

IS IT TIME YET FOR A STATUTE TO END EMPLOYMENT AT WILL?: LESSONS FROM THE HISTORY OF WORKERS' COMPENSATION

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ABSTRACT

Numerous proposals to end employment at will and restrict wrongful discharge suits have been offered. Advocates contend that employers have an incentive to support such legislation, just as employers had an incentive to support workers' compensation laws. However, such legislation has made little headway. This article takes a close look at the analogy with workers' compensation and argues that legislation to end employment at will is unlikely to succeed unless it, like workers' compensation, involves a broad shift in employment law with principled appeal to employers as well as employees. It suggests that provisions affirming duties for employees as well as employers have the potential to break the current legislative impasse.

Nearly twenty years ago, Clyde Summers wrote an influential article in which he argued it was time for a statute to protect employees from unfair dismissals not covered by labor law or civil rights law [1]. Since then, court cases in most states have carved out certain exceptions to the employment-at-will doctrine that an employer can dismiss employees for any reason or no reason [2-3], but legislative action has taken place only on a limited basis. The lack of action has not been for lack of trying. Numerous articles have been written that propose and outline legislation dealing with the issue of wrongful discharge [3, 4-17], and numerous bills on the subject have been introduced in state legislatures [7, 11, 18-19].

While there are significant differences among the proposed bills, with some proposals designed to win employer support [3, 8, 20] and others less concerned with acceptability to employers [1, 10], in general the proposals have a similar structure. Most proposed legislation contains provisions ending employment at will in favor of a standard under which there must be a valid reason ("good cause")

or “just cause”) for termination. Second, most proposals limit wrongful discharge lawsuits, with provisions ranging from allowing employees to opt for suits but with caps on damages [15] to allowing suits only in the case of discharges contravening public policy [21] to ending suits altogether as a trade-off to gain employer support [6].

Only one state, Montana, has passed a law requiring dismissals to be for a valid reason. The Montana legislation, passed in 1987 with substantial employer backing in the wake of judicial limitations on employment at will and some substantial wrongful discharge verdicts, including a \$1,500,000 verdict received by a bank teller, prohibits discharges not for good cause of employees who have completed a one-year probationary period. Reinstatement is not available, common law wrongful discharge suits are preempted, and damages are restricted to lost earnings up to a maximum of four years. Arbitration of claims is optional, but a side that declines arbitration is held liable for its opponent’s attorney’s fees if the opponent prevails in court [3, 21, 22-24]. The Model Employment Termination Act (META), proposed by the National Conference of Commissioners on Uniform State Laws [13, 20, 25], has significant parallels to the Montana statute: META creates a good cause standard for nonprobationary employees, preempts wrongful discharge actions, and supports arbitration and severance agreements; reinstatement is available as a remedy, with damages limited to back pay and attorney’s fees.

Employers and employer groups have, with some exceptions, been resistant to legislation to end employment at will [19, 26-28]. In the limited cases in which some employer groups have supported legislation, unions’ and plaintiffs’ attorneys have opposed employer-backed legislation as unduly restrictive and favored legislation that would maintain wrongful discharge suits [7, 28]. The result, thus far, has been legislative stalemate.

The stalemate has persisted despite the fact that most current proposals to end employment at will, such as META, contain financial incentives to employers in the form of limitations on wrongful discharge actions. Proponents of legislation have noted that because of the erosion of employment at will in most states and because of the potential for further erosion, it may be in employers’ long-term financial interest to support legislation eliminating employment at will, which would also limit or curtail wrongful discharge actions in the courts in favor of less costly administrative proceedings or arbitration [3, 6, 14]. Advocates of such a legislative compromise have offered an analogy to workers’ compensation legislation: just as early twentieth century employers were well-advised to support legislation giving them immunity from tort suits by injured employees, contemporary employers would be well-advised to support legislation preempting or at least limiting wrongful discharge suits [8].

