

Individual Bargaining, Collective Bargaining and Protective Legislation: Determining the Terms and Conditions of Employment in the Modern American Employment Relationship

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I. INTRODUCTION

Globalization has changed the face of the American workplace. With increased competition from corporations around the globe, the United States has responded by dramatically changing the way it does business in order to remain competitive. Systems have been implemented to increase both productivity and quality of output while reducing overall costs.¹ Additionally, companies are relying less on full-time workers; instead they are increasing the use of “contingent workers,” which include part-time, casual, and temporary workers.² All of these changes are affecting the methods used to address conflicts in the employment relationship.

The primary method of addressing such conflicts in the United States has always been through individual negotiations and contract.³ In comparison with other countries, this has produced some “harsh” results for American employees since our law governing individual employment contract has emphasized “freedom of contract” and flexibility with respect to the agreements employers can negotiate with individual employees.⁴ This can be seen even today in our common law “employment at-will” doctrine, our employee “duty of loyalty” doctrine, and the absence of any implied covenant of good faith and fair dealing in the majority of our jurisdictions. However, the use of individual negotiation and contract rights has been tempered over the course of our history by some reliance on collective bargaining and on federal and state regulation of the employment relationship.

During the Great Depression, when individual bargaining was clearly failing to meet the needs of workers, the United States Congress and President decided that it would be in the workers’ and the country’s interest to adopt federal laws protecting and encouraging collective bargaining as an important means of addressing workers’ needs. Accordingly, in 1935 Congress passed the Wagner Act⁵ (more commonly known as The National Labor Relations Act) to promote “equity in bargaining power between labor and management,” and to promote “industrial peace.”⁶ The idea was that, although workers might not be able to individually bargain with employers to achieve higher wages and benefits and achieve greater input into the running of their firms and society, they could bind together to accomplish these tasks through collective bargaining agreements.⁷

Throughout the 1940s and 50s, the perception grew among the American populace that

¹ Hoyt N. Wheeler & John A. McClendon, *Employment relations in the United States*, in INTERNATIONAL & COMPARATIVE EMPLOYMENT RELATIONS [hereinafter “INT’L RELATIONS”] 63 (Greg J. Bamber & Russell D. Lansbury eds., 1998).

² *Id.* at 63.

³ An employment contract can be either express or implied and is not required to be in writing. ALVIN L. GOLDMAN, LABOR AND EMPLOYMENT LAW IN THE UNITED STATES 58 (Kluwer Law Int’l Student ed. 1996).

⁴ State courts have often struck down “labor protective legislation on freedom of contract grounds.” MATTHEW W. FINKIN ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 22 (3rd ed. 2002).

⁵ 29 U.S.C. §§ 141-187 (2003).

⁶ *See* Wheeler & McClendon, *supra* note 1, at 65-66.

⁷ *See generally* JULIUS G. GETMAN ET AL., LABOR MANAGEMENT RELATIONS AND THE LAW 1-5 (2d ed. 1999).

unions had grown too strong under the legislative scheme of the Wagner Act as many industries became rife with labor strikes.⁸ Consequently, major amendments to the Act were adopted in the Taft-Hartley Amendments of 1947⁹ and the Landrum-Griffin Act¹⁰ of 1959 to uphold the “right of employees NOT to organize” and to limit union power.¹¹ As a result of changes in the federal statutory scheme and changes in the American economy, unions began a long and steady decline in importance in industrial relations in the United States that continues until this day.¹²

The decline of unions and the renewed focus on individual rights has led the United States Congress and state legislatures to rely increasingly on specific statutory rights as a way of addressing the perceived inadequacies of individual bargaining in meeting the needs of workers. Although the existing scheme of statutory protections had its origin at the turn of the last century and received a significant boost during the legislative heyday of the New Deal, the reliance on specific statutory provisions to give individual workers rights exploded during the Civil Rights era of the 1960s and 70s and continues today.¹³

Among the three primary means of addressing the needs of workers--individual bargaining, collective bargaining and protective legislation--each has its own advantages and disadvantages. Individual bargaining can provide the most individualized solution of meeting the needs of the parties. It also enjoys relatively low administrative costs. Unfortunately, market failures and lack of bargaining power¹⁴ mean that individual bargaining often results in an impoverished solution for many workers that fails to address many of their basic needs.

Collective bargaining allows for an individualized solution on the basis of a company or an industry and can solve many of the market imperfection problems of individual bargaining.¹⁵ Unfortunately, because so few workers are organized in the United States, relying on collective bargaining leaves the vast majority of employees without an effective way to address their needs in the employment relationship. As a practical matter, employees who undertake to organize are also subject to employer retaliation.

Protective state and federal legislation provides the least individualized way of addressing employees’ needs. It is also administratively costly. However, protective legislation can be used to provide all workers with at least some relief from the problems of individual bargaining. Moreover, the system of individual rights and enforcement used with most protective legislation coincides well with the American legal system and ideals of individualism.¹⁶

A secondary means of addressing the needs of workers is through the common law. The law of individual contracts is primarily shaped through state judicial decision although federal common law governs the enforcement of collective bargaining agreements.¹⁷ Unfortunately, the cost of litigation and the inconsistent application of common law across states prevent this method from becoming one of the primary ways to address employee demands.¹⁸

For the indefinite future, the United States will undoubtedly continue to undertake a mixed system of individual bargaining, collective bargaining, and individual statutory rights in governing the employment relationship with the primary emphasis on individual bargaining and individual statutory rights.

⁸ *Id.* at 5.

⁹ 29 U.S.C. §§ 151-61 (2003).

¹⁰ 29 U.S.C. §§ 401-531 (2003).

¹¹ *See generally*, GETMAN, *supra* note 7, at 5-6.

¹² *Id.* at 13-16.

¹³ For a history of federal legislation regulating the employment relationship, *see* GOLDMAN, *supra* note 3, at 38-46.

¹⁴ *See* Kenneth G. Dau-Schmidt, *Meeting the Demands of Workers into the Twenty-First Century: The Future of Labor and Employment Law*, 68 IND. L. J. 685, 688-92 (1993). Market failures include imperfect information, imperfect processing of information, and public goods. For instance, an individual is unable to bargain for public goods, such as the air quality and lighting at the workplace, because improvement of these goods enjoyed by one worker cannot be to the exclusion of the other workers. *Id.* at 690.

¹⁵ *See generally id.* at 692-695 (discussing the advantages and disadvantages of collective bargaining).

¹⁶ *See generally id.* at 696-698 (discussing the advantages and disadvantages of protective legislation).

¹⁷ Goldman, *supra* note 3, at 49.

¹⁸ *See* Dau-Schmidt, *supra* note 14, at 699-700.

