan, *supra* note 124, at 608 ("[A] union seeks 'fairness' in discipline . . . through consistent treatment of similar cases. . . . [I]f one employee is not punished for certain conduct, co-workers who engage in the same conduct should be treated in the same manner. Like cases should be treated alike. In a disciplinary situation, a union seeks what might be termed 'industrial equal protection.'" (footnote omitted)); Margaret A. Lucero & Robert E. Allen, *The Arbitration of Cases Involving Aggression Against Supervisors*, DISP. RESOL. J., Feb. 1998, at 57, 59 ("Additionally, it must be established that like-situated employees receive similar treatment (i.e., individuals committing similar offenses are similarly disciplined).").

abusing the employer's position, could lead the business to rethink that approach. While this type of change would be difficult in the unionized setting, this level of employer flexibility is necessary for sensible just cause. Each purported offense must be considered as part of an individualized inquiry, without regard to how such offenses have been treated in the past. This is not to say that such information is entirely irrelevant, however. Indeed, if as part of the investigatory process the worker alleges disparate treatment on the basis of a protected characteristic such as race or gender, comparative worker treatment may be critical to that claim and would go to the employer's potential motivations for treating the workers differently. Such evidence would also be relevant to workplace discrimination claims brought under other statutes, such as Title VII or the ADA.[200] Beyond these further accusations of discriminatory treatment, however, there is nothing prohibiting an employer from deciding to treat a worker offense more harshly than it has done in the past, providing that cause exists to justify the discipline.

B. *Sensible Just Cause: Some Additional Considerations*

Adopting the guideposts suggested above would provide additional protections to workers in this country from discharge, and help streamline employment law, while still minimizing any negative economic impact. A discussion of a few of the finer points of this proposal are important to explore, and this Section looks at the issue of the relevant probationary period for workers under the new standard, the burden of proof in these cases, the role of progressive discipline, and the remedies available.

One-year probationary period. It is very common in working environments that offer some level of worker protections to include a probationary period for their workers prior to becoming fully vested in these protections.[201] A six-month or one-year probationary period is not uncommon.[202] For example, before receiving the leave contemplated by the Family and Medical Leave Act to care for a newborn, or leave for certain medical issues of one's self or family member,

[200] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1); Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a).

[201] *See, e.g.*, Arries v. Navajo Cnty., No. CV 11-08118, 2012 WL 827248, at *2 (D. Ariz. Mar. 12, 2012) ("All employee probationary periods are periods of AT-WILL employment. Employees serving probationary periods may be terminated with or without cause and without recourse to the grievance process." (emphasis omitted)); *see also* Whidden v. John S. Nerison, Inc., 981 P.2d 271, 275 (Mont. 1999) (holding under Wrongful Discharge from Employment Act ("WDFEA") employers may not discharge employees without good cause outside probationary periods); Wissler v. Ohio Dep't of Job & Fam. Servs., No. 09AP-569, 2010 WL 2891641, at *7 (Ohio Ct. App. July 22, 2010) ("[W]e note that pursuant to R.C. 124.27(C), appellant's at-will employment could be terminated at any point during her period of probationary employment.").

[202] Paul Falcone, *Legal Implications of Probationary Periods*, SOC'Y FOR HUM. RES. MGMT. (Sept. 8, 2017), https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/legal-implications-of-probationary-periods.aspx [https://perma.cc/KV6B-M7G2].

an employee must have worked for twelve months and at least 1,250 hours.[203] And, as already discussed in the statutory example of just cause in Montana, the state carves out a one-year probationary period for workers prior to gaining these protections.[204] Given that the approach suggested here would change the basic nature of many workplaces, it seems reasonable to require new workers to complete a year of employment prior to receiving the just cause protections contemplated by this Article.

Workers who already successfully completed a year of employment prior to this standard going into effect would immediately receive these additional protections. During the one-year probationary period, the workers' employment would be considered at-will. This would encourage employers to continue to hire employees on a trial basis, helping to provide employers with flexibility when hiring workers. If an employer knows that it can easily terminate a new worker whose performance turns out to be poor, they may be more likely to take a chance on these workers in the hiring process. The probationary period also provides some level of insulation from sudden economic downturn. In this regard, employers may immediately lay off any probationary worker if, for example, a recession were to hit. This one-year probationary window thus allows employers to stay nimble and aggressive in hiring, again helping the broader economy. Sensible just cause would aim to provide workers a certain level of protection from unjustified employer discharge, while balancing these protections against the overall desire to keep as many workers employed as possible.

