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Getting Noticed: Direct and Indirect Power-Allocation in the Contemporary American Labor Market

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ARTICLES

GETTING NOTICED: DIRECT AND INDIRECT POWER-ALLOCATION IN THE CONTEMPORARY AMERICAN LABOR MARKET

Timothy J. Coley*

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President Obama has described the most recent U.S. economic downturn as the “worst financial crisis since the Great Depression.” Perhaps unsurprisingly, with the global collapse of credit markets, the failure of massive private institutions, and a widespread drop in profit-margins across all sectors, the financial crisis has resulted in a particularly pernicious environment for the nation’s workforce. In 2009, American workers faced not only massive layoffs and terminations, but also double-digit unemployment rates and record levels of underemployment. These job losses have led to a host of fiscal and budgetary problems, most notably, massive budget deficits for the federal government and many state governments alike, a surge in unemployment insurance claim filings, and a sharp uptick in welfare and
food-stamp applications and disbursements.\(^8\)

These trends depict a disturbing American labor market and illustrate the harsh impact that the economic recession continues to have on the American workforce. However, the current economic downturn has only served to underscore and ultimately exacerbate the certain longstanding problems facing American workers.\(^9\) These problems consist of two prongs. The first prong represents a deterioration in workplace quality, manifested by a marked decline in quality of life, a steady decrease in the provision of defined-benefit pension plans and healthcare benefits, the failure of wages to keep up with inflation, a growing disparity between rich and poor, and an ever-dwindling middle class.\(^10\) The second prong, on the other hand, reflects a paucity of workplace certainty. The vast majority of workers in the United States retains only marginal security in their employment due to the American “at-will” employment (or “employment-at-will”) scheme, which places them in a greatly disadvantaged position relative to their employers.\(^11\)

As the economy continues to hemorrhage jobs and widespread unemployment continues to consume abnormally-large amounts of government funding, the need for meaningful labor reform is evident. Currently, employment-rights advocates have focused reform efforts predominantly on the enactment of union-enabling legislation, that is, making it easier for employees to organize, form unions, and negotiate contracts.\(^12\) These reforms, it is argued, are the most practicable mechanisms for ensuring the most favorable, equitable, and livable conditions of employment for American


\(^12\) Telephone Interview with Paul Sonn, Legal Co-Director of the Nat’l Employment Law Project (Mar. 3, 2009) (defining the at-will employment doctrine as “any employment relationship not governed by a contract or a statutory provision is terminable at any time by either the employer or employee for any reason or no reason at all” and discussing the doctrine’s proponents and critics).
However, although these reforms are designed, in theory, to address the quality- and certainty-based problems facing American workers, in their present form they do little to confront the fundamental workplace problems related to employment security.

To adequately address the issues comprising the "certainty" prong of the workplace predicament facing at-will employees, corresponding reform should also be implemented. For purposes of this Article, these reforms, which focus on the allocation of authority directly to employees rather than unions, whether arising under statute or common law, are referred to as "direct-allocation" reforms. Alternatively, those approaches that concentrate on the grant of power to employees by means of labor and trade unions are labeled "indirect-allocation" reforms, because, rather than granting power directly to individual workers, it is conferred to the union as a proxy. The main objective of direct-allocation reform is to provide employees with certainty and security in their relationships with employers, as well as in their employment. This aim is of great importance because, although the indirect approach offers valuable and necessary protection for workers, it does not presently address the source of a great deal of workplace inequality—the inherent uncertainty engendered by the American employment-at-will scheme.

This scheme currently governs employment relationships in forty-nine of the fifty American states. During the course of ordinary, non-contractual employment, neither employer nor employee is legally bound to maintain the parties' employment relationship for any specific duration. Because this system allows employers to discharge employees for almost any reason, it inherently places workers in a drastically subordinate position relative to their employers. For this reason, several common law and statutory exceptions to the at-will scheme have been put in place that restrict employers' ability to terminate workers, thereby giving employees greater control over their employment.

13. See, e.g., What is the Employee Free Choice Act?, SEIU.ORG, http://seiu.org/a/what-is-the-employee-free-choice-act.php (endorsing a bill that would make it easier "for workers to join together and bargain for wages that support a family and quality, affordable heathcare").