The analogy between the current debate over employment at will and the early twentieth century debate over industrial accidents is indeed a close one, as Table 1 suggests. In fact, though, the workers’ compensation history implies that

Table 1. Comparisons between the Early Twentieth Century
Accident Issue and the Current Discharge Issue

Accidents	Discharge
1. Common law regime restricting employer liability to employees.	Ditto—employment at will.
2. Judicial narrowing of pro- employer doctrine.	Ditto—wrongful discharge suits.
3. Debate over employee rights versus employer rights.	Similar debate.
4. Employers' liability bills proposed but with relatively little success because of employer opposition.	Bills abolishing employment at will have not typically passed so far, despite compromise provisions in most bills.
5. Move from employers' liability to workers' compensation framework.	No comparable paradigm shift has taken place—see text for discussion.
6. Reformers, muckrakers supported legislation.	Academic support but journalists not a factor.
7. Active union support for legislation.	AFL-CIO weakly supportive.
8. International comparisons relied on by supporters.	Ditto—ILO convention, United Kingdom, Japan, Germany, etc.
9. Wastefulness of litigation cited as reason for compromise.	Ditto.
10. Active presidential support from Teddy Roosevelt.	No interest expressed by Reagan or Bush, or (thus far) by Clinton.
11. Deterring active Socialist movement a possible incentive.	No.
12. State committees of business, labor, reformers appointed.	No.
13. Legislation passed despite negative effect on business for attorneys.	?
14. Employers divided but important in passing legislation.	Potentially ditto but not yet, except in Montana.

proposals to end employment at will such as META are unlikely, rather than likely, to be passed in their current form. This article shows how such proposals to abolish employment at will while preempting some or all wrongful discharge suits are not truly analogous to workers' compensation legislation in the early twentieth century (see Table 1). Workers' compensation offered not only relief from lawsuits but also a changed, no-fault approach to industrial risks that had principled appeal to employers as well as to employees. Contemporary compromise proposals to abolish employment at will, on the other hand, offer employers only

financial inducements and lack a vision of the employment relationship that has principled appeal to most employers. Such proposals are analogous, it will be shown, not so much to workers' compensation as to "employers' liability" proposals to restrict employer defenses that were in fact widely made in the late nineteenth and early twentieth centuries, by and large unsuccessfully.

In addition to illuminating the current legislative impasse over employment at will, the analogy with workers' compensation helps illuminate how META and similar legislative proposals could be changed in a way that might break the impasse. In their current form, proposals to end employment at will lack a principled appeal to employers and other opinion leaders who want new workplace rights for employees to be coupled with a sense of responsibility rather than simply a sense of entitlement. The second part of the article explores how legislation of a modified, broader cast that affirms duties for employees as well as employers could be successful in the contemporary context. Workers' compensation statutes were passed after a long-term logjam over employers' liability bills was broken when both employers and employees saw merit in a broader, less fault-oriented approach to industrial accidents. Similarly, it is suggested, legislation has the potential to break the current logjam over employment at will if it can be associated with an organizational culture of fairer and also more responsible employment relations. A preliminary description of such a "shared responsibility" approach to legislation is offered in the concluding section.

THE PARALLEL BETWEEN EARLY TWENTIETH CENTURY ACCIDENT LAW AND CONTEMPORARY DISCHARGE LAW

Currently, the law in the United States on employer dismissal of employees is a complex and confusing hybrid. While no general right of employees to be dismissed only for good reasons has been recognized, state courts since the mid-1970s have increasingly allowed wrongful discharge lawsuits, thus eroding—though by no means eliminating—the common law employment-at-will doctrine. Three major exceptions to employment at will have been recognized in state court decisions: public policy, implied contract, and good faith [2, 3, 14].

The law in 1900 on the ability of employees to recover from their employers for on-the-job injuries was analogous in significant ways to contemporary law on termination. Employers in 1900 were subject to being sued for negligence that caused injury to their employees, but three common law doctrines that had been elaborated in the mid-nineteenth century restricted employer liability: the fellow servant rule, assumption of risk, and contributory negligence [29, 30].

By 1900, the restrictions on employer liability were highly controversial and were being eroded to some degree by courts and legislatures, just as the employment-at-will doctrine has been subject to recent judicial erosion. Advocates of change argued that the common law restrictions allowed negligent

employers causing serious harm to employees to shield themselves unfairly from liability, much as contemporary advocates of eliminating employment at will have argued that the doctrine unfairly shields errant employers from liability.

In the late nineteenth and early twentieth century, many states passed legislation depriving railroads, typically the most unpopular employers, of the fellow-servant defense that the employee's injury had been caused by another employee's negligence. Colorado, a center of populist sentiment, repealed the fellow-servant rule altogether, and other states limited it to some degree [29, 31-32].

