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Delaware Proposes Legislation to Eliminate Employment at Will

Jeffrey Campolongo and Jennie Maura McLaughlin All Articles

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Jeffrey Campolongo

The Delaware legislature has introduced a bill to require "just cause" for terminating an employee, which represents a significant departure from employment law practice in every other state but Montana. The standard overarching employment law across the country is "employment at will." In most states this is common law, and in a few it is statutory law.

Under the employment at will doctrine, an employee may be terminated at any time for any reason, or for no reason at all. This is, of course, subject to the requirements of other state and federal law concerning employment relationships, public policy concerns, and terms of employment contracts. But could this standard be changing?

In 1987, Montana enacted the Montana Wrongful Discharge Act, which prohibits employers from terminating employees in the absence of just cause. A few years later, in 1991, the National Conference of Commissioners on Uniform State Laws approved the Model Employment Termination Act, which proposes requiring all terminations to be for good cause. And, many government employees cannot be terminated without cause. Now the Delaware legislature is proposing the Employee Protection from Wrongful

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Termination Act.

Under the proposed Delaware law, employees can only be terminated for "good cause." At first blush this sounds like a good thing for employees as it provides for increased job protection and the employer is required to provide to the employee, in writing, the reason for termination. But the proposed legislation takes some rights away from the employee as well, perhaps a result of bargaining between employee and employer rights advocates.

"Good cause" in the Delaware law means (in short), "a reasonable basis ... in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise, job performance, and employment record, or (ii) the exercise of business judgment in good faith by the employer." It is readily apparent that this definition leaves open some holes within which an employer may be able to easily find means of termination. For instance, "conduct on the job or otherwise" suggests that employers could continue to terminate employees for conduct outside of the workplace that they disagree with. And "the exercise of business judgment" is fairly vague and risks arbitrariness.

These are obviously things that would typically be defined over time by statutory amendments and case law.

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However, unless the employer and employee agree in writing to judicial resolution of disputes, which few employers are likely to do, the employee's only recourse for termination is to file a complaint and arbitration demand with the Department of Labor. The Delaware Uniform Arbitration Act applies to the proceedings by default. Appeals, however, may be heard in the Superior Court.

The proposed law does not necessarily bind employers to the "good cause" requirements. Employers may eliminate employees without "good cause" if they offer severance pay — in required amounts — to the employee. Employers may also contract around or define the "good cause" requirements by written agreement. Should the law pass, it will be curious to see how many employers utilize the default rule of termination for cause versus those that write "at will employment" contracts or otherwise broaden their ability to terminate employees.

Reports have shown that the law in Montana has not affected the unemployment rate or the rate of job growth. (See Barry D. Roseman's article, "Just Cause in Montana: Did the Big Sky Fall?" from a September 2008 American Constitution Society Issue Brief.) Yet concerns remain about the elimination of "employment at will." If an employer is limited in its ability to terminate employees, it could make terminations more expensive, cause employees to be retained longer than usual and slow hiring. And the unemployed could have issues getting jobs as employers can easily assume that they must have lost their jobs for cause.

Some of the concerns expressed by various members of the National Employment Lawyers Association (NELA) revolve around the lack of explanation or provision for how this proposed law would relate to unemployment compensation, which may be denied if an employee is fired for cause. Other concerns are what employees are giving up in return for the "for cause" requirements. While requiring an employer to have cause for terminating an employee would seem to give an employee greater job protections, the proposed law in Delaware would eliminate the right to a jury trial, and in fact the right to a trial at all, and would limit the available damages. At present, employees in Pennsylvania do not have a right to a jury trial or punitive damages under the Pennsylvania Human Relations Act.

"At will" employment can seem harsh, especially when employees with great track records are terminated for reasons that seem completely unrelated to their performance on the job. A requirement that employers have good cause for terminations could be welcome, as long as employees are not giving up substantial rights in return. It will be interesting to see whether the law passes in Delaware and if any changes to it are made. It could certainly spur a trend of similar laws in other states. •

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, a boutique firm focusing on employee rights and counseling aspiring and established entertainers. He can be reached at jcamp@camplaw.com or 215-592-9293. **Jenie Maura McLaughlin** works on employment discrimination and workers' compensation cases for the Law Office of Jeffrey Campolongo.

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