

**A STATE-BY-STATE COMPARISON OF RECENT  
DEVELOPMENTS IN LEGISLATIVE PROPOSALS  
ON EMPLOYMENT TERMINATION LAW FOR  
PRIVATE NONUNIONIZED EMPLOYEES**

**STUART HENRY, PH.D.**  
*Eastern Michigan University*

**ABSTRACT**

This article reports the findings of fifty states and four territories comparing recent proposed legislation on employment termination protection for employees of privately owned, nonunionized employers, for the purpose of assessing their relative receptivity to uniform or model termination law.

Several criteria could be adopted in any comparison of the states' general position on rights and protections for the indefinite-term employee upon termination. Clearly important is the disposition of the courts on termination issues in the particular states, and to a lesser extent the way these issues have been decided across the nation. Here, the concern has generally been with the extent to which the British common law doctrine of employment-at-will, which for years had prevailed in cases involving noncontracted, indefinite-term employment relationships, has been subject to erosion through recognition of various public policy exceptions. A comparative assessment of court decisions has been considered in successive issues of *The Employment Coordinator*, in the biannual *Employment-at-will: A State by State Survey* [1], in two Rand studies [2, 3], and in numerous law journal articles [4-7]. Rather than focusing on developments in case law, in this article, I will summarize the results of a recent survey that compared the various attempts by representatives of the fifty U.S. states and four territories to introduce statutory legislation seeking to codify various rights of the employee upon termination. To date, I am unaware of any existing research that concentrates exclusively on recent past legislative activity in regard to employment termination law.

A comparison of such legislative attempts can proceed on a number of criteria. Here, I am concerned with three measures: 1) the frequency of legislative attempts over the last ten years to introduce laws protecting the rights of employees who are subject to termination decision; 2) the comprehensiveness of the proposed protections; and 3) the success of sponsors in enacting proposed bills into law. In addition, an assessment of receptivity to such legislation will be made based on a composite of these three measures, indicating the states which, in the future, are most likely to be receptive to attempts to introduce legislation on employment termination.

## RESEARCH METHOD

In November and December, 1990, a questionnaire was prepared requesting specific information on attempts by representatives of state legislatures to introduce bills to enact employment termination legislation.<sup>1</sup> The questionnaire was designed to provide information on the content, history, and legislative status of employment termination bills introduced over the last ten years for fifty-four U.S. jurisdictions comprising fifty states and four U.S. territories. After pretesting and revision, the questionnaire was mailed in January, 1991 to four groups in each jurisdiction: 1) the majority and minority leaders of the house and senate; 2) the director of each legislative research bureau; 3) the state contacts for labor policy; and 4) agencies responsible for bill status, typically the clerk of the house and the secretary of the senate. As far as possible, instances of duplication by office were eliminated. In all, 366 questionnaires were mailed. A return by February 15, 1991 was requested.

Initially, at least one completed questionnaire was received from all but nine states. Nonresponding states were subsequently encouraged to complete their surveys over the telephone. This resulted in information being completed from forty-nine states and four territories, which represents a response rate of 98.1 percent.<sup>2</sup> The majority of the responses were from members of legislative research bureaus or research librarians, although, in a number of cases, responses also came from representatives and senators, and in one case from a lieutenant governor.

Where more than one response was received from a state, the information was rationalized in relation to the printed documentation, bills, and acts requested and supplied. Some questions were eliminated from the final report because they requested the opinions of the legislature as perceived by administrators, and many of those responding felt unable or unwilling to address what they typically

<sup>1</sup> This survey has been conducted in conjunction with my National Science Foundation-supported study Grant No. SES-8921248 entitled: "The Relationship Between State Law and Private Justice."

<sup>2</sup> This response rate is based on the number of states from which I received at least one response. The one state from which no information was received and that did not respond constructively to follow-up telephone calls was Indiana. The District of Columbia is not included in this analysis.

referred to as “policy” or “opinion” questions as they considered themselves “nonpartisan agencies.” The data on which this report is based, therefore, is primarily factual, derived from the information provided by those surveyed and from the printed materials that they sent.