II. INDIVIDUAL BARGAINING AND RIGHTS

A. OVERVIEW

As previously stated, the primary means of addressing American workers' needs is through individual bargaining. In contrast to other industrialized countries, two facets of the system of individual contract rights in the United States stand out as truly exceptional--the employment-at-will doctrine and our reliance in individual employment contracts for the provision of health insurance. In the evolution of these doctrines, United States constitutional protections have played an important, but merely supporting role in establishing a strong legal environment for the presumption of freedom of contract. State and federal statutes have also played a largely supporting role in the development of both the employment-at-will doctrine and health insurance provisions providing either some specific prohibitions against discharge¹⁹ or prescribing certain forms and protections for employee health benefits if offered by the employer (ERISA).²⁰

B. THE EMPLOYMENT-AT-WILL DOCTRINE

i. Development of the doctrine

In the United States, an employment contract for an indefinite term is presumed to be at-will unless the parties expressly state otherwise.²¹ The establishment of the employment-at-will doctrine met the growing labor needs of the large "manufactory" employers in the mid to late nineteenth century. This "freedom of contract" based doctrine heavily favored the employer who was entitled to terminate the employee for good, bad, or no cause.²² Courts were initially so protective of this doctrine that they "regularly struck down as unconstitutional any federal or state legislative intrusion on the prerogative of employers to terminate the relationship."²³ This trend continued until the mid-twentieth century.

Today, most American workers are employed without a formal contract or without explicit job security clauses and are thus employed-at-will.²⁴ However, the employment-at-will doctrine has changed so substantially from its inception during the industrialization period that, in most American jurisdictions, employers are commonly prohibited from dismissing an at-will employee under certain circumstances. In *Woolley v. Hoffmann-LaRoche, Inc.*, the Court "clearly announced its unwillingness to continue to adhere to rules regularly leading to the conclusion that an employer can fire an employee-at-will, with or without cause, for any reason whatsoever."²⁵ The exceptions to the doctrine provide certain job security to the employee while still preserving overall freedom of contract.

¹⁹ Many federal and state statutes providing rights and benefits to employees also protect them from discharge by the employer when the employee seeks the protection or enforcement of the statute. These statutes include: state workers' compensation plans, the Americans with Disabilities Act (ADA), Title VII of the 1964 Civil Rights Act, the Occupational Safety and Health Act (OSHA), the Motor Carrier Act, Title III of the Consumer Protection Act of 1970, and the Fair Labor Standards Act (FLSA). See GOLDMAN, *supra* note 3, at 73. Protection from discharge is given to employees under the various whistleblower statutes. See HENRY H. PERRITT, JR., 2003 EMPLOYMENT LAW UPDATE 113-26 (2003). Employees are also insulated from termination that contravenes clear and established public policy. See *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 877 (Mo. Ct. App. 1985) (holding that "employers...are not free to require employees, on pain of losing their jobs, to commit unlawful acts or acts in violation of a clear mandate of public policy expressed in the constitution, statutes and regulations." *Id.*).

²⁰ 29 U.S.C. §§ 1001-1461 (2003).

²¹ See *Payne v. The West. & Atl. RR Co.*, 81 Tenn. 507 (1884).

²² *Id.* at 519-20. Over one-hundred years later, the basic doctrine still persists. In *Murphy v. American Home Prods. Corp.*, the plaintiff was terminated by the defendant company after twenty-three years of employment when the plaintiff reported corporate accounting improprieties. The Court confirmed that the termination was proper because "where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason." 448 N.E.2d 86, 89 (N.Y. 1983).

²³ PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 48 (1990) (citing *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915)).

²⁴ GOLDMAN, *supra* note 3, at 64.

²⁵ *Woolley v. Hoffmann-LaRoche, Inc.*, 491 A.2d 1257, 1260 (N.J. 1985).

ii. Exceptions to the at-will doctrine

The second half of the twentieth century brought tremendous change to both contract and civil rights laws. These changes produced exceptions to the employment-at-will doctrine which subsequently transferred some of the original bargaining power from the employers to the employees in the form of increased job security and limited protection from arbitrary discharge.

The most common exception to the employment-at-will doctrine is the public policy exception which permits recovery in tort by an at-will employee who has been dismissed in violation of a clear and substantial public policy.²⁶ “Public policy’ is that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good.”²⁷ This exception includes protection from discharge for whistleblowers,²⁸ for employees who refuse to perform illegal acts,²⁹ and for employees who are engaging in lawful activities such as jury duty or seeking public office.³⁰ As of October 1, 2000, forty-three states permitted recovery based on the public policy exception³¹ although many of these courts require that the public policy be grounded in a specific constitutional, statutory, or regulatory provision rather than just “judicially recognized fundamental policies.”³²

Contract law has generated another exception to the at-will doctrine where an implied contract has been created, most frequently in cases involving employee handbooks and manuals. In *Woolley*, the plaintiff-employee filed a successful breach of contract claim against his employer subsequent to his discharge. The plaintiff alleged that the employer’s handbook contained an implied promise that an employee could only be fired for cause, and even then, only after certain disciplinary procedures were followed.³³ The Court held that “absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will.”³⁴ In 2000, thirty-eight states recognized an implied contract exception to the at-will doctrine.³⁵ In some jurisdictions, an employee handbook is considered to establish an implied in fact contract while in others, courts require the employee to show proof that he/she had “actual knowledge” of the invoked provision.³⁶ To effectively show an implied contract from a handbook, “the provision governing job security must be sufficiently definite to constitute a contractual commitment.”³⁷

A third exception to the at-will doctrine was recognized in 1980. The implied covenant of good faith and fair dealing ensures that “neither party will do anything which will injure the right of the other to receive the benefits of the agreement.”³⁸ The original purpose of the implied covenant of good faith and fair dealing doctrine was to protect the expectations of the

²⁶ FINKIN, *supra* note 4, at 172. See also GOLDMAN, *supra* note 3, at 71.

²⁷ FINKIN, *supra* note 4, at 172.

²⁸ See *Harless v. First Nat’l Bank in Fairmont*, 246 S.E.2d 270 (W.Va. 1978) (holding that an employee-at-will who was terminated for reporting violations by his employer of the state Consumer Credit and Protection Act has a valid cause of action).

²⁹ See *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (allowing recovery by an employee who had been dismissed after refusing to pump bilges into the water, which was illegal under federal law).

³⁰ FINKIN, *supra* note 4, at 175.

³¹ Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 1, 2001, Exhibit 1. See also GOLDMAN, *supra* note 3, at 71.

³² GOLDMAN, *supra* note 3, at 71.

³³ *Woolley*, 491 A.2d at 286-87.

³⁴ *Id.* at 285-86.

³⁵ Muhl, *supra* note 31, at exhibit 1. Many of the courts that deny this exception do so because of “the lack of consideration and the want of a ‘bargained-for’ exchange.” FINKIN, *supra* note 4, at 92. An extension of this exception is made in circumstances where an employer attempts to hide behind the employment-at-will doctrine in order to terminate an employee who was fraudulently induced to accept employment. See *Berger v. Sec. Pac. Info. Sys., Inc.*, 795 P.2d 1380 (Colo. Ct. App. 1990).

³⁶ FINKIN, *supra* note 4, at 91.

³⁷ *Id.* at 93. See, e.g., *Heidick v. Kent Gen. Hosp, Inc.*, 446 A.2d 1095 (Del. 1982); *Miles v. Bibb Co.*, 339 S.E.2d 316 (Ga. Ct. App. 1985).