14. See infra Part II.B.

15. See infra notes 27–29 and accompanying text. Perhaps, alongside the direct allocation efforts discussed in this Article, labor unions can secure even greater positions of power and effectuate more efficient safeguards against unfair termination. However, that unions possess the ability to undertake such sweeping reform is increasingly unlikely. See infra notes 91–95 and accompanying text.


18. See infra notes 47–58 and accompanying text.
This Article maintains that in order to better allocate the innate power imbalance of the American at-will employment system, a two-pronged approach would provide more robust protection for American workers, as compared to the current emphasis exclusively on rebuilding labor unions. This Article notes that reform incorporating the direct-allocation approach would provide an effective counterpart to the indirect-allocation reforms labor activists choose to endorse in terms of political feasibility and overall effectiveness. It further suggests that the implementation of direct-allocation reforms would ultimately create a complementary and reciprocal relationship with any indirect-allocation efforts, thus providing a firmer basis upon which to broaden the rights of American workers and potentially strengthen the ability of labor unions to secure the most favorable collective bargaining agreements for their constituent members.

This Article will proceed in four Parts. In Part I, this Article briefly discusses the historical development of both the indirect- and direct-allocation approaches, examines their roles in contemporary employment law jurisprudence, and explores the reciprocal relationship these two types of reform would provide one another. In Part II, this Article outlines the contours of direct-allocation reforms and discusses the possible manifestations of such efforts, namely the expansion of certain exceptions to the at-will doctrine. In an effort to delineate the most effective means with which to combat enduring problems in the contemporary labor-market, Part II also discusses the benefits of the direct-allocation options and contrasts these benefits with the indirect approach. Part III explores several reform proposals and analyzes the extent to which each is capable of effectuating the direct allocation aims through federal legislation, including provisions requiring employer notice prior to termination, a warning and cure arrangement for underperforming workers, and a federal severance-pay requirement. This Part concludes that a federal notice requirement would present the most prudent means to protect workers because it would provide for incremental reform that balances the dual constraints of political feasibility and overall effectiveness. Finally, Part IV discusses the interplay between the direct-allocation proposal and the current union-focused reform efforts. The Article concludes that, even for advocates of allocating power to labor unions to promote greater equality in the American workplace, the implementation of direct-allocation reforms could serve to bolster organized labor initiatives in the future by granting all employees greater levels of security and certainty when negotiating with employers.

19. On its face, a severance requirement does not change the operation of the at-will system in the traditional sense; however, such an obligation would constrain employers’ ability to freely terminate workers, thereby giving employees greater power and bargaining leverage. See infra Part III.B.3; see also infra note 135.
II. AN OVERVIEW: THE HISTORICAL DEVELOPMENT OF THE INDIRECT- AND DIRECT-ALLOCATION APPROACHES

A. The Indirect-Allocation Approach

Labor and trade unions have existed in one form or another for centuries. In the United States, the modern American organized labor movement can be traced back to foundational legislation of the New Deal era. The most significant legislation is the 1935 National Labor Relations Act (NLRA), which prohibits employers from terminating, harassing, or otherwise retaliating against employees due to their membership or activity in labor unions. The NLRA also empowers employees to form labor unions in order to engage in collective bargaining negotiations with employers and protects the rights of unionized workers to take part in "concerted activity," such as participating in strikes or protests. In the past century, since this legislation's enactment, American labor unions have secured many fundamental reforms for workers, including the implementation of the social security system and the standardization of wages and work hours.

Labor unions' ability to improve the quality of workplace conditions derives from the unions' power to bargain collectively on behalf of member employees. Collective bargaining is generally defined as "the decision-making process whereby employers and unions negotiate the wages and conditions of employment," often resulting in "a signed, legally enforceable agreement." In addition to taking part in collective bargaining, labor unions provide other crucial benefits and protections to their members, including lobbying for

20. See SIDNEY WEBB & BEATRICE WEBB, HISTORY OF TRADE UNIONISM 1–2 (1894). The predecessors of contemporary American labor unions began as offshoots of the medieval guild system, but, in their current institutional manifestation, "labor unions have existed only in the past 200 years—that is, with the advent of the Industrial Revolution." J.C. DOCHERTY, HISTORICAL DICTIONARY OF ORGANIZED LABOR 1 (2d ed. 2004). Generally, unions are defined as "a continuous association of wage-earners for the purpose of maintaining or improving the conditions of their employment." WEBB & WEBB, supra, at 1. A more modern definition is a "voluntary organization[] of employees created to defend or improve the pay and conditions of their members through bargaining with their employers." DOCHERTY, supra, at 1.