Contrary to the oversimple perception of courts in the Gilded Age and early twentieth century as consistently pro-employer and anti-employee, the courts' roles varied from state to state, much as courts recently have varied in their willingness to establish exceptions to employment at will. While some courts, such as the New York Court of Appeals, struck down pro-employee legislation, other state courts limited the three major employer defenses to employee lawsuits with exceptions such as the "vice-principal" rule, under which courts held employers responsible for the negligence of supervisors [30]. Debates on the proper role of the judiciary in expanding employee rights took place [33], reminiscent of those occurring currently. The majority of the Washington state supreme court, which supported cutting back the fellow-servant rule and other pro-employer doctrines, was chided by dissenters for unwarranted judicial activism on behalf of employees [34].

In the late nineteenth and early twentieth centuries, as in the last fifteen years, exceptions to employer defenses encouraged a large and growing amount of litigation. A significant number of employees were successful in winning jury verdicts, sometimes large ones, even while others recovered nothing as a result of being unable to pigeonhole their cases into one of the exceptions to employer defenses [30, 35].

The parallel between the situation concerning employer liability for job injuries in the early twentieth century and the contemporary situation concerning employer liability for terminations extends to the domain of proposals for legislative reform. Many legislative proposals to address the perceived harshness and unfairness of the common law impediments to recovery against negligent employers were being offered in 1900. These late nineteenth and early twentieth century proposals, called employers' liability bills, eliminated or cut back on the fellow-servant rule, contributory negligence, and assumption of risk as employer defenses [29, 31, 36-37], much as contemporary proposals [1, 15] have called for eliminating or cutting back on employment at will. Employer's liability bills were supported by labor unions and resisted by employers [29, 38], as has been the case with current legislative proposals to end employment at will [6, 21, 27] (though union support for ending employment at will has been less active than union support for employers' liability for accidents).

THE CHANGE FROM AN EMPLOYERS' LIABILITY TO A WORKERS' COMPENSATION FRAMEWORK

A crucial point in the analogy between the early twentieth century debate over industrial accidents and the present is that employers' liability bills were largely unsuccessful legislatively. There was a stalemate over them, much as there is now a stalemate over legislation to abrogate employment at will. The passage of workmen's compensation legislation took place because of what can be termed a paradigm shift from the fault-based, adversarial perspective of employers' liability bills to a broader perspective on employment relations that focused on the compensation of injured employees without regard to fault.

The year that stands out as a key turning point in the shift that led to the passage of workmen's compensation legislation is 1908. Prior to 1908, efforts over many years by unions and reformers to pass employers' liability bills had been opposed by business and had met with limited success, except as applied to railroads. In New York, for example, unions had backed employers' liability bills unsuccessfully in 1881, 1885, 1887, 1891, 1892, 1894, 1899, and 1900; a moderate employers' liability bill had passed in 1902 but had been declared unconstitutional, and alternative legislation had been rejected by the legislature in 1904 [29].

In 1908, President Theodore Roosevelt endorsed a system of workmen's compensation under which injured employees would be compensated on a broader basis than under employers' liability bills, which premised liability on a showing of employer negligence. Under workmen's compensation, employees would receive compensation without having to show employer fault, and employers would be immunized from lawsuits. In endorsing workmen's compensation, Roosevelt followed a path that had been earlier urged by reformers such as John R. Commons in Wisconsin and Miles Dawson in New York, who had argued for a change from the fault-based system of the common law to an administrative system of no-fault compensation, modeled after European workmen's compensation statutes such as those of Britain and Germany [29, 37]. Also in 1908, the National Civic Federation, a group dominated by representatives of large businesses but that also included representatives of labor, expressed support for state workmen's compensation laws conditioned on abolition of suits against employers, and made passage of such legislation a priority [38].

While proposals for employers' liability in bills had languished for years in the face of employer opposition, the proposals for workmen's compensation moved ahead rapidly in 1908 and the years immediately following. Following Roosevelt's recommendation, Congress established workmen's compensation for federal employees. Numerous states, including New York, Massachusetts, Ohio, Wisconsin, Minnesota, Illinois, New Jersey, Connecticut, and Washington, established commissions, typically composed of representatives of business and labor along with academics and reformers, to study changes in the law concerning job injuries [29, 35, 38]. The influential Pittsburgh study of industrial accidents

conducted by Crystal Eastman provided a basis for state commissions to support workmen's compensation with its finding that the overwhelming majority of accidents were better attributed to the nature of industrial production processes than to negligence [31].