³⁸ *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722, 728 (Cal. Ct. App. 1980) (quoting *Comunale v. Traders & General Ins. Co.*, 328 P.2d 198 (Cal. 1958)).

parties to the contract and ensure that the parties' intentions were realized.³⁹ The covenant was not necessarily designed to protect a public policy interest.⁴⁰ Although the covenant started in traditional contract law,⁴¹ it was extended into the employment realm when a California court noted the continuing trend of contract principles applying to the employment relationship.⁴² As of 2000, this exception to the at-will doctrine had been recognized by only eleven states,⁴³ including Massachusetts and California. Recovery under this exception is generally in contract and not tort.

When the covenant of good faith and fair dealing exception was first applied by the courts to the employment relationship, it was predicted that the exception would be accepted by a majority of states in a fashion similar to their acceptance of the public policy and implied contract exceptions. However, many courts have refrained from applying this exception until either the state legislature or the state's highest court acts.⁴⁴ Other courts refuse to apply the doctrine because they find it too vague and broad, and because they feel it often leads to arbitrary and inconsistent applications.⁴⁵ Still other courts are leery to apply the exception for fear that it will be misapplied to convert an employment-at-will relationship into a just cause relationship.⁴⁶

In the minority of states that do recognize the implied covenant exception, there is wide divergence as to when and how it is applied.⁴⁷ Some courts permit the use of the doctrine for recovery only where termination has deprived the employee of earned wages or commissions from a past performance.⁴⁸ Other states recognize the implied covenant when termination contravenes public policy.⁴⁹ The doctrine has been used where termination by the employer is motivated by bad faith, malice, or retaliation⁵⁰ or where the employer's conduct constitutes fraud, deceit, or misrepresentation.⁵¹ A small number of states allow the use of the covenant to protect the right to job security⁵² or when a special relationship exists between the contractual parties.⁵³ California permits perhaps the broadest use of the exception where an employee's length of service, "together with the expressed policy of the employer, operate as a form of

³⁹ See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 389-90 (Cal. 1988).

⁴⁰ See *id.* at 394.

⁴¹ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (providing that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Id.*); U.C.C. § 1-203 (1998) (requiring that "every contract or duty within this Act [U.C.C.] imposes an obligation of good faith in its performance or enforcement." *Id.*).

⁴² *Cleary*, 168 Cal. Rptr. at 729.

⁴³ See Lynn Marx, *At Will Employment*, OLR RESEARCH REPORT (March 1, 2001), available at <http://www.cga.state.ct.us/2001/rpt/olr/htm/2001-r-0246.htm> (last visited Feb. 19, 2004).

⁴⁴ 27 AM. JUR. 2D *Employment Relationship* § 66 (2003). See also *Ward v. 84 Lumber*, 758 F. Supp. 355, 336 (D. Md. 1991); *Edelman v. Franklin Iron & Metal Corp.*, 622 N.E.2d 411, 414 (Ohio Ct. App. 1993).

⁴⁵ J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 362-63 (1995). See also Seth William Goren, *Looking for Law in All the Wrong Places: Problems in Applying the Implied Covenant of Good Faith and Fair Dealing*, 37 U.S.F. L. REV. 257, 267 (2003); FINKIN, *supra* note 4, at 182.

⁴⁶ Parker, *supra* note 45, at 355, 363.

⁴⁷ FINKIN, *supra* note 4, at 182.

⁴⁸ *Henderson v. L.G. Balfour Co.*, 852 F.2d 818, 822 (5th Cir. 1988).

⁴⁹ *Lewis v. Cowen*, 165 F.3d 154, 167 (2nd Cir. 1999). Critics argue that applying the covenant to further public policy will dilute the doctrine. Instead they suggest that courts should require that these claims be brought under the public policy exception in tort. Parker, *supra* note 45, at 368. See also Jason Randal Erb, *The Implied Covenant of Good Faith and Fair Dealing in Alaska: One Court's License to Override Contractual Expectations*, 11 ALASKA L. REV. 35, 46 (1994).

⁵⁰ *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974).

⁵¹ *Merrill v. Crothal-American, Inc.*, 606 A.2d 96, 101 (Del. 1992).

⁵² 82 AM. JUR. 2D *Wrongful Discharge* § 69 (2003). See also *Cleary*, 168 Cal. Rptr. at 729.

⁵³ 82 AM. JUR. 2D *Wrongful Discharge* § 71 (2003). *But see* Cyndi M. Benedict et al., *Employment and Labor Law*, 50 SMU L. REV. 1101, 1134 (1997) (discussing the Texas Supreme Court's decision in *McClendon v. Ingersoll-Rand Co.* where the court failed to find that the special relationship in the employment context was similar to that in the insurance realm and thus refused to uphold the implied covenant in the employment setting).

estoppel, precluding any discharge of such an employee by the employer without good cause.”⁵⁴

One final exception to the at-will doctrine that has been granted in a few states permits employees to recover in tort if the manner in which they were terminated was wrongful, regardless as to whether the employer had the right to terminate the employee.⁵⁵ To successfully prove intentional infliction of emotional distress, the employee must show that the conduct of the employer during the termination was “extreme and outrageous,” the employer acted intentionally or recklessly, and the employer’s conduct caused the employee to suffer from severe emotional distress.⁵⁶

iii. United States and international at-will doctrine developments

Despite the development and expansion of the above exceptions, the employment-at-will doctrine is still the predominate form of employment relationship in the United States. Only Montana, Puerto Rico, and the Virgin Islands have statutorily eliminated the doctrine and have made remedies available to employees who are dismissed without good cause.⁵⁷ By contrast, most other industrialized nations, including many European countries, Japan, Canada, and other countries in Asia and Africa, provide statutory protection against unjust discharge.⁵⁸ In most European Union countries, for instance, strict rules require employers to comply “with rigid procedures and time limits, as well as the payment of certain benefits. Any termination in violation of the procedures may be challenged, and courts generally tend to rule in favor of the dismissed employee.”⁵⁹ The International Labour Organization has also supported the prohibition against unjust discharge.⁶⁰ Article 4 of the ILO Convention and Recommendation on Termination of Employment of 1982 (No. 158) seeks to eliminate the employment-at-will doctrine and to require employers “to specify a valid reason for the termination of their employees.”⁶¹

iv. Current trends in the application of the at-will doctrine

As previously mentioned, globalization has made dramatic changes to the American workplace since the birth of the employment-at-will doctrine. Companies are constantly retooling their businesses to ensure that productivity is maximized while streamlining costs. The length of employment relationships is being shortened as many permanent employees are being replaced by part-time and casual employees and subcontractors.⁶² The union movement has also steadily declined in the United States.⁶³ While still the predominate form of the individual employment relationship, the at-will doctrine has been somewhat reduced in strength because of an increase in governmental regulation and the development of the at-will exceptions.⁶⁴

⁵⁴ See Cleary, 168 Cal. Rptr. at 729. See also West’s hr-esource.com, *Legal Guide to Human Resources: Employment At Will and Employment Contracts* § 8.02(3) at <http://www.hr-esource.com/index.asp?rightframe=hresources/sampleChapters/lghSampleChapter.html>.