22. Id. § 157.


24. DOCHERTY, supra note 20, at 65.

25. Id. at 16.

26. Union efforts and collective bargaining agreements often benefit nonmembers as well by improving wages, benefits, and workplace conditions; however, it appears that nonmembers typically do not benefit as much as union members do. See, e.g., Edward J. Schumacher, What Explains Wage Differences Between Union Members and Covered Nonmembers?, 65 S. Econ. J.
positive legislation and political candidates, and organizing protests, slowdowns, strikes, and lockouts if necessary to achieve their objectives.  

Conceptually, by employing these tactics, unions should be able to counteract the negative effects of the American at-will scheme. Regardless, as long as a surplus of labor exists, employers are more easily able to find substitute labor than workers are able to gain employment, particularly in unskilled positions; labor unions theoretically help counteract this imbalance. Thus, due to this innate divergence of incentives, employers are able to terminate workers for almost any reason with little-to-no consequence, and non-contract employees are left with an utter lack of job security in their positions. Particularly, in the aftermath of the current financial crisis, with millions of jobs drying up, employers are able to shed jobs more freely, leaving terminated employees with no opportunity to plan for unemployment or obtain substitute employment in any capacity.  

Unions, by allowing workers to pool their individual negotiating power together, are able to better even out this power differential because organized unions enjoy more bargaining leverage in the aggregate than any individual worker could achieve on his own.

Nonetheless, over the course of the past several decades, industry advocates and politicians have assailed the organized labor movement in the United States. Perhaps the turning point in this “war on unions” came in the early days of the Reagan presidency:

[a]n important turning point came in 1981, shortly after [President] Reagan took office, when he fired about 12,000 federal air traffic controllers who went out on strike. The controllers—represented by one of the few unions that supported Reagan in his bid for presidency, the Professional Air Traffic Controllers’ Organization or PATCO—were fired for violating a law that forbids federal workers from striking. By carrying out his threat to fire the controllers if they did not return to work Reagan not only set limits

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28. Presumably, in a few instances, the costs of locating and training new employees may be significant. But, in unskilled employ or in manufacturing positions that require minimal training, these costs are not likely to be obstacles to finding substitute workers in a labor surplus.  


30. See Kate Brofenbrenner, A War Against Organizing, Wash. Post, June 3, 2009, at A19 (examining tactics taken by employers to prevent the formation and continuation of unions).
for public employee unions, but also signaled that it was OK for businesses to play hardball with private sector unions.\textsuperscript{31}

By summarily terminating the members of PATCO, President Reagan’s actions demonstrated that American labor-policy was in a state of flux and that the federal government’s relationship with labor unions was undergoing a marked shift. This presidential “union-busting” created negative repercussions for organized labor, both in the immediate aftermath of the firings and in the years thereafter:

[Reagan’s actions] sent a clear message to the corporations that union-busting was on the immediate agenda. By 1987, nearly three-quarters of all contracts covering 1,000 or more workers included wage concessions. Approximately 200,000 workers abandoned their unions through decertification elections in the 1980s. By the end of the decade, union membership had declined to 16 per cent of the American labor force. Workers lacked an effective, progressive labor movement that could fight for higher living standards.\textsuperscript{32}

The deterioration of the American organized labor movement has continued up to the present day. During the past half-century, there has been a “steep decline in the percentage of organized private-sector employees—from 35 percent in 1954 to 23.6 percent in 1980 to just 7.6 percent [in 2009].”\textsuperscript{33} Inevitably, the reasons given for the current decline in unionization depend largely on one’s view toward organized labor in general. Union advocates believe that the decline is caused by aggressive anti-union abuses by employers, underscoring the need for new substantive pro-union legislation.\textsuperscript{34} Union critics, on the other hand, argue that the decline of unions is due to a combination of overzealous union demands, the resultant alienation of employers, and other factors, such as “[g]lobal competition, deregulation and the decline of U.S. industries . . . .”\textsuperscript{35} Still, despite the recent decline in union activity, union advocates assert that now is the opportune time to introduce legislation that would help them recapture the ground they once held, thereby

\textsuperscript{31} Stacy Hirsh, Reagan Presidency Pivotal for Unions, BALT. SUN, June 8, 2004, at C1.