Burden of proof stays with the employer. It is worth discussing where the burden of proof lies in proving that an employee was fired for just cause. As most arbitrators have concluded in the collective bargaining context, this burden resides with the employer.[205] This means the employer would be required to show, by a preponderance of the evidence, that it has satisfied the five requirements discussed above and that there was sensible just cause to fire the worker. Putting the burden of proof on the employer makes sense with respect to terminations, given the negative reputational impact that such a discharge can have on a worker.[206] Discharged workers must typically explain to future prospective employers why they separated from their prior employment, and having a termination on an individual's record can make it difficult for them to find other suitable employment. Given this potential negative reputational impact on the employee, it makes sense to require the employer to show the existence of just cause to justify the termination.[207]

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[203] 29 U.S.C. § 2611(2)(A)(i)-(ii).

[204] MONT. CODE ANN. § 39-2-901(1) (2021).

[205] *See* Estlund, *supra* note 190, at 136 ("Under a just cause provision, the employer must have a valid basis for discipline or discharge. . . . The hearing, at which the employer bears the burden of proof, resembles a trial, but is less formal." (footnote omitted)).

[206] *See* Hirsch, *infra* note 274, at 122 (discussing burden of proof for proposed standard for worker discharges as reflecting policy underlying standards).

[207] As this Article is limited to the topic of terminations, it takes no position on where the

Progressive discipline unnecessary. Unlike discipline for the vast majority of unionized workers under a collective bargaining agreement, progressive discipline would not be necessary for a sensible just cause dismissal. Progressive discipline typically involves a multi-step process that is negotiated through a collective bargaining agreement.[208] Pursuant to these agreements, workers often receive lower levels of discipline—such as an oral or written warning or suspension—prior to being discharged.[209] However, under a sensible just cause standard, an employer may move directly to a termination of the employee, *if a reasonable employer under the same circumstances would do the same, and if supported by the guideposts set forth above*. An employer could still use lesser forms of discipline where warranted, such as to retain and rehabilitate good employees who have simply committed minor infractions. However, to maintain employer flexibility under a sensible just cause paradigm, companies would not be required to engage in progressive discipline if the guideposts support immediate employee discharge.

Employees v. independent contractors. This Article does not wade into the debate about whether coverage should apply to employees or independent contractors. Much has already been written on this debate,[210] and this politically charged issue was at the forefront of a recent Proposition item in California and subsequent litigation in the courts.[211] Regardless of whether sensible just cause

burden of proof should lie if a jurisdiction extended the just-cause standard to an employer's adverse actions that resulted in less than a discharge. There may be certain circumstances where it would be more appropriate in those instances for the worker to carry the burden of proof.

[208] *See* Abrams & Nolan, *supra* note 124, at 607 (noting "discipline should be imposed in gradually increasing degrees").

[209] *See id.* at 620 ("In many situations, such as those involving absenteeism and poor work performance, management must impose discipline in gradually increasing degrees. Sudden imposition of the maximum penalty is often unwarranted."); *see also* William A. Herbert & Alicia McNally, *Just Cause Discipline for Social Networking in the New Gilded Age: Will the Law Look the Other Way?*, 54 U. LOUISVILLE L. REV. 381, 429 (2016) ("The purpose of progressive discipline is to enhance workplace productivity and stability through counseling and graduated levels of penalties aimed at correcting employee misbehavior.").

[210] *See* Lisa J. Bernt, *Wrongful Discharge of Independent Contractors: A Source-Derivative Approach to Deciding Who May Bring a Claim for Violation of Public Policy*, 19 YALE L. & POL'Y REV. 39, 39 (2000) ("In determining whether and when such a cause of action should be available to independent contractors, it is necessary to re-examine the reasons the public policy exception to the employment-at-will rule was adopted and how it has evolved."); *see also* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought To Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 297-98 (2001) (describing how ambiguous legal classification system of employee status benefits employers); Orly Lobel, *The Debate Over How To Classify Gig Workers Is Missing the Big Picture*, HARV. BUS. REV. (July 24, 2019), https://hbr.org/2019/07/the-debate-over-how-to-classify-gig-workers-is-missing-the-bigger-picture (describing classification question as "red herring" and asserting real challenge is "how to modernize employment and labor protections to fit with the realities of work today").

[211] *See generally* Faiz Siddiqui & Nitasha Tiku, *California Voters Sided with Uber,*

would apply to employees, independent contractors, or both, clearly defining the terms is paramount. Thus, while a broader statute would help a greater number of workers, and is probably the better approach, defining the exact coverage requirements is an endeavor best left for the federal or state legislatures. Broader coverage is typically better, but it may not always be practicable.