## **FINDINGS**

In reporting the findings, I have considered the data in terms of the following issues: 1) states without bills on employment termination rights; 2) the frequency of proposed bills relating to employment termination; 3) the success in enacting such bills; 4) other attempts at employment termination; and 5) the extent of coverage of the proposed legislation.

### **States Without Bills on Employment Termination Rights**

Based on the responses to this survey, the states in Table 1 indicated that they had had no bills in the last ten years concerning employment termination. Some of these states had explicitly affirmed in law a policy of at-will employment. For example, §34-7-1 of Georgia’s Code provides that “An indefinite hiring may be terminated at will by either party” [8]. Georgia court cases uphold that such termination affords no cause of action for a breach of contract and no liability to the employer, regardless of whether the employee was exercising public policy rights, since no public policy exception is recognized. More over, although California is considered to have been an arena of considerable development with regard to the termination issue, the California Labor Code §2922 holds that “An employment having no specific term, may be terminated at the will of either party on notice to the other. Employment for specified term means an employment for a period greater than one month” [9]. Similar express provisions of the at-will provision exist in both North Dakota (Century Code 34-03-01) [10] and South Dakota, as in CL 60-4-4, which provides that “An employment having no specified term may be terminated at the will of either party on notice to the other, unless otherwise provided by statute” [11]. In Florida, a statute even provides an employment-at-will policy for certain state employees [12].<sup>3</sup>

### **Frequency of Recent Proposed Termination Legislation**

Of those jurisdictions having some legislative activity concerning termination for privately-employed indefinite-term nonunionized employees during the last ten years, there is variation in the number of bills proposed in each state. Table 2 shows those

<sup>3</sup> A number of the states having little or no legislative activity on employment termination consider themselves “Right to Work” states, as in Nevada’s revised statutes 613.230 [13], which means that they prohibit discharge of employees for their refusal to join a union and guarantee employees the right to work without having to join or pay money to a union.

**Table 1. States Without Proposed  
Employment Termination  
Legislation, 1980-1990**

Alaska	
Arkansas	
Florida	
Georgia	
Kansas	
Maryland	
Mississippi	
Samoa	
Vermont	
Wyoming	
Total	10

states and territories whose respondents to this survey claimed that they had some legislative activity. The table indicates the year in which bills were introduced, and reveals the variation in the number of legislative attempts that have been made in a jurisdiction to provide termination protection to employees. In the forty-three (79.6%) states or territories that have introduced bills on employment termination, a total of 188 bills have been introduced. While 36 percent (68) of these bills were introduced between 1980 and 1985, 64 percent were introduced between 1986 and 1991. There is considerable variation between states, with some states, such as Alabama and Nebraska, having all their activity in the earlier period, whereas others, such as New Jersey and New Mexico, have had most of their activity in the later period. Other states, such as West Virginia, have had consistent legislative activity across the whole period.

### **Success in Enacting Termination Law**

Table 2 also shows that, of the forty-three states or territories having proposed legislation on employment termination, twenty-three (53.5%) have enacted a total of forty-three bills on aspects of employment termination during the ten-year period under study. Thirty-five percent (15 bills) of employment termination legislation has been enacted in the period from 1980-1986, whereas 64 percent of these bills (28) have been enacted between 1986-1991. Thus, both the number of bills introduced and the number of bills being legislated seems to have increased in recent years by a ratio of 2 to 1. Again, it is important to recognize the variation between the states when considering this issue.