\textsuperscript{32} Manning Marable, Rethinking Black Liberation: Towards a New Protest Paradigm, 38 RACE & CLASS 1, 3–4 (1997).

\textsuperscript{33} Peter Kirsanow, Employee No Choice Act, NAT’L REV., Mar. 23, 2009, at 25.


\textsuperscript{35} Kirsanow, supra note 33, at 25; see With GM’s Wagoner Ousted, Should Union Head Have Met the Same Fate?, FOX NEWS, Mar. 31, 2009, http://www.foxnews.com/politics/2009/03/31/gms-wagoner-ousted-union-head-met-fate/ (last visited May 17, 2010) (commenting that despite “massive concessions” the United Auto Workers (UAW), union critics claim that the UAW hastened GM’s downfall by requiring excessive wages, pension rates and health benefits for its members).
providing American workers with greater levels of workplace power authority.\textsuperscript{36}

Currently, legislation that union advocates claim would accomplish this goal has been introduced in the U.S. House of Representatives.\textsuperscript{37} If enacted, this legislation, entitled the Employee Free Choice Act (EFCA), would permit the formation and certification of labor unions without use of the "secret balloting" process, as currently required under the NLRA.\textsuperscript{38} The EFCA, which is further discussed in Part IV, instead would authorize a process known as "card check," which "allow[s] workers to be certified as a bargaining unit if a majority signed cards indicating their support for a union."\textsuperscript{39} This Act, advocates believe, must be implemented immediately to begin the process of restoring fair working-conditions and wages, rebuilding the middle class, and, ultimately, strengthening the American economy as a whole.\textsuperscript{40}

\textbf{B. The Direct-Allocation Approach}

Although the EFCA and similar union-building legislation may be a concrete step toward remedying workplace inequality, the fundamental inequities built into the American at-will employment scheme require farther-reaching action. In all but one state, Montana, the at-will system governs non-contractual employment relationships.\textsuperscript{41} This system provides that, in the

\textsuperscript{36} See, e.g., Reich, supra note 34 (calling for quick passage of union-enhancing legislation).
\textsuperscript{37} Telephone Interview with Paul Sonn, supra note 12; see Employee Free Choice Act, H.R. 1409, 111th Cong. §§ 1–2 (2009).
\textsuperscript{38} Compare National Labor Relations Act, 29 U.S.C. § 159(c)(1) (2006) (requiring a secret-ballot election if the Board finds that "a question of representation exists" after an investigative hearing concerning such matter), with Employee Free Choice Act, H.R. 1409 ("[T]he Board shall not direct an election but shall certify the individual or labor organization as the representative. . . .").
\textsuperscript{39} James Oliphant, Pro-Union Bill Loses Key Supporters, L.A. TIMES, Mar. 28, 2009, at A16. The Employee Free Choice Act (EFCA) also toughens sanctions against employers for violating employees' rights to organize and take part in union activity. Id.
\textsuperscript{41} RAYMOND L. HOGLER, EMPLOYMENT RELATIONS IN THE UNITED STATES: LAW, POLICY, AND PRACTICE 236–37 (2004). Montana still uses the at-will system to some extent; a worker may be fired without cause during the six-month probationary period. However, after probation, the employee may only be fired for cause. Id.