Remedies for sensible just cause. To be effective, a sensible just-cause standard must be more than simply a toothless tiger. An effective statutory scheme for wrongful discharge must include powerful remedial relief. These remedies should make workers whole for the wrongs they experience, and further deter this type of wrongful employer conduct in the future.[212] A good model to follow for such relief—with one significant exception—is Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination.[213] This statute provides for various forms of relief, including back pay (damages from the date the wrong occurred), front pay (damages from the date of judgment to an unspecified date in the future), compensatory damages (typically pain and suffering), punitive damages, and attorney's fees.[214]

All of these categories of relief found in Title VII would similarly be appropriate in a just-cause wrongful discharge statute. To be even more effective, however, the statute should not place any caps on punitive or compensatory damages. Title VII includes a sliding statutory cap on these damages, limiting the amount of combined punitive and compensatory relief to only $300,000 for claims brought against the largest employers (those with five hundred or more employees).[215] These caps have watered down the effectiveness of Title VII over the years, as they remained static for the last three decades.[216] Inflation significantly eroded the deterrent effect of these types of damages during this time. This is not to say that there would not be any guardrails to

Denying Drivers Benefits by Classifying Them as Independent Contractors, WASH. POST (Nov. 4, 2020, 6:43 PM), https://www.washingtonpost.com/technology/2020/11/03/uber-prop22-results-california/ (describing Proposition 22 and ensuing litigation); Preetika Rana, *California Ballot Measure That Classifies Uber, Lyft Drivers as Independent Ruled Unconstitutional*, WALL ST. J. (Aug. 20, 2021, 11:58 PM), https://www.wsj.com/articles/proposition-22-is-unconstitutional-california-judge-says-11629512394.

[212] *Cf.* Hirsch, *infra* note 274, at 128 (discussing damages with respect to proposal for worker discharges).

[213] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (making it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

[214] *See* 42 U.S.C. § 1981a(a)(1) ("In an action brought by a complaining party under . . . the Civil Rights Act of 1964 . . . against a respondent who engaged in unlawful intentional discrimination . . . prohibited under . . . 42 U.S.C. 2000e-2 . . . the complaining party may recover compensatory and punitive damages.").

[215] 42 U.S.C. § 1981a(b)(3) ("The sum of the amount of compensatory damages . . . and the amount of punitive damages awarded . . . shall not exceed . . . in the case of a respondent who has more than 500 employees . . . $300,000.").

[216] *See* 42 U.S.C. § 1981a (documenting effective date of statute as November 21, 1991).

protect against runaway jury punitive damages awards. Indeed, the Supreme Court put in place a ten-to-one punitive damage to actual damage upper limit ratio to comply with Constitutional due process concerns.[217] This ten-to-one ratio would similarly be applicable to awards for wrongful discharge.

And, as discussed in greater detail in the implementation Section below, sensible just cause would provide an exclusive remedy. In other words, workers would be required to elect a single statute under which to proceed.[218]

C. *Implementation of Sensible Just Cause Standard*

Articulating a standard for just-cause dismissal, along with the rationale for that standard, is a relatively straightforward endeavor. Taking that standard beyond the realm of theory is far more difficult, and the process of implementing sensible just cause into the workplace must be carefully considered. There are two ways that such a standard could be adopted.

First, Congress, if it were inclined to act, could implement sensible just cause as federal law. In several other instances over the past several decades, Congress provided workers greater protections where necessary. For example, the Occupational Safety and Health Act improved health and safety standards,[219] the NLRA recognized the ability to bargain collectively,[220] and a number of other federal laws extended civil rights protections.[221] Federal law also encourages workplace safety with respect to drug use,[222] prohibits polygraph testing of workers in most instances,[223] and prohibits most child labor.[224] Where deemed necessary, then, Congress intervened to help level the playing field and provide workers with greater protections. Given what we have seen in recent years, Congress should adopt a sensible just-cause standard to protect workers from

[217] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580-81 (1996).

[218] *See infra* Section IV.C (discussing implementation of proposed standard).

[219] Occupational Safety & Health Act of 1970, 29 U.S.C. §§ 651-78 (establishing national standards for workplace safety).

[220] National Labor Relations Act, 29 U.S.C. §§ 151-69 (providing, workers with "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection").

[221] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (prohibiting employment discrimination based on race, color, religion, sex and national origin); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (prohibiting wage discrimination based on sex); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (prohibiting employment discrimination based on age); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96 (prohibiting discrimination based on disability by federal employers); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-13 (proscribing discrimination against individuals with disabilities).

[222] Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 8101-8106.

[223] Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-09 (proscribing in most circumstances employers from subjecting current and prospective employees to polygraph tests).

[224] Fair Labor Standards Act, 29 U.S.C. § 212 (addressing child labor).

unjust terminations.[225] As discussed, Congress previously stepped in to establish greater worker rights in the employment context. Congress hopefully will see the need to step in again and provide workers with additional protections from unjust dismissal.