While employer and employer groups were by no means unanimously in support of workmen's compensation, the question was not a polarized, employer-versus-employee issue as employers' liability legislation had been [29, 35, 37]. Business organizations such as the National Association of Manufacturers and the Boston Chamber of Commerce joined the National Civic Federation in support of workmen's compensation proposals [32, 38]. In 1910 and the years immediately following, state after state passed statutes providing for compensation for injured employees and employer immunity from injury-related lawsuits, and by 1920, all the major industrial states had workmen's compensation laws. In nearly all states, business was successful in its efforts to have private actions against employers abolished as part of establishing an administrative system of no-fault compensation for employees.

THE DIM PROGNOSIS FOR EMPLOYMENT-AT-WILL LEGISLATION IN ITS CURRENT FORM

In the early twentieth century debate, the key shift that took place and made the passage of legislation possible was the transition from an adversarial, zero-sum framework—employers' liability bills—to a broader framework with principled appeal to both employers and employees. That transition has not taken place in the contemporary debate. Rather, what has occurred to date has taken place within an adversarial, fault-oriented framework in which one party's gain is understood as another's loss. Placed in historical perspective, contemporary legislative proposals such as the Model Employment Termination Act to abolish employment at will and preempt some or all wrongful discharge suits with administrative proceedings or arbitration are not analogous to workers' compensation and its attendant paradigm shift. Rather, such proposals are analogous to employers' liability legislation, specifically to a moderate version of such legislation in which most or all of the suits by injured employees against employers would be arbitrated or adjudicated administratively rather than tried in court.

The fact that workers' compensation proposals earned considerable employer support, unlike employers' liability bills or current proposals to abolish employment at will, presents an interesting problem with important implications for the employment-at-will debate. The appeal of workers' compensation to employers presents a puzzle because employer self-interest, narrowly conceived, supports remaining in a negligence or fault system rather than shifting to a no-fault system such as worker's compensation, since a no-fault system allows liability in a much greater number of cases. So why have contemporary proponents of abolishing employment at will—who have suggested relief for employers from lawsuits *and*

remaining in a fault system—not done better with employers than early twentieth century workers’ compensation proponents, who offered only relief from lawsuits? To put the question another way, why did workers’ compensation carry the day while employers’ liability bills, including moderate employers’ liability proposals with inducements for employers, had generally failed?

The sensible explanation is that the shift from employers’ liability bills to workers’ compensation had positive qualities for early twentieth century employers not captured by a narrow, short-term view of employer self-interest. Employers’ liability bills, appropriately tailored, could have been more immediately financially advantageous to employers than workers’ compensation. But while employers’ liability legislation posed a clear win–lose issue legally and ideologically, with employers the losers, workers’ compensation made it possible to shift to a different, no-fault, framework. The belief that industrial accidents were not best viewed in terms of fault offered something of long-term value to employers.

Support for workmen’s compensation meant moving away from an individualistic, fault-based way of looking at the employment relationship that, whatever its possible short-run, money-saving value for employers, cast them in the role of worker-maiming villains—Gilded Age Snidely Whiplashes, as it were. The new no-fault approach to compensation, on the other hand, viewed accidents nonmoralistically, as an outcome of socially desirable production processes that brought benefits (as well as hazards) to employees and the community, rather than as the result of employer (or employee) fault. Given the rise of large-scale industrial enterprises whose operations were neither well-explained nor easily justified by laissez-faire individualism, as well as the existence of substantial support for socialism and other movements morally critical of business, it is reasonable to conclude that the no-fault, communitarian approach of workmen’s compensation had appeal for many employers for reasons beyond immediate balance sheet calculations.

In light of the workers’ compensation history, the basis of current employer resistance to legislation abolishing employment at will and the potential for employer support emerging for such legislation becomes clearer. Money is important, but restrictions on wrongful discharge suits are not, at least given the current level of such suits [39], likely to convert most employers into supporters of META or similar legislation. In the form that it has been presented to date, legislation abolishing employment at will, like employers’ liability legislation, is an adversarial win–lose issue legally and ideologically, with employers on the losing end, even if the legislation is cast in a form that makes its dollars-and-cents consequences acceptable or even potentially favorable to employers.

Advocates of ending employment at will are not on solid ground to assume that legislation is likely to pass based on a coalition of those philosophically opposed to employment at will with employers who want to save money by preempting wrongful discharge suits. There are three central flaws in the idea that legislation

ending employment at will will pass on the basis of such a compromise. First, wrongful discharge suits are not, despite all the publicity they have generated, especially costly on a per-employee basis for employers in general [39, 40]. Second, employees (and certainly their attorneys) care about money, just as employers do. If actual or potential levels of wrongful discharge awards were high enough to make a bill that curtails such suits financially advantageous to employers as a class, such a bill would—in immediate if not long-run terms—be financially disadvantageous to employees as a class.