Table 2. Status of Employment Termination Legislation

State or Territory	Date Introduced	Whether Enacted	Date Enacted
Alabama	80 82 83	Y N 82 80	83
Arizona	91	N	
California	84	N	
Colorado	81 81 81	N	
Connecticut	83 83 89 91	Y N 83 89	83
Delaware	83 83 90 91	Y N 83	83
Guam	82	Y	82
Hawaii	83 84 85 86 87 91	Y	83 84 85 86 87
Idaho	82 86 87	Y	82 86 87
Illinois	83	Y	84
Iowa	82 89	N 82 89	
Kentucky	80 84 87	Y	80 84 87
Louisiana	84 84 88	N	
Maine	81 81 85 85 90 90	Y N 81 85 85 90 90	81
Massachusetts	89 89 89 89 90 90 90 90	N 89 90	
Michigan	83 88 88	N	
Minnesota	87 89	Y N 89	87
Missouri	81 86 87 87 88 89 90 91	Y N 86-90	81
Montana	87	Y	87
Nebraska	83 83 84	N	
Nevada	85 89 89	Y N 85 89	89
New Hampshire	83 87 90 91	N	
New Jersey	86 86 88 90	N	
New Mexico	81 85 87 87 89	Y N 81 85	87 89 90 91
	89 90 91 91 91	87 89 91 91	
New York	84-91 all years	N	
North Carolina	85 87 87	Y	85 87 87
North Dakota	87	N	
Ohio	87	Y	88
Oklahoma	80-91 all years	Y	—
Oregon	83 91	N	
Pennsylvania	81 84 85	N	
Puerto Rico	81 (x3) 82 85 (x6) 86 (x9) 87 88 89 (x7) 90 (x4) 91	Y N	82 86 (x3) 88 90
Rhode Island	90	N	
South Carolina	84 86 87 89 90	Y N 84 87 89	90
South Dakota	87 89	N 87 89	
Tennessee	89 90 90	Y N 90	90 90
Texas	81 85 87 89	N	
Utah	89	N	
Virgin Islands	86	Y	86
Virginia	82 89 89	Y N 89	82 89
Washington	87 87	N	
West Virginia	81 81 83 84 85 86 86 87 88 89 89 89 89	Y N	87 89
Wisconsin	79-80 81 83 89	N	

Totals: 43 states 188 bills 23 states or territories have enacted law affecting termination

**Table 3. Additional Efforts at  
Legislating Employment  
Termination**

<hr/>	
Arizona	
Colorado	
Connecticut	
Delaware	
Massachusetts	
Mississippi	
Nevada	
New Hampshire	
Oklahoma	
Puerto Rico	
South Dakota	
Texas	
Utah	
<hr/>	
Total	13
<hr/>	

### **Other Legislative Activity**

In addition, as can be seen from Table 3, thirteen (24.1%) states or territories report additional efforts by legislators to draft employment termination legislation. These efforts typically involved requests by legislators to their research bureau staffs to research and assist in the construction of bills prior to their introduction.

### **Coverage of Proposed Legislation**

There is considerable variation in the degree of protection provided by the proposed legislation concerning employees subject to dismissal. In considering this issue, I have classified these proposed developments in employment termination protection as comprehensive, moderate, and minimal. This classification relates to the degree of the coverage in the proposed bills, not to the amount of legislative activity on the issue (considered above) or the success of sponsors in having these bills passed into law. "Comprehensive" refers to states that have introduced a generic wrongful termination or unlawful discharge bill based on a "just" or "good cause" standard.<sup>4</sup> "Moderate" refers to states whose bills attempt

<sup>4</sup> The good or "just cause" standard derives from labor arbitration, and has been summarized by arbitrator Carroll R. Daugherty in the case of *Grief Bros. Cooperage Corp.* [14]. The case for including this standard in an employment protection statute has been argued by Clyde W. Summers in the *Virginia Law Review* [15]. See also James R. Redeker, *Employee Discipline: Policies and Practices* [16].