Second, individual states or local jurisdictions could fill the gap in the federal law by adopting their own sensible just-cause standards. To be sure, a federal statute would have more heft and would cut across state lines, providing greater unanimity and worker protection. However, such a provision is unlikely to be adopted in the face of the current gridlock in Congress. Despite attempts to do so, workers have been unable to secure many additional civil rights protections in recent years.[226] More progressive-leaning states, counties, or cities could take it upon themselves to pass this type of legislation on a local level. This localization would allow these jurisdictions to tailor the laws to fit the needs of their own constituents and workplaces.

This would not be the first time the states have stepped in to provide greater worker protections. Indeed, many states adopted minimum wage rates well above the current federal minimums.[227] Other jurisdictions protect certain characteristics not covered by federal law, such as appearance discrimination and marital status.[228] And still other jurisdictions have lowered the number of employees needed to be covered by the employment discrimination statutes (currently fifteen employees under federal law) or provided greater damages

[225] *See* Blades, *supra* note 6, at 1435 ("[T]here has been a blind acceptance of the employer's absolute right of discharge. This outmoded doctrine has been supported by technical principles of contract law.").

[226] *See* HUM. RTS. CAMPAIGN & EQUAL. FED'N INST., 2020 STATE EQUALITY INDEX 8-9 (2020), https://hrc-prod-requests.s3-us-west-2.amazonaws.com/HRC-SEI20-report-Update-022321-FInal.pdf [https://perma.cc/MG58-5W7X] (tabulating handful of positive legislative advances regarding LGBTQ rights at state level between 2010 and 2020).

[227] *See* Andrew Soergel & Sara Clarke, *24 U.S. States Will See a Minimum Wage Increase in 2021*, U.S. NEWS & WORLD REP. (Aug. 2, 2021, 3:21 PM), https://www.usnews.com/news/articles/best-states/minimum-wage-by-state (listing states with minimum wage laws above federal floor).

[228] *See, e.g.*, CAL. GOV'T CODE § 12920 (West 2023) (proscribing discrimination in employment based on marital status, among other categories); *see* Wisconsin Fair Employment Act, WIS. STAT. § 111.31 (2022) ("The legislature finds that the practice of unfair discrimination in employment against properly qualified individuals by reason of their age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters, substantially and adversely affects the general welfare of the state."); *see also* D.C. Code Ann. § 2-1402.11 (2023) ("It shall be unlawful discriminatory practice to [discriminate in employment] based upon . . . personal appearance . . . ."); DEL. CODE ANN. tit. 19, § 711(b) (2022) (making it unlawful for employer to "[f]ail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to . . . marital status"); HAW. REV. STAT. § 378-2 (2021) (forbidding discrimination in employment based on marital status, among other categories).

than what currently exist under those statutes.[229] And an overwhelming number of states and cities have joined the ban-the-box movement which advocates against asking applicants about prior convictions as part of the initial phase of the hiring process.[230] Expanding worker protections to include a sensible just-cause provision to protect workers from wrongful discharge would be a natural fit in these jurisdictions.

Moreover, adopting the sensible just-cause standard proposed here would help streamline workplace law. More specifically, any just-cause legislation should make clear that the statute provides an exclusive remedy. Thus, workers must decide between bringing a claim for wrongful discharge or bringing a claim for race, color, sex, national origin, or religious discrimination under Title VII,[231] age discrimination under the Age Discrimination in Employment Act ("ADEA"),[232] or disability discrimination under the Americans with Disabilities Act.[233] In the context of an unlawful discharge, most workers would likely elect to proceed under the new just-cause legislation, given the broader remedies proposed here. Without the limits of the statutory caps that exist under Title VII and the ADA,[234] or the doubling of damages limits found in the liquidated damages provision of the ADEA,[235] workers would be entitled to far greater relief under the sensible just cause standard proposed here. Workers would thus naturally proceed under this new statute, which would help funnel all discharge cases under a single law rather than under the current patchwork of different statutory provisions. Consolidation under a single law would help streamline workplace claims, or at least those that arise in the context of a worker discharge. It would also provide those workers who suffered a discriminatory discharge with greater make-whole relief than they are currently entitled to under federal

[229] *See, e.g.*, CAL. GOV'T CODE § 12926(d) (West 2023) (defining employer as "any person regularly employing five or more persons"); DEL. CODE ANN. tit. 19, § 710(7) (2023) (defining employer as "any person employing 4 or more employees").