⁵⁵ GOLDMAN, *supra* note 3, at 74.

⁵⁶ FINKIN, *supra* note 4, at 247 (quoting *Margita v. Diamond Mortgage Corp.*, 406 N.W.2d 268, 271 (1987)).

⁵⁷ GOLDMAN, *supra* note 3, at 64-65.

⁵⁸ Comm. on Lab. & Emp., The Ass’n of the Bar of the City of New York, *At-Will Employment and the Problem of Unjust Dismissal*, 36 REC. B. CITY N.Y. 170, 175 (1981).

⁵⁹ Annette M. Schüller et al., *Doing Business in the European Union: An Overview of Common Legal Issues*, COLO. LAW., June 2002, at 18.

⁶⁰ Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L. J. 83, n.89 (2001).

⁶¹ Cindy Barber, *Comparison of International and U.S. Employment Termination Procedures: How Far Have We Come? – A Step in the Right Direction*, 19 SYRACUSE J. INT’L L. & COM. 165, 184 (1993).

⁶² Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L. J. 1, 13 (2001).

⁶³ Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 361 (2002). In 1950, 31.5% of the nonagricultural labor force was unionized. *Id.* (citing U.S. Dep’t of Labor, Bureau of Labor Statistics 1980b, at 412 tbl.165, in MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 10 tbl.1 (1987)). By 2003, only 12.9% of wage and salary workers were union. U.S. Dep’t of Labor, Bureau of Labor Statistics, *Union Members in 2003* (Jan. 21, 2004), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

⁶⁴ Befort, *supra* note 63, at 378.

The current at-will system clearly has some deficiencies. Unlike American labor law, “the legal rules governing the employment relationship consist of a crazy quilt of regulation emanating from a variety of sources—federal and state, legislative and judicial. These regulations, in turn, bear little relationship to one another.”⁶⁵ Unlike labor law where enforcement is through the specialized labor court (NLRB), judges of general jurisdiction do not specialize in employment law. With the growing amount of statutory and at-will exception claims that can be made to challenge termination, the number of employment cases is rapidly increasing.⁶⁶ Employers and employees are finding the current system of litigation involving these individual exceptions to be costly and time consuming.⁶⁷ Because of these factors, there is a movement towards arbitration either by individual agreement or statute. Arbitration has been found to be both quicker and cheaper than the current litigation system.⁶⁸

Some analysts have argued that American legislators should to adopt statutory schemes for discharge that are similar to those found in some European countries.⁶⁹ Under such a system, employers can discharge employees without cause, but only if they pay the employee some set amount of severance pay, for example one month’s pay for each two years of service. The employer could avoid making the severance payments, only if he or she could show just cause for dismissal. Such adjudications could be handled through arbitration, or before unemployment compensation panels.⁷⁰ These analysts also argue that adopting such a statute on the federal level would ensure that all workers across the United States receive the same legal protection.⁷¹

C. HEALTH INSURANCE BENEFITS

Until the 1940s, health care coverage in the United States was predominately the responsibility of the patient. Fewer than 10% of Americans had health care coverage.⁷² During the 1950s, however, unions began to bargain for insurance and the federal government offered tax incentives for employers to adopt private health insurance plans, so that by 2000, 64.1% of Americans received employment-based health insurance.⁷³ Employer-sponsored health plans are covered by the federal Employee Retirement Income Security Act (ERISA). ERISA does not mandate that employers provide health insurance to employees nor does it require employers who offer health insurance to either absorb all medical expenses or provide for complete medical coverage.⁷⁴ Therefore, medical coverage, if offered at all, and the cost to employees can vary significantly among employers. Whether an employee receives health benefits is left to individual or collective bargaining.

Several problems exist within the current United States health care system. In 2002, only 61.3% of Americans received employment-sponsored health insurance while federally funded health insurance plans, Medicare and Medicaid, cover an additional 25.7% of the population. More than 43.6 million Americans (15.2% of the population) were without any health insurance throughout 2002.⁷⁵ Lack of insurance can have a profound effect on human health which will inevitably affect the quality of life and. Productivity in the United States.⁷⁶

⁶⁵ *Id.* at 397.

⁶⁶ *Id.* at 397-400. The number of employment claims has grown ten times faster than other types of civil litigation. *Id.* at 400.

⁶⁷ *Id.* at 400-02.

⁶⁸ *See id.* at 403-04.

⁶⁹ *Id.* at 406.

⁷⁰ *Id.* at 405-06.

⁷¹ *Id.* at 408.

⁷² FINKIN, *supra* note 4, at 754. *See also* PERRITT, *supra* note 19, at 144-151 (for history of health care benefits in the U.S).

⁷³ FINKIN, *supra* note 4, at 754-55.

⁷⁴ *Id.* at 755-56. *See also* GOLDMAN, *supra* note 3, at 125.

⁷⁵ Robert J. Mills & Shailesh Bhandari, *Health Insurance Coverage in the United States: 2002*, U.S. CENSUS BUREAU, Sept. 2003, available at <http://www.census.gov/prod/2003pubs/p60-223.pdf>.

⁷⁶ Sara R. Collins & et al., *Health Care Reform Returns to the National Agenda: The 2004 Presidential Candidates' Proposals 15*, THE COMMONWEALTH FUND, at http://www.cmwf.org/programs/insurance/collins_reformagenda_671.pdf (last revised Feb. 20, 2004)

The rapidly rising cost of health care in the United States put many employers at a competitive disadvantage. Within the United States, health care costs vary by state. In 2003, New Hampshire State Senators proposed legislation that would reform the state's small-group insurance market enabling New Hampshire businesses to better compete with other states.⁷⁷ American businesses are also at a competitive disadvantage in the world economy. The private sector in the United States spends over 7.7% of gross domestic product on health care while the private sector in countries like Canada spends only 2.8%. This difference occurs because much of the health care expenditures in other countries are paid out of the state's general revenues.⁷⁸

The rising cost of health care and the lack of universal coverage will need to be addressed by the United States in the near future. National health care reform has become a major issue in the current presidential campaign. Unfortunately, three of the four major plans proposed by the candidates do not extend coverage to all uninsured.⁷⁹ One possible solution would be for the United States to adopt a "two-tiered" health insurance system similar to that enjoyed by Germany. Under such a system the government guarantees and pays for a basic health insurance program for all citizens, which is then supplemented by private employer provided insurance for higher wage workers. However, there is some doubt that a long term tax-sponsored universal plan will be accepted by the majority of Americans.⁸⁰ Instead, a compromise between universal coverage and our current system could be implemented which will expand the capacity of public programs to cover more of the uninsured, for example everyone under the age of 18, while also providing increased tax benefits for continued private insurance.⁸¹

III. COLLECTIVE BARGAINING

A. OVERVIEW

During the course of the last fifty years, collective bargaining has declined in importance as a method of addressing the needs of American workers. The percent of labor organized in the private sector has declined from 40% in the 1950s to 8.2% in 2003.⁸² Although other countries have suffered declines in the percent organized over the same period, others have enjoyed increases, and none, except perhaps Australia, has experienced such a precipitous decline.⁸³ This decline in the percent organized in the United States has not only affected the methods by which workers address their needs, but it has also swung the political balance in favor of employer interests.⁸⁴ Where American workers in collective bargaining agreements once had a

⁷⁷ News Release, New Hampshire State Senate, Senators Propose Insurance Reform (Mar. 17, 2003), available at <http://www.gencourt.state.nh.us/senate/press/2003/prescottreform.html>.