Table 4. Extent of Coverage of Proposed and Enacted Termination Legislation, 1980-1991

Comprehensive	Moderate	Minimal
Colorado	Delaware	Alabama
Connecticut	Nebraska	Arizona
Hawaii	New Mexico	Guam
Iowa	Oklahoma	Idaho
Massachusetts	Texas	Illinois
Michigan		Kentucky
Minnesota		Louisiana
Missouri		Maine
Montana		Nevada
New Jersey		New Hampshire
New York		North Carolina
Oregon		North Dakota
Pennsylvania		Ohio
Puerto Rico		Rhode Island
South Carolina		South Dakota
Virgin Islands		Tennessee
Washington		Utah
		Virginia
		West Virginia
		Wisconsin

to provide protection in a wide variety of areas but fall short of the general case and do not include a “just cause” standard. Finally, “minimal” refers to states where legislative proposals have sought only to provide limited protection, such as providing employees with written reasons for termination, or partial protection relating to specific acts such as workers’ compensation or whistle-blowing.<sup>5</sup> From Table 4, it can be seen that seventeen (40.5%) states have proposed bills or existing legislation on termination that I have classified as comprehensive, five (11.9%) have bills or acts considered moderate, and twenty (47.6%) have bills or acts considered minimal.<sup>6</sup>

<sup>5</sup> Where states have not provided information they have been omitted, but this should not be taken as indicative that these states lack activity.

<sup>6</sup> A detailed analysis of the content of each state’s proposed and enacted legislation by this classification is contained in a supplement to the original research report [17].

## SUCCESS AND DIFFICULTY AT LEGISLATING ON EMPLOYMENT TERMINATION

Table 2 indicates those states that were successful in legislating employment termination. Especially notable are the state of Montana and the territories of the Virgin Islands and Puerto Rico, the only three jurisdictions to have enacted "just cause" termination protection. However, it is important in assessing the states' legislative activity on this issue to consider the reasons for the failure of earlier legislation, insofar as this is possible.

In considering the information provided concerning the nonenactment of earlier proposed legislation, it is important to distinguish between policy reasons and procedural reasons. While many of the proposed bills failed in committee (procedural reason), the policy reasons for the particular failures are more difficult to ascertain, particularly since they are matters of opinion and in some cases not part of a public record. In some jurisdictions, research bureaus are established to provide nonpartisan research assistance and are expressly forbidden to offer comments reflecting personal opinions, value judgments, or assessments relating to the prospects for particular issues or bills. Consequently, the policy information available is somewhat sketchy and should be considered neither reliable nor representative, but rather indicative. Where policy information was provided, I have focused on the actual public discussion about the bill and the reasoning presented in the debates. I have included some of the general opinion, insofar as it gives some insight into the nature of objections to this type of act.

In some states, such as Massachusetts, there has been a general unwillingness by the legislature to interfere with the at-will doctrine. In others, such as California, there has been a disagreement about the value of writing such changes into the statute in light of the recent "settled" court decision of *Foley* [18]. Also in California, there has been opposition from organized labor on the issue of enacting employment termination legislation. This legislation is seen as a threat to the special services that unions can offer employees. If such services are made available to nonunionized labor, organized labor fears further undermining of the advantages of joining unions. Indeed, a 1983 Michigan bill was not enacted because opponents were of the opinion that it would result in all employees being treated almost as if they were unionized employees. Also in Michigan, the 1988 bills were never debated as employers did not want to change the ground rules even if the legislative intent was to help them. Employers were fearful of court interpretations of any new law.

Considerable insight into the lack of success of some early attempts at legislation comes from Nebraska, where bills reached a committee vote but were indefinitely postponed and effectively killed after being the subject of a public hearing. Most significant in relation to termination was 1984 Nebraska bill #738, which failed essentially because it was argued to be: too generally cast; distorted regarding the reality of current interpretations of at-will employment; repetitious



of existing protection on discrimination; redundant in relation to decisions already made by courts; expensive to employers; inequitable and expensive for businesses; limiting to employers' discretionary judgment; a tool by which the courts could be made into arbiters of employment relations; likely to increase the amount of litigation and costs to the state, to the benefit of lawyers; and vague, amorphous, ineffective, and unpredictable in defining its core concepts, particularly "good faith," a concept that, it was argued, has been displaced by the public policy standard. Indeed, in Nebraska and in many other states, this kind of opposition comes from business, where it is presented eruditely by corporate attorneys, employers' associations, and chambers of commerce. In New York, for example, there is a feeling from such groups that impeding the flexibility of an employer via closure of the "at-will" doctrine might create situations whereby businesses that need to consolidate to survive economically might not be able to do so. In such cases, it is alleged that all employees could suffer for the sake of enhanced written "protection."