[230] *See* Beth Avery & Han Lu, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (Oct. 1, 2021), https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/ [https://perma.cc/S25C-VSW9] ("Nationwide, 37 states and over 150 cities and counties have adopted what is widely known as 'ban the box' so that employers consider a job candidate's qualifications first—without the stigma of a conviction or arrest record.").

[231] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (providing cause of action for employment discrimination based on race, color, sex, national origin, and religion).

[232] *See* Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (providing cause of action for employment discrimination based on age).

[233] *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-13 (providing cause of action for employment discrimination based on disability).

[234] 42 U.S.C. § 1981a(b)(3) (setting limits on compensatory and punitive damages).

[235] 29 U.S.C. § 626(b) (limiting payment of liquidated damages to willful violations of statute).

law.[236] This would be a welcome change given that these damages for discriminatory discharges have remained the same for the past thirty years.[237]

V. IMPLICATIONS OF PROPOSED GUIDEPOSTS

A number of implications flow from adopting the proposed guideposts set forth above. This Part addresses these implications, as well as the existing scholarship in this area.

The framework proposed here is designed to break down the unfair dynamic that currently exists between workers and management. At-will employment has played a positive role in many parts of the economy, but the dichotomy that now exists between corporations and their workers is simply too stark. The sexual harassment and abuse that has been shown empirically to pervade the workplace is only one example.[238] The relative helplessness of workers in the midst of one of the largest health crises in our nation's history is another.[239] But the current inequities that exist in employment go beyond these two glaring examples and pervade all areas of the workplace.[240] At-will employment provides employers with the opportunity for abuse, particularly with vulnerable workers and when economic times are uncertain.

The sensible just cause model proposed here seeks to level that playing field, or to at least provide workers with some basic level of protection from discharge. Unlike the current employment structure, employers under the proposed model will be required to provide some reason for a worker's termination and cannot simply remain silent on this question.[241] Likewise, the reason for discharge articulated by the employer under sensible just cause must be reasonable as well.[242]

By allowing the pendulum to swing back toward workers on the discharge question, employees will have some comfort in knowing that they will be able to retain their jobs if they perform them well. This will have numerous immediate positive consequences. Most notably, if employees are aware cause is necessary in order to terminate them, employees may be less afraid of speaking up when their workplace rights are being violated. As discussed earlier,

[236] *See generally* 42 U.S.C. § 1981a(b)(3).

[237] *See generally id*.

[238] *See supra* Section II.A (discussing prevalence of sexual harassment in workplace).

[239] *See supra* Section II.B (addressing employer workplace abuse during pandemic).

[240] *See supra* Section I (discussing how at-will termination has enabled employers' unfair treatment of employees).

[241] *See supra* Section IV.A (outlining proposed model of just-cause standard and underlying principles); *see also* Abrams & Nolan, *supra* note 124, at 607-09 ("[The employer] knows why it took the action, and for that reason it should bear the burden of explaining why discipline is justified.").

[242] Abrams & Nolan, *supra* note 124, at 607-09.

the fear of retaliation is powerful, and one that still prevents workers from bringing hostile work environment complaints even in the #MeToo era.[243]

Additionally, by requiring sensible just cause for discharge, workers will also have a greater level of job security, assuming they perform their positions effectively.[244] This can lead to greater loyalty to the company with which they are employed, resulting in a greater investiture in their jobs and local communities.[245] Similarly, companies will benefit from an increased willingness of workers to report the wrongdoing of others at the company if those same workers are protected from retaliatory discharge.[246] While some corporate problems can be systemic, other issues—often those related to harassment—are perpetrated by rogue employees through conduct that is hidden from the business.[247] By encouraging worker complaints related to this wrongdoing, sensible just cause also benefits the companies themselves by increasing awareness and allowing businesses to remedy any problems more quickly, thus reducing exposure to legal liability.[248]

From the standpoint of basic fairness, applying the sensible just-cause standard is also simply the right thing to do.[249] The proposed standard still does not put employers and employees on equal footing.[250] Indeed, the law would not change in any working area not related to discharge. Instead, the guideposts suggested here would help protect workers from the ultimate adverse employment action—unjust termination. Employers should not be able to use

[243] *See supra* Section II.A (describing instances of retaliation in #MeToo-era workplace sexual harassment claims).

[244] *See* Abrams & Nolan, *supra* note 124, at 599 (explaining how just-cause standard in collective agreements helps create job security for employees).

[245] *See* Partee, *supra* note 8, at 704; Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 677 (1988) ("Employee loyalty resulting from expectations of long-term employment may be more beneficial in managing a business enterprise than the implicit threat of unemployment.").

[246] Kathleen C. McGowan, *Unequal Opportunity in At-Will Employment: The Search for a Remedy*, 72 ST. JOHN'S L. REV. 141, 176-77 (1998) (noting employees are more willing to engage in participatory and risk-taking behavior with job security).