⁷⁸ Daniel Gross, *Whose Problem is Health Care?*, N.Y. TIMES, Feb. 8, 2004, at sec. 3 p.6.

⁷⁹ Collins, *supra* note 76, at vii.

⁸⁰ Critics of President Clinton's 1994 proposed health reform program were opposed to the establishment of new bureaucracies and the reduction of choice by both physicians and patients. PERRITT, *supra* note 19, at 174.

⁸¹ Before extensive reform is made on the national level, it is probable that more immediate work will be done to "cover prescription drug costs and to increase coverage of population groups especially at-risk by extending state programs associated with Medicaid." *Id.* at 199.

⁸² WEILER, *supra* note 23, at 105; U.S. Dep't of Labor, *supra* note 63, at 7.

⁸³ Union membership in the U.K. has fallen by more than a third since 1979. John Goodman et al., *Employment Relations in Britain*, in INT'L RELATIONS, *supra* note 1, at 35. In Australia in 1953, 65% of the population was unionized whereas by 1996, only 31% was unionized. Edward M. Davis & Russell D. Lansbury, *Employment Relations in Australia*, in INT'L RELATIONS, *supra* note 1, at 115. In Sweden, the union movement remained strong throughout the 1990s and is currently one of the densest in the world with 90% of blue-collar employees and 80% of white-collar employees unionized. Olle Hammarström & Tommy Nilsson, *Employment Relations in Sweden*, in INT'L RELATIONS, *supra* note 1, at 230. For an overview of union development throughout ten countries, see Oliver Clarke et al., *Conclusions: Towards a Synthesis of International and Comparative Experience in Employment Relations*, in INT'L RELATIONS, *supra* note 1, at 298-99. See also RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 222 (1984).

⁸⁴ Union influence once extended into the non-union environment by encouraging non-union employers to adopt wage and benefit packages similar to those in the union environment in order to attract good, non-union workers. However, with the decline in unionization, unions no longer have this effect on non-union employers. Befort, *supra* note 63, at 391, 394. Today, courts are also likely to favor the employer and view collective bargaining as "an interference with the benevolent working of the market." GETMAN, *supra* note 7, at 14.

strong bargaining position, they now have only limited workplace decision-making capability.⁸⁵ Once again, Constitutional law plays primarily a background role with respect to the law on organizing, at least in the private sector, since Constitutional rights in the United States are primarily a check on government power rather than on the acts of private individuals.⁸⁶

B. NATIONAL LABOR RELATIONS ACT

The primary law governing collective bargaining in the United States is the National Labor Relations Act (NLRA). As previously mentioned, this act is made up of the original Wagner Act (1935) and the Taft-Hartley Amendments (1947). Section 7 of the NLRA states the basic rights granted to employees—the right to organize or be free from organization. Section 7 states that “employees shall have the 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...”⁸⁷ To be covered under the act, the employee’s actions must be conducted “in concert” with those of at least one other employee or be based on rights within the collective bargaining agreement.⁸⁸

Section 8 regulates the conduct of both employers and unions that interferes with employees’ Section 7 rights and requires that the parties bargain “in good faith.” Section 8(a) regulates employer unfair labor practices. Section 8(a)(1) prohibits employers from interfering, restraining, or coercing employees in their exercise of guaranteed rights under Section 7 while Section 8(a)(2) prohibits the employer from dominating employee organizations. Sections 8(a)(3) and (4) prohibit the employer from retaliating against union employees. Section 8(b) regulates the conduct of unions and requires unions to bargain in good faith.⁸⁹

Section 9 outlines the election procedures for selecting the collective bargaining representative and specifies that the majority representative is the “exclusive representative” of all of the employees in the bargaining unit, whether union member or not.⁹⁰ Section 9 is very unusual in comparison with the labor laws of other countries. With the exception of the United Kingdom’s recent efforts to adopt a system for determining representation, no other industrialized country has a similar election procedure and few, if any, have a similar concept of exclusive representation.⁹¹ Finally, Section 10 grants authority to the NLRB to investigate unfair labor practices and provide remedies if required.⁹²

C. CURRENT STATUS OF COLLECTIVE BARGAINING

i. Reasons for the decline of collective bargaining in the United States

Several factors have led to the drastic decline of collective bargaining in the United States. The global economy has wrought significant changes on the United States labor market by shifting America’s reliance from traditional union-heavy manufacturing industries to traditional non-union service industries.⁹³ Furthermore, since 1940 there has been tremendous growth in the managerial and professional workforce which is exempt from coverage under the NLRA.⁹⁴

⁸⁵ Befort, *supra* note 63, at 410.

⁸⁶ See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1580 (2002).

⁸⁷ 29 U.S.C. § 157 (2003).

⁸⁸ GOLDMAN, *supra* note 3, at 168.

⁸⁹ GETMAN, *supra* note 7, at 6.

⁹⁰ *Id.* at 7.

⁹¹ See Kenneth G. Dau-Schmidt, *Labor Law and Industrial Peace: A Comparative Analysis of the United States, the United Kingdom, Germany, and Japan under the Bargaining Model*, 8 TUL. J. INT’L & COMP. L. 117, 134, 136-37 (2000).

⁹² GETMAN, *supra* note 7, at 7. See also Befort, *supra* note 63, at 364-65.

⁹³ FREEMAN & MEDOFF, *supra* note 83, at 224.

⁹⁴ Donna Sockell, *The Future of Labor Law: A Mismatch Between Statutory Interpretation and Industrial Reality?*, 30 B.C. L. REV. 987, 995 (1989). In 1940, only 33% of the workforce was classified as managerial or professional. In 1985, the percentage of managerial and professional workers had grown to 55%. By comparison, the operatives, craftsmen, and laborers groups declined from nearly 40% in 1950 to 28% in 1985. *Id.* at 995-96.