Still, other jurisdictions, such as California, may be slowly rejecting the at-will system:

\textbf{still,}
absence of a written contract between the employer and employee providing otherwise, both may leave the employment relationship freely.\textsuperscript{42} Moreover, under the at-will scheme, "the term of employment is of indefinite duration, the employer can terminate the employee for good cause, bad cause, or no cause at all."\textsuperscript{43} Ironically, the primary rationale for the implementation of the employment-at-will system in the first place was that it would put the employer and employee on "equal footing in terms of bargaining power."\textsuperscript{44} However, the notion that the at-will doctrine inherently provides employers and employees comparable bargaining positions has been almost universally discarded by American courts and legislatures.\textsuperscript{45} Opponents of the at-will scheme have concluded that its impact upon workers "has become incongruous with our social norms, with our views of who we are as a polity, and with the kind of society in which we want to live. To put the matter bluntly, employment at-will should be given notice and dismissed."\textsuperscript{46}

However, several exceptions exist to the default employment-at-will scheme, arising under both statutory and common law, and they serve to limit an employer's ability to legally terminate employees.\textsuperscript{47} This Article addresses three relevant common law exceptions to the at-will doctrine. The first, the "implied contract," is recognized in thirty-eight states and makes enforceable an agreement "between an employer and employee, even though no express, written instrument regarding the employment relationship exists," even if, depending on the jurisdiction, disclaimers are made to the contrary.\textsuperscript{48} The implied-contract exception typically arises when employers fail to live up to "oral or written representations [made] to employees regarding job security or procedures that will be followed when adverse employment actions are taken."\textsuperscript{49}


43. Muhl, supra note 42, at 3.

44. Id.

45. See Radin & Werhane, supra note 17, at 113–27.

46. Grodin, supra note 41, at 138; see Radin & Werhane, supra note 17, at 127 (arguing that employment-at-will is a default that should be augmented by employment practices that emphasize professionalism and respect).

47. See generally Abaray, supra note 42 (discussing the exceptions to at-will employment that are recognized by various states).

48. Muhl, supra note 42, at 7–8 (explaining, in addition, that many courts in these thirty-eight states found "that the contents and representations made in employee handbooks could create an implied contract").

49. Id.
Next, the covenant of good faith and fair-dealing exception involves "an implied promise . . . that the employer will not terminate the employee arbitrarily or without cause." 50 This exception closely resembles the "for cause" employment doctrines seen in Europe and Canada; in the United States, however, it has only been adopted by a handful of jurisdictions. 51

Finally, the public policy exception "generally prohibits an employer from terminating an employee because the employee exercised a statutory right, refused to violate the law, or otherwise acted to further the public interest." 52 The public-policy exception offers the broadest support among the states and has the potential to provide a variety of protections to a wide swath of workers. 53

In addition to these common law exceptions, 54 a number of federal statutory exceptions to the at-will scheme also exist, including the National Labor Relations Act, 55 the Equal Pay Act, 56 Title VII of the Civil Rights Act of 1964, 57 the Age Discrimination in Employment Act, 58 and the Americans with Disabilities Act. 59 The passage of these statutory exceptions has often tracked significant social or economic movements, such as the Civil Rights Movement, the New Deal, and the Women's Equality Movement. 60 In effect, these statutory exceptions were implemented because the U.S. Congress no longer deemed it socially tolerable for employers to possess the unmitigated ability to terminate an employee, especially based on discrimination, criminality, and retaliation. Conceptually, these statutes fall under the general heading of

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51. Muhl, supra note 42, at 10–11; see infra text accompanying notes 71–74 (discussing the doctrines of Europe and Canada).
52. Labor and Employment Law Blog, supra note 50.
54. Employment law is generally the subject of state jurisdiction and many states have enacted statutory exceptions to the at-will system. However, because this Article focuses on federal employment jurisprudence and reform, an in-depth discussion of state legislative exceptions to the employment-at-will scheme falls outside the scope of this discussion.
“direct-allocation reforms” because they pursue the same objective as the aforementioned common law at-will exceptions: equalizing the employer-employee power imbalance by directly giving individual workers greater levels of direct control over their employment relationships.