[247] *See generally* Lynn S. Paine, *Managing for Organizational Integrity*, 72 HARV. BUS. REV., Mar.-Apr., 1994, https://hbr.org/1994/03/managing-for-organizational-integrity ("[E]xecutives are quick to describe any wrongdoing as an isolated incident, the work of a rogue employee. The thought that the company could bear any responsibility for an individual's misdeeds never enters their minds.").

[248] *Cf.* Leonard, *supra* note 245, at 677-78 ("[A]bandonment of the at will presumption logically should deter employers from discharging employees when they lacked the evidence to support a reasonable justification for the discharge. Thus, the volume of discharge litigation might actually decrease over the long term.").

[249] *Cf.* Partee, *supra* note 8, at 711 ("[T]he doctrine of employment at will conflicts with basic notions of fairness.").

[250] *Cf.* Abrams & Nolan, *supra* note 124, at 598 ("A collective agreement incorporates the fundamental understanding [that the employment relationship is unbalanced], but also provides it with sufficient detail that it properly can be termed a bargain. The result is likely to be more balanced than the fundamental understanding itself.").

the threat of discharge as a means of bending employees to their will if doing so would result in an illegal or unethical act, and if there is no reasonable basis for severing the employment relationship. Families depend on employment for their livelihoods, and it is not asking too much for employers to recognize the reliance aspect of the employer-employee relationship. Employers should provide workers with the basic dignity of guaranteed employment if a reasonable probationary period has been met, if the employee performs satisfactory work, and if the company does not face an economic downturn.[251]

There are, of course, numerous companies that do act in an ethical manner and seek to promote and protect their workers where they can.[252] Unfortunately, as shown above, this does not account for all employers, and those companies that do take advantage of their position do so at great expense to its workers. A sensible just-cause standard thus puts in place a backstop to protect against this type of runaway employer abuse. If all companies could be trusted to act in an ethical way, such a standard would be unnecessary. The recent empirical and anecdotal evidence regrettably shows that companies cannot be left to their own devices with respect to workers.[253]

Some will argue that sensible just cause goes too far in seeking to remedy the current workplace problems.[254] And in so doing, the argument would be that the approach advocated for cuts away at the primary benefit of at-will employment: employer flexibility.[255] It is a fair concern that any revision to the decades-old approach to work law in this country might undo some of the benefits of the doctrine. However, the sensible just-cause standard was carefully crafted to specifically minimize any potential negative economic impact.[256]

More specifically, the approach proposed here would only apply to a single adverse action by an employer—discharge. All other adverse actions, including failure to hire, transfer, or promote, would not be included.[257] Thus, the sensible just cause standard narrowly carves out only one area of employment for protection, albeit the most important area. In the unionized collective bargaining

[251] *See generally* Blades, *supra* note 6, at 1405.

[252] Emily Bonta & Amanda Keating, *Labor Day 2021: The 32 Companies Leading for Their Workers by Industry*, JUST CAP. (Sept. 1, 2021), https://justcapital.com/news/the-best-companies-for-workers-by-industry [https://perma.cc/Q7GH-BMDF] (summarizing survey results assessing companies' prioritization of workers).

[253] *See supra* Section II.A, B.

[254] *See* Martin H. Malin, *The Distributive and Corrective Justice Concerns in the Debate Over Employment At-Will: Some Preliminary Thoughts*, 68 CHI.-KENT L. REV. 117, 142-45 (1992) (presenting and countering arguments in favor of at-will termination); Cynthia L. Estlund, *Wrongful Discharge Protections In an At-Will World*, 74 TEX. L. REV. 1655, 1667-68 (1996).

[255] *See supra* Section I.

[256] *See supra* Section IV.A.

[257] For practical purposes, constructive discharge may need to be included under the sensible just-cause approach. Failure to include constructive terminations under the model could allow employers to make working conditions so intolerable for workers that they would leave involuntarily, without any legal repercussions for this conduct.

context, arbitrators routinely require just cause for *any* disciplinary action by an employer that has properly been grieved by the worker.[258] Thus, the carve out offered here is far more limited than what employers typically expect on the unionized front. Employers need not be concerned about their hands being tied with respect to the majority of employment decisions under this standard, which would therefore not discourage hiring.

Additionally, and again in direct contrast to the collective bargaining context, sensible just cause permits a company to discharge a worker where there has been an economic downturn.[259] The downturn justifying discharge can be in the economy, in the industry, or isolated to the company in question, as long as the decision is objectively reasonable.[260] This additional carve out to just cause (and distinction from the collective bargaining context) is specifically designed to free up employers to hire when economic conditions are favorable, without fear that such a decision will come back to hurt the company if it becomes financially impracticable to retain the employee.[261] Again, such a carve out would go a long way toward providing employers with the flexibility they need to feel comfortable continuing to hire.