The changing demographics of the workforce also contribute to the decline. Younger workers born after World War II are less likely to favor union representation.⁹⁵ Similarly, a significant number of women and minorities who traditionally have not supported unionization are entering the workforce. In 1980, only 18.9% of women were unionized compared to 31% of men.⁹⁶ Unionization has also suffered in the wake of corporate America's recent reliance on short-term employees, including contractors and part-time and casual employees, who have only modest attachment to the workplace.⁹⁷ Inadequate penalties and weak enforcement of many provisions of the NLRA have also contributed to the decline.⁹⁸ The provisions of the NLRA have been untouched since 1959 and, therefore, have not kept pace with the increasing importance of the global market.⁹⁹ Finally, the increasing cost of union organizing campaigns and the often strong employer resistance offer further explanation to the decline of collective bargaining in the United States.¹⁰⁰

ii. Addressing employee needs in the global economy

Despite the decline in collective bargaining, there is still a need for employees' collective voice. Public goods in the workplace, such as the quality of air, light, safety, and speed of the assembly line, must still be negotiated collectively to ensure efficiency in their production.¹⁰¹ Another reason for supporting collective action is to provide the employees with extra legal protection from termination. The risk still exists today that an individual at-will employee could be terminated for expressing his or her true workplace preferences to the employer.¹⁰²

Companies can also benefit from the collective voice of employees with improvements in quality, safety, production, and work environment. Because employees are on the front lines, they are often best-suited to provide management with unique insight into the overall operation.¹⁰³ Over the last two decades, a growing number of companies have implemented programs that allow employees to directly participate in the operation of the business.¹⁰⁴ These "employee involvement plans," including the often used "quality circles," traditionally involve smaller groups of employees and often management. The EIPs encourage employers and employees to rid themselves of the traditional adversarial relationship and instead adopt one that is more cooperative, providing benefits to all parties.¹⁰⁵ Often, EIPs tackle workplace issues and develop plans to improve safety, output, quality, and the like. Some of the groups also specifically address the needs of the workers and the work environment.¹⁰⁶ A few businesses have even given some employee groups significant responsibility and autonomy and have empowered them to decide on their own "issues such as how and when work is to be done, who will become members of the team through hiring or transfer, when and from whom parts and materials will be obtained, and which team members performed well enough to merit bonuses or selection for team leader roles."¹⁰⁷

There are significant challenges when implementing EIPs in the United States. Although several court decisions have upheld the use of EIPs,¹⁰⁸ such arrangements can be found to be unlawful domination and assistance or "company unions" in violation of NLRA Section

⁹⁵ Samuel Estreicher, *The Dunlap Report and the Future of Labor Law Reform*, 12 LAB. LAW. 117, 118 (1996).

⁹⁶ Befort, *supra* note 63, at 365-66. Although in 2003 a greater percentage of men than women were unionized, the gap between unionization of men and women has decreased significantly from 1980. U.S. Dep't of Labor, *supra* note 63, at 2, 4.

⁹⁷ Befort, *supra* note 63, at 367-68.

⁹⁸ *Id.* at 371-72.

⁹⁹ Estreicher, *supra* note 95, 118.

¹⁰⁰ FREEMAN & MEDOFF, *supra* note 83, 228-39.

¹⁰¹ Dau-Schmidt, *supra* note 62, at 21 (citing FREEMAN & MEDOFF, *supra* note 83, at 8-9).

¹⁰² FREEMAN & MEDOFF, *supra* note 83, at 9.

¹⁰³ Dau-Schmidt, *supra* note 62, at 21.

¹⁰⁴ WEILER, *supra* note 23, at 191.

¹⁰⁵ *Id.* at 192.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Sockell, *supra* note 94, at 1004.

8(a)(2).¹⁰⁹ Commentators argue that some flexibility must be instilled into the labor laws, especially NLRA Section 8(a)(2),¹¹⁰ to allow American companies to more quickly respond to changes in the global market. Numerous scholars have argued that Section 8(a)(2) should either be repealed or amended to allow for employer-sponsored EIPs.¹¹¹ Additionally, other commentators have argued that the entire NLRA requires a complete overhaul.¹¹² Inflexible provisions imposed upon management that prohibit it from effectively competing in the global economy should be either eliminated or amended.¹¹³ Furthermore, there has been considerable criticism about the declining effectiveness of remedies for unfair labor practices.¹¹⁴ The remedies are often too low to effectively dissuade employers from violating the NLRA.¹¹⁵ Accordingly, to ensure that the union is properly balanced with the employer, penalties for violation of the NLRA must be increased to deter parties from committing unfair labor practices.¹¹⁶

Scholars have proposed various alternatives that would revive the collective bargaining process and ensure that the much needed employees' collective voice is heard in the workplace. These alternatives include Matthew Finkin's proposed system of "minority representation" allowing for unions to represent a "significant minority of the employees,"¹¹⁷ Michael Harper's "two-tiered system" which gives unions either full representation through traditional elections or limited representation acquired through "an abbreviated employee-selection procedure without employer input or resistance,"¹¹⁸ Michael Gottesman's proposed solution of empowering individual employees with the same rights that they would traditionally receive through collective bargaining such as protection from employer reprisal,¹¹⁹ and finally, Paul Weiler's proposal of the government-mandated "Employee Participation Committees," modeled on the "West German *Betriebsrat*, or Works Council," which gather information and consult with the employer on certain issues.¹²⁰ Without significant effort to rejuvenate the opportunities for expression of collective voice in the American work place, it appears that this method of addressing the interests of workers will continue to stagnate, and perhaps suffer further decline in the United States.

IV. INDIVIDUAL STATUTORY RIGHTS

A. OVERVIEW

Individual employment demands in the United States are also addressed through statutory

¹⁰⁹ See Estreicher, *supra* note 95, at 121-22 (citing *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994); *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893 (1993)).

¹¹⁰ See WEILER, *supra* note 23, at 192-93, 201.

¹¹¹ Dau-Schmidt, *supra* note 62, at 22. See also Sockell, *supra* note 94, at 1002-07; Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125 (1994); Bruce E. Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 YALE L. & POL'Y REV. 729 (1999).

¹¹² The text of the NLRA has remained practically the same since 1959 and much of it is "open-textured, and susceptible of a range of interpretations." Estlund, *supra* note 86, at 1535.

¹¹³ WEILER, *supra* note 23, at 187-88. Current "American-style unionism" closely regulates the operation of the business which inhibits management's ability to "respond to changes in its environment—either in its product market, its technology, or its work force and their sentiments." *Id.* at 188. Often, collective bargaining agreements can run up to 500 pages (whereas many 1930s agreements were only one page in length) and some even give unions the power to regulate business inside the firm. *Id.*

¹¹⁴ Sockell, *supra* note 94, at 1013.

¹¹⁵ See Dau-Schmidt, *supra* note 62, at 22; Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 506-09 (1992). The NLRB may only award remedies and may not punish. *Id.* at 506.

¹¹⁶ Dau-Schmidt, *supra* note 115, at 508.

¹¹⁷ Dau-Schmidt, *supra* note 62, at 22-23 (citing Matthew W. Finkin, *The Road Not Taken: Some Thoughts on NonMajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993)).

¹¹⁸ *Id.* at 23 (citing Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 IND. L. J. 103, 124-28 (2001)).

¹¹⁹ *Id.* (citing Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 71-85 (1993)).