C. The Reciprocity of the Direct- and Indirect-Allocation Approaches

Despite the implementation of these exceptions to the at-will scheme, individual workers in the contemporary American labor market still maintain very marginal leverage over their employers because employers enjoy a perpetual surplus of available labor during a period of high unemployment and underemployment, especially in unskilled fields. Unskilled workers are most adversely affected by, and most vulnerable to, demand fluctuations in the labor market; but, they are also the group that is least protected by organized labor unions. Ostensibly, these workers’ plight would be improved through some form of collective bargaining. By joining together through labor unions, these workers theoretically would be able to gain greater leverage in the workplace, thereby improving each of their disadvantaged positions relative to their employers. However, due to a confluence of factors, namely the ability of employers to terminate union-minded employees, the historically hostile political climate regarding union-enabling legislation, and the current fractured condition of the unions themselves, policies like the EFCA, that merely make it somewhat easier to form organized unions, provide insufficient protections to vulnerable American workers. Additional reforms are also needed to directly combat the inequities built into the at-will employment scheme.


62. The American Federation of Labor (AFL), which, together with the Congress of Industrial Organizations (CIO), forms the largest union organization in the United States, historically has been accused of harboring hostility toward unskilled foreign workers, allegedly viewing them as "scabbing wage-breakers unreceptive to unionization." Fraser Ottanelli, Immigration and American Unionism, 58 INDUS. REL. 346, 346 (2003) (reviewing VERNON M. BRIGGS, JR., IMMIGRATION AND AMERICAN UNIONS (2001)). However, this lack of representation is also owed, in large part, to the efforts of behemoth employers, such as Walmart and McDonald’s, to actively and heavy-handedly prevent unionization. Ester Reiter, Serving the McCustomer: Fast Food is Not About Food, in RETHINKING SOCIETY IN THE 21ST CENTURY (MICHELLE WEBBER & KATE BEZANSON EDs., 2d ed. 2008).


65. See HOGLER supra note 41, at 4–5, 8 (outlining the significant obstacles that prevent union involvement).
Accordingly, by expanding protections found in currently-recognized exceptions to the at-will doctrine, the specific balance of power between an individual worker and her employer could be more equally and equitably distributed. Although the federal statutory exceptions mentioned above apply uniformly in every jurisdiction, the three common law employment-at-will exceptions (implied contract, implied covenant of good faith and fair dealing, and public policy) are applied inconsistently among the states. These common law exceptions are afforded varying degrees of recognition in different jurisdictions—some states, like California, recognize all three; others, such as Colorado and Oregon, recognize only some; and still other states, like Alabama and Georgia, recognize none of these exceptions.

Federal reform is necessary because, by incorporating the policies underlying these common law exceptions into federal law, they would apply equally throughout every United States jurisdiction. Such reform would not only enable workers nationwide to gain greater individual power in relation to their employers, but would in turn, provide all affected workers with fundamentally greater levels of certainty and security in their positions.

Moreover, a strategic federal expansion of certain at-will exceptions would benefit other reforms that utilize the indirect-allocation approach. The basic theory underlying indirect-allocation reforms is that unions can secure for workers, inter alia, better working conditions, compensation, and benefits by negotiating on behalf of workers as a group. In the end, union action provides workers with greater power individually, but the method in which this occurs is somewhat circuitous—a group of employees first grants its bargaining power to the union, which then negotiates with employers as a proxy for these employees, and, after the union obtains the most favorable terms practicable, this power is then transferred back to individual employees,

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68. Id. at 141–43 (noting that Colorado recognizes the public-policy exception, but not the implied-contract or covenant of good faith and fair dealing exceptions); id. at 207–09 (explaining that Oregon recognizes the implied-contract and the public-policy exception, but not the covenant of good faith and fair dealing).
69. Id. at 131–33, 150–52.
70. This equality would exist at least to the extent that employers are under the purview of Congress’s Commerce Clause jurisdiction. See infra notes 104–06 and accompanying text. Presumably, small employers without a sufficient connection to interstate commerce would likely be exempt from such legislation; Title VII of the Civil Rights Act of 1964, which prohibits employer discrimination on the basis of race, color, religion, sex, or national origin, only has jurisdiction over employers affecting interstate commerce and employing “fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.” 42 U.S.C. § 2000e(b) (2006). Any federal legislative reform contemplated in this Article would likewise face a similar limitation.
71. See, e.g., DOCHERTY, supra note 20; OUTTEN ET AL., supra note 64, at 7, 316–17.
commonly in the form of beneficial terms of a collective bargaining agreement.\footnote{72}{See Outten et al., supra note 64, at 316–17.}

In comparison, the direct-allocation method secures greater power for workers in a more immediate fashion. By directly transferring enhanced levels of job certainty and security to individual workers, the workers’ leverage as individuals would be increased from the outset, which would not only benefit that worker in her specific relationship with her employer, but would also ultimately allow a greater allocation of power to labor unions in the aggregate. This interchange illustrates the symbiotic, catalytic, and reciprocal relationship of direct- and indirect-allocation reforms; when individual workers are placed in more advantageous positions vis-à-vis their employers, unionization efforts can be bolstered, strengthened, and empowered. Their combined, potential effectiveness would be much greater than under either approach in isolation.