Third and crucially, employers, like employees, are not simply calculating machines. Employers (along with opinion leaders and politicians who vote on legislation) care about principles as well as about dollars. Employer resistance to legislation eliminating employment at will is not limited to a narrow comparison of awards in wrongful discharge suits with potential awards in a system in which discharges are arbitrated or subject to review by a state agency. There is a broader matter of organizational culture and organizational values [41] at stake. In addition to the question of whether it is desirable for the courts, an administrative agency, or an arbitrator to have influence over terminations, there is an issue as to whether recognizing a right to continued employment absent good reason would encourage an adversarial and uncooperative workplace culture. Employment at will, even in its now somewhat attenuated form, is a major background rule of the U.S. business system and culture, and absent a principled argument broader than granting employees enhanced rights against employer exploitation, even employers who are not doctrinaire adherents of *laissez faire* and the unalloyed right to fire for any reason or no reason are not likely to support a statute to end employment at will.

Principled employer resistance to giving up employment at will does not necessarily stem from adherence to *laissez faire*. Such adherence is of course one source of resistance, but there is another, more moderate, set of beliefs that accounts for employer resistance. Just as there is a principled vision of relations between employer and employee that animates support for the proposal to abrogate employment at will, there is also a principled vision of employee relations that animates skepticism about the proposal, though not the strong opposition to it that is associated with adherence to a *laissez faire* position. Support for ending employment at will is related to an employee-rights based vision of the employment relationship in which the employee is seen as in need of protection from the superior power of the employer [17]. Skepticism about legal review of termination decisions, on the other hand, is related to a vision of the employment relationship that emphasizes the importance of shared purpose between employer and employees and regards litigation to enforce rights as often, though not necessarily, conducive to undesirably adversarial and bureaucratic relations.

META and most other current proposals for ending employment at will acknowledge employers' financial interests by including provisions to partly or wholly preempt wrongful discharge suits. What the proposals do not do, though,

is to respond effectively to the objection that ending employment at will would be conducive to, or would at least do nothing to improve, a culture of adversarial, legalistic, workplace relations in which employees shirk and focus on entitlements rather than responsibilities [42]. The point, emphasized by Summers [1] and other proponents of legislation [5-6, 43], that other industrial democracies have jettisoned employment at will is not a sufficient response, given the skeptical concern that there is a distinctively legalistic and adversarial element in American culture that would be reinforced by the elimination of employment at will in a way not comparable to more collectivistic organizational cultures such as those prevailing in Japan or Germany [43].

At a broad level, concerns have been widely expressed in recent years over whether American social relations inside and outside organizations are too individualistic, legalistic, and adversarial compared to those prevailing in other major industrial nations [42-46]. Unless proponents of legislation to end employment at will can respond effectively to the skeptical objection that it is likely simply to reinforce legalistic and adversarial tendencies seen as already overly powerful in the culture of American organizations (or unless there is a much broader judicial curtailment of employment at will than has actually taken place [19], such legislation is likely to have as little success in state legislatures or Congress as the employers' liability legislation that it resembles had in the late nineteenth and early twentieth centuries.

TOWARD A NEW APPROACH: "SHARED RESPONSIBILITY" PROVISIONS

From a policy perspective, the crucial step in relating workers' compensation to the employment-at-will issue is to consider whether there is an approach for dealing with the employment-at-will issue that not only responds to employers' immediate dollars and cents concerns, as META and similar legislative proposals attempt to do, but that also has principled appeal to employers, employees, policy experts, and politicians. There are two compatible ways for proposals relating to responsibility for dismissal to change the current approach in the way that workers' compensation changed the terms of the debate over responsibility for job accidents. The first way involves taking the analogy with workers' compensation literally. Just as workers' compensation shifted the legal regime governing job injuries from negligence to strict liability, a legislative proposal to deal with dismissal could make a parallel shift to a no-fault approach through focusing not on adjudicating responsibility for termination but on severance pay and modifications of unemployment compensation [21].

Given the difference between dismissal, which is a conscious decision, and on-the-job injury, which hardly ever is, a fault-oriented framework is more difficult to transcend in the area of dismissals than in that of accidents. Nevertheless,

it would certainly be possible, as in the workers' compensation case, to try to shift the law's emphasis away from determining whether an employer's conduct was blameworthy to providing some reasonable compensation for the employee. Rather than conceptualizing dismissals primarily in terms of fault to be assigned to one side or another—to an errant employee or an abusive employer—it would be possible, and very likely sensible, to conceptualize dismissals largely in terms of economic factors and shared employer–employee responsibility. (Modern versions of the Crystal Eastman study of accidents [31] that focused on the causes for termination would be of interest on this issue.)