¹²⁰ *Id.* (citing WEILER, *supra* note 23, at 284-97).

regulation. Individual state and federal statutory rights in the employment relationship have enjoyed a boom in the face of the decline of collective bargaining in the United States. Although many important federal statutes have their origins in the first half of the twentieth century, including workers' compensation statutes,¹²¹ the Fair Labor Standards Act (FLSA) of 1938, and the Social Security Act of 1935, it was during the Civil Rights era of the 1960s that federal legislation protecting individuals exploded. Legislation has been enacted to discourage discrimination (Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, and Equal Pay Act of 1963), promote worker health and safety (OSHA, 1970), regulate employee pensions and benefits (ERISA, 1974), provide notice of plant closing and major layoffs (WARN, 1988), provide protection from lie detector testing (EPPA, 1988), provide job protection for whistle blowers, provide job protection during family and medical leaves (FMLA, 1993), remove barriers in the workplace for workers with disabilities (ADA, 1990), provide protection to employees whose wages have been garnished (Title III of the Consumer Protection Act of 1970), and provide protection for workers who have filed for bankruptcy (Bankruptcy Reform Act §525). In part this rise in reliance on protective legislation has occurred because of the decline of unionization in the United States, but also because reliance on individual rights rather than collective action fits the reliance of both the American people and our judicial system on individualism.¹²² Furthermore, the reliance on protective legislation can be attributed to changes in the global economy that have led to greater bargaining inequality between employees and employers. With the imbalance growing and the often "harsh" enforcement of the at-will doctrine, these new government regulations help to address the most egregious treatment of individual workers by their employers.¹²³

B. STATUTORY SCHEME AND PROTECTIONS AFFORDED

As discussed above, American employers are subject to various state and federal statutory constraints. This section describes the most important of these statutes.

i. Anti-discrimination statutes

Title VII of the Civil Rights Act of 1964¹²⁴ prohibits employers and governments from discriminating against any employee or applicant on the basis of race, religion, national origin, or sex. Title VII also prohibits a company from employing facially neutral practices that have a disproportionate effect on one of the protected classes unless the company can provide a compelling business interest.¹²⁵ All Title VII suits are brought forth by the Equal Employment Opportunity Commission.¹²⁶ Three other statutes also prohibit discrimination by employers and are enforced by the EEOC.¹²⁷ The Age Discrimination in Employment Act of 1967 prohibits employers from discriminating against employees or applicants over the age of forty on the basis of age;¹²⁸ the Equal Pay Act of 1963 protects both men and women covered under the FLSA and prohibits pay differentials based on sex;¹²⁹ and the American with Disabilities Act of 1990 prohibits employers from discriminating against disabled employees or applicants who are capable of performing the job with or without reasonable accommodation.¹³⁰ A final anti-

¹²¹ In 1908, Congress enacted a workers' compensation law covering some government workers. FINKIN, *supra* note 4, at 616. All states adopted workers' compensation legislation between 1911 and 1948. *Id.* at 617 (citing E. BERKOWITZ & M. BERKOWITZ, CHALLENGES TO WORKERS' COMPENSATION: AN HISTORICAL ANALYSIS IN WORKERS' COMPENSATION BENEFITS 158-60 (Worrall & Appel eds., 1985)).

¹²² See Befort, *supra* note 63, at 376-77. "Unionization...is a matter of collective action. The dominant American self-image, in contrast, is squarely grounded in the cult of the individual." *Id.* at 377.

¹²³ *Id.* at 384.

¹²⁴ 42 U.S.C. §§ 2000e-1-17 (2003).

¹²⁵ Befort, *supra* note 63, at 379 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971)).

¹²⁶ GOLDMAN, *supra* note 3, at 150.

¹²⁷ See Equal Employment Opportunity Commission, Discriminatory Practices, *available at* http://www.eeoc.gov/abouteeo/overview_practices.html (last modified Aug. 13, 2003).

¹²⁸ 29 U.S.C. §§ 621-634 (2003). See also Befort, *supra* note 63, at 379.

¹²⁹ 29 U.S.C. §§ 206(d) (2003). See also GOLDMAN, *supra* note 3, at 153.

¹³⁰ 42 U.S.C. §§ 12101-12213 (2003). See also Befort, *supra* note 63, at 379. Employers need not provide accommodation if it would create an undue hardship on the employer. *Id.*

discrimination statute, the Uniformed Services Employment and Reemployment Rights Act (1994), protects military reservists from workplace discrimination upon return from reserve or active duty.¹³¹

ii. Anti-retaliation and whistleblower statutes

State and federal whistleblower statutes prohibit employer retaliation against an employee who has reported a wrongdoing committed either by the company or a company officer.¹³² State whistleblower laws can vary significantly with regards to the amount of protection, the type of employee that is protected, and the remedy provided.¹³³ There are also numerous federal statutes providing protection to employees who report violations by their employers under these acts.¹³⁴ For instance, the major environmental acts, including the Clean Air Act,¹³⁵ OSHA,¹³⁶ and the Clean Water Act,¹³⁷ provide protection to whistleblowers. Government employees are protected from employer retaliation under the Federal Whistleblower Protection Act of 1989.¹³⁸ The anti-discrimination acts mentioned in the section above as well as other federal statutes, such as the FMLA, ERISA, FLSA, and the NLRA, also provide special protection for those employees who report employer violations of the acts.¹³⁹

The new Sarbanes-Oxley Act of 2002, enacted in the wake of recent accounting scandals in the United States, contains two provisions, one civil and one criminal, which prohibit an employer from retaliating against an employee of a publicly traded company for reporting “improper conduct regarding securities fraud and corruption” that could hurt innocent securities investors.¹⁴⁰ An effect of this Act is to provide uniform and consistent application throughout the United States because, as previously mentioned, state whistleblower legislation can vary among states. With the Sarbanes-Oxley Act, employees of a public company that operates in several states will be treated similarly, regardless of the state in which the employee works.¹⁴¹

iii. Statutes mandating workplace standards

Several federal statutes mandate minimum workplace standards. The Occupational Safety and Health Act (OSHA) requires an employer to maintain certain health and safety standards and provide a work environment that is free from dangerous hazards. Businesses are subject to government inspection under OSHA.¹⁴² The Employee Retirement Income Security Act (ERISA) regulates employee retirement and welfare benefit plans.¹⁴³ Although ERISA requires the employer to meet various provisions relating to pension plans, it does not compel an employer to provide health benefits nor does it regulate the content of any welfare benefits offered.¹⁴⁴ The Worker Adjustment and Retraining Notification Act (WARN)¹⁴⁵ compels employers with more than one-hundred full-time employees to give at least sixty days notice to employees who will be affected by either a plant closing or a massive layoff.¹⁴⁶ The Family and Medical Leave Act (FMLA)¹⁴⁷ requires larger employers to allow employees to take up to twelve weeks unpaid leave each year to care for a new child, one’s own serious illness, or a

¹³¹ 38 U.S.C. §§ 4301-4333 (2003).

¹³² GOLDMAN, *supra* note 3, at 73.

¹³³ FINKIN, *supra* note 4, at 186-87. Of the thirty-seven states that have whistleblower laws, twenty provide protection only for government employees while the remaining seventeen protect government and non government alike. GOLDMAN, *supra* note 3, at 74.

¹³⁴ PERRITT, *supra* note 19, at 113.

¹³⁵ 42 U.S.C. § 7622 (2003).