Finally, sensible just cause would also take the additional step of not requiring strict adherence to industrial equal protection. This essentially means that if an employer failed to discharge workers for certain misconduct in the past, it could still discharge a different worker in the future for the same misconduct.[262] Again, this approach is meant to maximize employer flexibility in a way that would not restrict hiring. There are obvious exceptions to this—such as differential discipline on the basis of a protected characteristic including race or gender—but that type of disparate treatment is already actionable under federal law.[263]

At the end of the day, the potential costs of adopting sensible just cause to supplant at-will employment are outweighed by the many obvious benefits. There can be no doubt that, even following an initial probationary period (and even permitting a carve out for economic downturn), a system which requires a legitimate employer justification for discharge would add an additional layer of bureaucracy to the employment setting that does not currently exist. Nonetheless, given the substantial and undeniable abuses by employers in the workplace, adding protections from discharge for all workers is a necessity.

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[258] *See* Abrams & Nolan, *supra* note 124, at 594 ("Virtually every collective bargaining agreement contains some such limitations, by far the most common of which is the requirement that there be 'just cause' for discipline.").

[259] *See supra* Sections III, IV (discussing use of economic downturn as basis for worker discharge).

[260] *See* Leonard, *supra* note 245, at 677 ("Abandonment of an at will presumption does not necessarily mean all employees would be guaranteed continued employment regardless of their job performance or the economic needs of the employer.").

[261] *See supra* Section IV.A.

[262] *Id.*

[263] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (protecting employees from workplace discrimination on basis of enumerated protected categories).

Sensible just cause provides this protection in a carefully thought out way, attempting to maximize employer flexibility and encourage the continued hiring of workers where practicable.

Others have weighed in at different times on the value of a just-cause system in our society.[264] For example, in an oft-cited essay that addresses this topic, Professor Cass Sunstein "explored the possibility of producing labor law reform through a simple step: Switch the default rule."[265] In raising this potential change, Professor Sunstein notes that reforms could "promote a situation in which workers, rather than employers, have more presumptive rights, to be tradable only through voluntary bargaining."[266] As Professor Sunstein suggests, one potential rationale for such a change is that many workers do not fully understand the true lack of protections that they have in the workplace,[267] and "a switch of the default rule will increase the information that is provided to employees—and that probably counts as a good thing."[268] This Article explored more fully executing precisely what Professor Sunstein proposes, changing the default rule to provide just cause protections for workers. This Article outlined exactly how that result can be achieved, strictly limiting the protections to discharge, and carving out exceptions for at-will probationary employees and economic downturn.

Professor Rachel Arnow-Richman explored calls for just-cause reform to at-will employment, which she characterized as "imported reflexively from the collective bargaining context without serious consideration of how such a change in the law would serve workers' interests."[269] Professor Arnow-Richman is right on the mark in recognizing that the just cause standard currently used in the unionized context cannot work in an at-will employment environment.[270] She further advocates for "the adoption of a 'pay-or-play' system under which an employer would be required to provide meaningful advance notice of termination, or, at the employer's election, offer wages and benefits for the

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[264] *See, e.g.*, Partee, *supra* note 8, at 711-12.

> Reversing the presumption of employment at will and instituting a rebuttable just cause presumption would remedy the economic and moral defects that inhere in both employment at will and across-the-board just cause standards. A rebuttable just cause presumption would allow different labor markets to be governed by distinct dismissal standards, thereby preserving and improving upon the economic benefits of employment at will, while providing job security to those who need it most.

Id.

[265] Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 133 (2002).

[266] *Id.*

[267] *Id.* at 120 ("There is growing evidence that workers overestimate their legal rights—a phenomenon that we might label the 'fairness heuristic,' by which employees believe that the law is what (they think) fair law would be.").

[268] *Id.* at 122.

[269] Arnow-Richman, *supra* note 12, at 7-8.