### **DISCUSSION: ASSESSMENT AND PROSPECTS**

In assessing the prospects for states to enact statutes incorporating employment termination protection, it is important to consider not just one but all three measures identified here: frequency, coverage, and success. In considering these measures together, it is possible to make some assessment of the jurisdictions that are most likely to enact termination legislation in the future. Table 5 comprises a rank ordering based on composite scores from the previous three measures. Clearly, this ranking is quite crude. It is based on a weighted score on each of the three measures.<sup>7</sup> In addition, states that have been inactive in the past need not be inactive in the future. Finally, there is an arguable connection between the activity of the courts on these matters and the activity of legislators, and I have not considered this here. It may be that where there has been a significant undermining of employment-at-will in the courts, there will be a greater tendency to codify. Alternatively, it may be that where the courts have come to a certain and consensus decision, as in California, then the decision to legislate is seen as unnecessary. Yet another issue is the willingness of particular legislators to enact uniform legislation in the past. Finally, it is worth considering that a critical issue in

<sup>7</sup> Comprehensiveness 60 percent; Successful Enactment of Termination Laws 30 percent; and Number of Bills Introduced 10 percent. This weighting is somewhat arbitrary but reflects what, in my judgment, is the relative importance of the measures. Comprehensiveness is considered the most important here, since many states have proposed and enacted minimal, partial, and restricted employee protections that are way short of "just cause." Actual success is considered the next most significant measure, since the number of bills proposed is irrelevant unless some are enacted. Thus, the third level of weighting is for the number of bills, which is significant because persistence is, to some extent, important in bringing change through attrition.

Table 5. Receptivity Ranking of States toward  
Employment Termination Law

Existing Law	High Receptivity	Medium Receptivity	Low Receptivity
Montana	Hawaii	Delaware	New Hampshire
Puerto Rico	New Mexico	North Carolina	Wisconsin
Virgin Islands	Missouri	Idaho	Louisiana
	Massachusetts	Texas	North Dakota
	South Carolina	Tennessee	California
	New York	Virginia	Rhode Island
	Connecticut	Nebraska	Utah
	Minnesota	Maine	Arizona
	West Virginia	South Dakota	Alaska
	Oklahoma	Kentucky	Vermont
	New Jersey	Nevada	Wyoming
	Pennsylvania	Alabama	Samoa
	Colorado	Illinois	Arkansas
	Michigan	Ohio	Kansas
	Washington	Guam	Maryland
	Iowa		Florida
	Oregon		Georgia
			Mississippi

legislative activity may be either the perception held by a state's employers of the uncertainty and unpredictability of existing case law, or of the employers' relative immunity from and resilience to what courts do. Indeed, as a recent commentary on legislation of the "cause standard" for at-will employees insightfully observed [19, p. 682]

Ironically, the push for uniform federal rule might come from employers who ultimately may prefer a single rule rather than judicially created common law vulnerability in each of a growing number of states. In the event of legislation employers might actually be in a stronger position to oppose union organizing efforts by arguing that the statutory protection eliminates the need for union representation.

None of these factors are considered here, making assessments of probable success of model legislation extremely difficult. However, rather than having no assessment, the assessment derived from the rankings of extent, coverage, and success is perhaps, at best, a crude guide to the states where activity on employment termination legislation can be most vigorous.