¹³⁶ 29 U.S.C. § 660(c) (2003).

¹³⁷ 33 U.S.C. § 1367 (2003).

¹³⁸ 5 U.S.C. §§ 1201-22 (2003).

¹³⁹ PERRITT, *supra* note 19, at 118-22.

¹⁴⁰ *Id.* at 101. *See also* 18 U.S.C. §§ 1514A, 1513(e) (2003).

¹⁴¹ PERRITT, *supra* note 19, at 101.

¹⁴² GOLDMAN, *supra* note 3, at 409.

¹⁴³ 29 U.S.C. §§ 1001-1461 (2003).

¹⁴⁴ Befort, *supra* note 63, at 380.

¹⁴⁵ 29 U.S.C. §§ 2101-2109 (2003).

¹⁴⁶ Befort, *supra* note 63, at 380.

¹⁴⁷ 29 U.S.C. §§ 2601-2654 (2003).

family member with a serious medical condition.¹⁴⁸ Finally, state workers' compensation statutes require employers to cover the cost of medical treatment and rehabilitation for employees injured on the job, regardless as to fault of injury. Employers are also compelled to provide some monetary relief for lost wages.¹⁴⁹ Employers are generally prohibited from retaliating against employees who file workers' compensation claims.¹⁵⁰

C. CURRENT ISSUES AND RECOMMENDATIONS

A serious problem facing the United States, and for that matter all countries in the global market, will be whether a nation-state can maintain a system of substantial individual worker rights in the face of international competition. Where countries regulate an employer to the point where the costs to the employer are significant, the employer will relocate to a country with fewer regulations.¹⁵¹ In the race for global market domination, countries have incentive to minimize regulation of employers resulting in a "race to the bottom."¹⁵²

There are four strategies, each with advantages and disadvantages, which nations can adopt to avoid the "race to the bottom" and maintain adequate regulatory protection.¹⁵³ Countries can establish treaties with trading partners establishing regulatory criteria that will preempt national law.¹⁵⁴ While this solution would give workers the same rights across a range of countries, reaching a consensus on adequate standards¹⁵⁵ and enforcement mechanisms would be problematic. The second method elaborates upon the first by negotiating treaties with trading partners that establish minimum standards but permit states to gradually implement the treaty requirements within a specific time period.¹⁵⁶ This method provides additional flexibility to countries by allowing them more time and latitude to develop and implement low-cost regulatory solutions that meet the specific need of their people.

The third alternative is to trade only with countries that have similar, and acceptable, regulatory systems. Stronger trading countries with more stringent regulatory standards might be able to "encourage" others to increase their regulatory standards.¹⁵⁷ Unfortunately, monitoring the enforcement of these labor standards in foreign countries will be difficult.¹⁵⁸ Finally, a country may choose to apply its regulatory employment statutes extraterritorially.¹⁵⁹ While traditionally American laws have not applied outside the United States, there have been some recent examples in commercial law where American laws have been applied abroad.¹⁶⁰ Congress has also shown some recent inclinations towards extending the application of the NLRA, ADEA, and Title VII to American corporations employing United States workers overseas.¹⁶¹

The changing face of the American worker has also created problems for the regulatory regime. As previously discussed, American companies have replaced many full-time workers with part-time, casual, and temporary employees and contractors. Because many of these employees are not as connected to their employers, they are unlikely to have the same length of service as full-time employees. Unfortunately, these employees are unable to take advantage of many of the regulatory statutes.¹⁶² A few statutes, such as the FMLA and ERISA, require

¹⁴⁸ GOLDMAN, *supra* note 3, at 121.

¹⁴⁹ *Id.* at 41.

¹⁵⁰ *Id.* at 73.

¹⁵¹ Dau-Schmidt, *supra* note 62, at 25.

¹⁵² *Id.* at 25 (citing Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 988-89 (1995)).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 26.

¹⁵⁶ *Id.* (citing Van Wezel Stone, *supra* note 153, at 1001).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 27.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (citing Van Wezel Stone, *supra* note 153, at 1018).

¹⁶² Befort, *supra* note 63, at 416.

employees to work for a specific length of time before certain benefits may accrue. Some statutes only apply to employees who work a minimum number of hours per year, while others apply only to employers over a certain size. Furthermore this type of “contingent employee” might fall outside the legal definition of “employee” in various statutes.¹⁶³

One means of extending regulatory protection to contingent employees would be to change the relevant statutory definitions of who is a covered “employee.” For example, employment laws in Canada, Sweden, Germany, and the Netherlands have recognized a category of worker that falls between employee and independent contractor.¹⁶⁴ These “dependent contractors,” while not legally employees, occasionally receive “employee-like legal protections by virtue of working in positions of economic dependence.”¹⁶⁵ While these countries do not extend all protections to “dependent contractors,” they do extend those where “basic societal interests are at stake,” such as statutes relating to health, safety and discrimination.¹⁶⁶ Another solution that has been proposed to extend regulatory benefits to contingent workers is to allow contingent workers to accrue periods of service across several employers in order to meet the statutory requirements.¹⁶⁷ Of course, the cost of the benefits provided would have to be prorated and allocated among the various employers.¹⁶⁸

V. CONCLUSION

There has been a significant amount of change in the American labor market since the 1950s when collective bargaining was at its peak. In 2004, the employment-at-will doctrine is still strong, albeit with a growing number of exceptions. Moreover, the enactment of individual statutory protections has exploded, at the expense of collective bargaining. Congress seems to have all but given up on collective bargaining and has focused instead on expanding individual statutory rights.¹⁶⁹ But, Congress must not rest. As the global economy continues to force companies to change their business practices, the laws must adapt as well. A form of collective action is still essential to meet the needs of many workers. United States labor laws must be reformed to address both the modern worker’s requirements and the changing corporate environment. The relationship must change so that it is less adversarial and instead, more cooperative in providing needed benefits to both the employer and the employee.¹⁷⁰

Even with significant reform of our laws governing the process of collective bargaining, it seems unlikely that unions will ever represent even a majority of American workers. Therefore, Congress must find solutions that will provide greater individual protections to the employees while being mindful of the effects these will have on American companies in the global market. Congress should also be attentive to the effect an increase in individual protections will have on the judicial system.¹⁷¹ A move towards labor-specific courts or alternative dispute resolutions (ADRs) for labor and employment cases would relieve much of the pressure on federal and state courts and would provide for quicker, cheaper, and more consistent adjudication of claims. United States labor and employment laws must be given new flexibility to protect both employees and employers in the twenty-first century.

¹⁶³ *Id.* at 416-17.

¹⁶⁴ *Id.* at 454-55.

¹⁶⁵ *Id.* at 454.

¹⁶⁶ *Id.* at 455.

¹⁶⁷ *Id.* at 458-59.

¹⁶⁸ *Id.* at 459.

¹⁶⁹ William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 *BERKELEY J. EMP. & LAB. L.* 259, 272 (2002).

¹⁷⁰ WEILER, *supra* note 23, at 192.

¹⁷¹ Corbett, *supra* note 170, at 274.