[270] *Id.* at 17-21 (discussing differences between just cause in unionized verses individualized contexts).

duration of the notice period."[271] Professor Arnow-Richman's proposal, now made over a decade ago, correctly recognizes the need to protect workers in the context of a discharge.[272] Providing notice of discharge and/or severance type wages would certainly provide more than what workers have now. However, what we have seen over the past several years with respect to employer abuses in harassment and sexual abuse, particularly during an international health crisis, suggests that we go even further. Professor Arrow Richman's suggestion is a great place to start; the recent empirical data show that additional protections are now needed.[273]

In his excellent work, Professor Jeffrey Hirsch has further noted the confusion surrounding the rules for worker discharge, highlighting the different standards under the law that exist when it comes to firing an employee.[274] Professor Hirsch proposes resolving this confusion by simplifying the rules and adopting a single "law of termination," and he carefully explains how such a proposal could operate effectively.[275] The sensible just cause standard proposed here does not call for a complete unification of the law in discharge cases, but given the more aggressive remedies advocated for here, many more aggrieved workers would likely choose to pursue claims under this new standard than under the existing regime. This Article thus agrees with Professor Hirsch that employee discharge is a key area in need of workplace reform.[276]

Over the years, others have weighed in on the topic of just cause for worker discipline as well.[277] What has changed is the evident power shift toward

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[271] *Id.* at 7.

> [P]ay-or-play would serve primarily as a source of income replacement that terminated workers would be obligated to exhaust before becoming eligible for unemployment benefits. Importantly, the rights of terminated workers would not be dependent on the employer's reason for terminating. Absent serious misconduct, employers would be obligated to provide notice or severance irrespective of the reason for termination. Thus, a pay-or-play system would eliminate the subjective and fact-intensive question of whether termination was justified—the key inquiry under just cause.

Id.

[272] *Id.*

[273] *See supra* Section II.A.

[274] Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 92-93 (2008) ("This Article proposes the law of termination as the answer to these concerns by vertically integrating the multiple sources of law and horizontally integrating the rules within the lone remaining jurisdiction.").

[275] *Id.* at 122 (arguing for "giving the employer the burden to show that it satisfied the procedural requirements and giving the employee the burden to show that the employer's stated rationale for the termination did not constitute a reasonable business justification").

[276] *Id.* at 108. Professor Hirsch's proposed termination standard "would impose an exclusive restriction on employers' ability to terminate employees by prohibiting terminations that cannot be justified by a valid business reason." *Id.*

[277] *See, e.g.*, Porter, *supra* note 5, at 65 (proposing model legislation under which "employers would be free to terminate without the burden of proving just cause, allowing them to get rid of unproductive or poorly performing employees with limited risk of litigation. However, certain enumerated reasons for termination would be unlawful"); Estlund, *supra*

employers in the working relationship that has become so transparent in recent years.[278] Recent events—backed up by empirical evidence—demonstrate clearly that many businesses have abused their workers.[279] We should act quickly to recalibrate the employer-employee relationship, and a sensible just cause standard is the most realistic and practicable way of achieving that goal. Sensible just cause is carefully crafted not to overreach. At a minimum, such a standard should serve as a springboard for a renewed debate on the need to provide additional worker protections from discharge in the current employment setting.

CONCLUSION

One recent analysis by *Bloomberg Businessweek* nicely summarized the need for reform in workplace law, positing that "[a] national just-cause standard, or even a majority just-cause U.S. workforce, would usher in an historic shift of negotiating power away from bosses to employees," establishing a new working relationship that is "more like a contract and a bit less like feudal serfdom."[280] In the face of demonstrable employer abuse enabled by at-will employment in recent years, a sensible just cause standard is needed to return some level of protection to workers from unjustified discharge. While a complete shift to just cause protections for all adverse employment decisions is unrealistic and unnecessary, workers should have some level of protection in their jobs where a reasonable probationary period has been met, the employee performs satisfactory work, and the company does not face a financial downturn. At prior points in our nation's history, the country has recognized the need to recalibrate the at-will employment dynamic and build in additional worker protections. We again find ourselves at just such a precipice, where unprecedented employer abuse must be addressed by providing workers certain rights before discharge.

note 254, at 1657 ("My objective here is to question the apparent consensus that existing wrongful discharge law has basically taken care of the most egregious and socially harmful abuses of employer power. I will argue that the at-will presumption continues to operate within the realm of wrongful discharge protections against employer discrimination and retaliation . . . ."). *See generally* Cottone, *supra* note 33 (proposing statutory reform incorporating just cause for termination); McGinley, *supra* note 10 (proposing omnibus federal just-cause employment statute); McGowan, *supra* note 246, (advocating for adoption of just-cause standard for termination); St. Antoine, *supra* note 44; Abrams & Nolan, *supra* note 124; Partee, *supra* note 8; Leonard, *supra* note 245; *see also* Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 498-99 (1976); Malin, *supra* note 254, at 134-35.

[278] *See supra* Introduction.

[279] *See supra* Section II.

[280] *See* Eidelson, *supra* note 114 ("As long as companies need no good reason to fire people, [a New York City council member] says, employees will be vulnerable to wage theft, sexual harassment, and other workplace ills.").