### III. Direct Allocation Generally: Mining the Common Law for Insight Into a Federal Legislative Exception

What form should a legislative direct-allocation reform take? If the ultimate objective is to obtain fairer employment relationships, it is tempting to jettison the entire at-will employment system altogether. Other countries, including Canada and Western European nations, utilize a “for cause” (also known as a “just cause”) termination system, as compared to the American at-will approach.\footnote{73}{Hepple, supra note 63, at 298–99.} In these countries, labor statutes “explicitly require pre-termination hearings before an employer dismisses an employee for misconduct, so as to provide the employee with the opportunity to confront and respond.”\footnote{74}{Grodin, supra note 41, at 147.} The realization of such an approach in the United States would signal a momentous shift in employer-employee relations and would accomplish, on a greater scale, the certainty-based objectives that the common law at-will exceptions currently promote. Further, the implementation of a national “just cause” employment system would provide crucial job security for American employees and work to halt the vicious cycle of job cuts, mounting unemployment insurance expenses, welfare and food-stamp filings, rising rates of unemployment and foreclosure, lower tax inflows, and rampant government deficits.\footnote{75}{See supra notes 2–9 and accompanying text.}

Nevertheless, the implementation of such an approach is fatally infeasible in the current American political and legal landscape. As discussed above, in the United States, although several important federal workplace statutes have been enacted, most employment laws and policies are set by individual states, causing wide variability in the different states’ approaches to employment
law. Hence, a complete overhaul of the current employment-at-will scheme and the implementation of an across the board “for cause” system would require one of two extremely unlikely options: a coordinated, simultaneous adoption of a “for cause” system by all fifty jurisdictions, or a federal reorganization and preemption of all states’ employment law jurisprudence. Clearly, the first scenario is highly improbable, as evidenced by the states’ varied recognition of the different common law at-will exceptions. Despite the willingness of certain states, such as California and Montana, to reject the employment-at-will doctrine outright, others have hesitated to discard the doctrine to any degree. Next, an overarching federal imposition of a “for cause” scheme seems likewise implausible because it would be politically untenable for the federal government to overtake the states’ decision-making power in a traditionally domestic area, such as employment and labor law.

Therefore, because it appears highly unlikely that a federal “for cause” employment system will be adopted in the United States in the immediate future, the enactment of a more incremental type of reform to the at-will scheme would provide the most effective course of action. Accordingly, this Article will now examine the various common law exceptions to the at-will scheme as they are variously recognized in different states, looking at each reform’s level of support, scope, and overall effectiveness. This analysis provides insight into the most prudent types of incremental federal legislative reform. In effect, the existing variations between the currently recognized common law exceptions will be used as a barometer to gauge the most effective and politically feasible federal direct-allocation legislation.

76. See FUNDAMENTALS OF EMPLOYMENT LAW, supra note 16, 131–236 (reviewing the recognized exceptions to the doctrine of employment-at-will in the fifty states and the District of Columbia); see also supra notes 41–67 and accompanying text.


79. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 n.4 (1985) (“We cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions; obviously, much of this is left to the states.”) (quoting Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971))); see also, HOGLER, supra note 41, at 19–20 (discussing the role of the federal government and state governments in the regulation of employment).
A. The Implied-Contract Exception

The implied-contract exception to the at-will doctrine provides that an employer’s assurances to an employee, including those found in employee handbooks, can form the basis for employment contracts. This exception is recognized in thirty-eight jurisdictions in the United States; however, even among states that recognize this exception, there is divergence regarding its scope. Some states recognize a weaker version of this exception, where only written assurances can form the basis for an employer’s implied contract. Other states accept a more robust version in which an employer’s oral representations to employees can form an implied contract, even in cases where the employer disclaims these statements as not contractually binding.