The second way of changing the existing approach to the employment-at-will issue takes the analogy with workers' compensation more broadly. Just as workers' compensation represented a change in the legal regime that had appeal as a matter of principle for employers as well as employees, a proposal to deal with responsibility for dismissal could become a part of a change in the legal understanding of the employment relationship aimed at appealing on grounds of principle to employers (and politicians) as well as employees. Such a legislative approach would recognize the developing contemporary understanding that employers have duties of good faith and fair dealing in relation to employees [47]. But it would also recognize the principle that employees have comparable duties of good faith, loyalty, and fair dealing in relation to employers. In other words, such a legislative approach would emphasize shared responsibilities in the employment relationship, rather than being focused only on trading off new rights for employees with saving money for employers.

Currently, American employment law is not oriented toward promulgating a conception of shared duties of good faith, loyalty, and fair dealing applicable to employees and employers alike. Instead, there are pockets of employment law, such as civil rights and wrongful discharge, that place responsibilities on employers, and other pockets of law, such as agency, that place responsibilities on employees. A unifying affirmation of shared responsibility by employers and employees is lacking.

Current legislative proposals to end employment at will, such as META, also lack a unified vision of employment relations. Protecting employees from exploitative employer terminations and saving employers money, while both worthy objectives in their own right, do not cohere readily. Nor do these goals taken together establish a vision of organizational culture that most employers, or any other group, such as centrist politicians, significant to the passage of legislation at the state or federal level, can support with enthusiasm. While provisions regarding the preemption of wrongful discharge suits have financial appeal, employers, along with many opinion leaders and politicians, are still likely to have a concern that the conferring of a broad new right on employees without balancing provisions affirming employee responsibilities is all too likely to foster and reward adversarial, "I've got mine, Jack" attitudes toward work and adversarial organizational cultures [42].

The aim of a shared responsibility approach is to support constructive organizational cultures by affirming employee responsibilities as well as employee rights. Shared responsibility provisions could be offered independently or in the form of amendments to META or another proposed bill at the state or federal level. Rather than being limited simply to the issue of wrongful discharge, shared responsibility provisions could enunciate the principle that employees and employers alike have duties of good faith, loyalty, and fair dealing in connection with the employment relationship. Such provisions could state that the employer's duties entail that discharge of employees not take place except for good cause, but would also state that the employee's duties entail that employee actions in regard to notice of departure be carried out with due regard for the interest of the enterprise of which the employee is a part, as well as for the employee's personal interest.

To avoid excessive supervision of the employment relationship by the legal system, shared responsibility provisions could contain language designed to encourage employers and employees to work out issues together or through informal processes rather than resorting to the courts; the provisions in the Model Employment Termination Act and the Montana statute that limit damages and encourage arbitration have merit along these lines. Optimistically, shared responsibility provisions could contribute to more cooperative, less adversarial, and more productive organizational cultures in the United States. At the very least, such provisions would counter the potential that simply abolishing employment at will by itself might have to uphold adversarial and narrowly rights-oriented attitudes toward employment.

CONCLUSION

The history of the passage of workers' compensation provides an excellent example of how legislation can succeed when it is framed in a way that offers not only financial tradeoffs but also embodies a broadly shared picture of a fairer and more responsible employment relationship. Shared responsibility provisions affirming duties of loyalty, good faith, and fair dealing on the part of employees as well as employers (along, possibly, with severance pay provisions), are a promising avenue, though not an assured one, to breaking the stalemate that currently prevails on the employment-at-will issue, just as workers' compensation was a way of breaking the stalemate that had previously prevailed on the employers' liability issue. Adopting such provisions would not require scrapping the hard and constructive work that has already been done to formulate legislation, such as the Model Employment Termination Act, that is sensitive to employee rights and employer financial concerns. Through appropriate amendments, META and similar current legislative proposals can be modified in a way that would connect them to a vision of shared responsibility in the workplace with broad appeal to employers, employees, and opinion leaders. The analogy with workers' compensation suggests that such revised legislation, responsive to overarching values

concerns as well as to dollars-and-cents concerns, has a better chance of succeeding than legislation as it has been structured to date.

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ENDNOTES

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