In any attempts to introduce model or uniform legislation on employment termination,<sup>8</sup> it would seem prudent to concentrate efforts on the states high on the list, rather than lower on the list, since considerable effort might be expended in the latter to little effect. However, it may also be a consideration that the states lower on the list are those whose indefinite-term employees are the ones most in need of some protection, and any protection here would be more beneficial to the employees.

A further consideration is the benefit to employers of the existence of employment-termination protection. While in the past there has been considerable opposition to the introduction of any legislation that appears to expand the employee's rights and diminish the employer's prerogatives or raise the costs of labor, such an interpretation may be both short-sighted and self-defeating.

### ACKNOWLEDGMENTS

I wish to thank Gary Brian Gulliver, Stanley M. Fisher and Professor Theodore St. Antoine for their helpful comments on the survey design.

\* \* \*

Dr. Stuart Henry is an Associate Professor in the Department of Sociology, Anthropology and Criminology at Eastern Michigan University, where he teaches Law and Society, Corporate and White Collar Crime, and Criminological Theory. He obtained his doctorate from The University of Kent at Canterbury, England. He has published over fifty papers, either as book chapters or as professional journal articles, and has authored, coauthored, or edited seven books. His latest project is a National Science Foundation-funded study of the relationship between state and private law, focusing on the drafting process that resulted in the Uniform Law Commissioner's Model Employment Termination Act.

### REFERENCES

1. D. A. Cathcart and M. S. Dichter (eds.), *Employment-at-will: A 1989 State-by-State Survey*, National Employment Law Institute, Larkspur, California, 1990.
2. J. N. Dertouzos, *The End of Employment-at-will: Legal and Economic Costs*, Rand, Santa Monica, California, 1988.
3. J. N. Dertouzos and L. A. Karoly, *Labor Market Responses to Employer Liability*, Rand, Santa Monica, California, 1991.
4. R. Hartigan (ed.), *Employment-at-will Reporter: Annotated Index and Guide to Decisions, 1983-1985*, Legal Publishers, Boston, 1985.

<sup>8</sup> It is not insignificant that at its 100th Annual Meeting in Naples, Florida on August 8, 1991, the Uniform Law Commissioners, who had been drafting proposed uniform employment termination legislation since 1987, adopted the draft act before them as a model, rather than a uniform act.

5. A. D. Hill, *Wrongful Discharge and the Derogation of the At-will Employment Doctrine*, Wharton School, Industrial Research Unit, University of Pennsylvania, Philadelphia, 1987.
6. D. E. Casper, *Public Regulation, Rules, and Policy Governing Employment at Will: Recent Journal Articles, 1985-1989*, Vance Bibliographies, Monticello, Illinois, 1990.
7. A. W. Stewart, *Employment at Will: A Brief Checklist*, Vance Bibliographies, Monticello, Illinois, 1989.
8. GA Code Ann. §34-7-1 (1988).
9. Cal Lab. Code §2922 (1992).
10. N.D. Cent. Code §34-03-01, (1987).
11. S.D. Laws Ann. §60-4-4 (1978).
12. Fla. Stat. §110 (1991).
13. Nev. Rev. Stat. §613.230 (1989).
14. Grief Bros. Cooperage Corp., 42 Lab. Arb. 555, (1964) (Daugherty, Arb.).
15. C. W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 *Virginia Law Review* 481 (1976).
16. J. R. Redeker, *Employee Discipline: Policies and Practices*, Bureau of National Affairs, Washington, D.C., pp. 35-38, 1989.
17. S. Henry, Appendix to State by State Comparison of Proposed Employment Termination Legislation, mimeo, Department of Sociology, Anthropology and Criminology, Eastern Michigan University, Ypsilanti, 1991.
18. *Foley v. InteractiveData Corp.*, 47 Cal. 3d 654, (1988).
19. *Employment Coordinator*, 82,682, Sept. 19, 1988.

Direct reprint requests to:

Dr. Stuart Henry  
Department of Sociology  
Eastern Michigan University  
Ypsilanti, MI 48197