80. See Muhl, supra note 42, at 7–8.
81. See id. at 7–9 (discussing Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980)). Compare Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 885 (Mich. 1980) (finding enforceable a “for cause” provision contained in an employer’s policy statement that created an expectation of job security even though there was no agreement as to the duration of employment), with Mullinax v. John’s Wholesale Jewelry, 598 So.2d 828, 840 (Ala. 1992) (holding that ambiguous representations about the longevity of employment made during hiring negotiations did not create a secure position for the employee).
82. See Mullinax, 598 So.2d at 840 (refusing to find an implied contract based on oral assurances); see also Walsh & Schwartz, supra note 16, at 651–53.
83. See Toussaint, 292 N.W.2d at 884; see also Walsh & Schwartz, supra note 16, at 651–53.
The most common use of the implied-contract exception is to enforce provisions found in employee handbooks that often state an employee will only be terminated "for cause" or outline specific disciplinary procedures in the case of poor workplace performance. In addition, this exception has been applied to a broad range of other scenarios, such as when an employer indicates that an individual will remain employed so long as she "did a good job and performed adequately," or when an "employee's longevity of service, regular raises, promotions, oral assurances of continued employment or lack of meaningful criticism of the employee's work" causes that employee to reasonably assume she will only be fired for just cause.

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84. Muhl, supra note 42, at 7; Walsh & Schwartz, supra note 16, app. 1, at 678–89.
86. FUNDAMENTALS OF EMPLOYMENT LAW, supra note 16, at 174; see Walker v. Consumers Power Co., 824 F.2d 499, 503 (6th Cir. 1987) (finding that testimony regarding assurances of job security if the employee performed adequately was enough to create a cause of action for wrongful termination).
87. FUNDAMENTALS OF EMPLOYMENT LAW, supra note 16, at 138; see Foley v. Interactive Data Corp., 765 P.2d 373, 387 (Cal. 1983) (holding that personnel practices and policies may be considered when determining if an agreement against at-will termination exists).
The implied-contract exception has the potential to grant a substantial amount of power directly to workers and provide a greater level of workplace certainty and security for at-will employees. As compared to the “normal” at-will relationship, if an employer forms an implied contract with its employees, it must abide by the terms of that agreement, thus significantly limiting that employer’s ability to “freely terminate” its employees.88 These obligations provide employees with higher levels of certainty regarding the conditions under which they will continue employment, thus making each worker more confident in his ability to retain that position—that is, workers enjoy greater job security by actively avoiding actions that under the manual or contract constitute grounds for termination.89

Politically, however, it is unclear whether effective labor reform can practically be implemented through the implied-contract exception. First, as evidenced by the distribution of jurisdictions that recognize this exception in Map 1, there is a large divide between those jurisdictions that recognize a weak form of the implied-contract exception and those that have adopted a more robust version of the exception.90 Although over three-fourths of all states recognize the implied-contract exception in some form, these jurisdictions are split; twenty-two states adopt the weaker form of the exception and sixteen recognize the robust form.91 Accordingly, these figures demonstrate that a fundamental lack of consensus exists among the states regarding the proper scope of this exception or whether it should be recognized in the first place.

Further, reform based on the implied-contract exception must contain either the weak or robust version because the purpose of enacting a single federal scheme is to create uniformity and consistency between jurisdictions. Undertaking such a reform, however, would necessarily create tension between the states that believe the robust form goes too far in exposing employers to liability and those that feel the weak form does not adequately protect at-will employees. Nevertheless, given the relatively high number of states that recognize a weak form of the implied-contract exception (twenty-two) and the low, but not insignificant, number of states that do not recognize this exception in any form (twelve), the most politically feasible manifestation of this exception probably would most resemble the weaker version.92 Not only would the federalization of a weak version of the implied-contract exception enjoy support from those states that already recognize it, but it would also serve as a compromise between the states that use the robust form and those that do not recognize the exception at all. Moreover, the sixteen states that

88. See, e.g., Toussaint, 292 N.W.2d at 890.
89. See id. at 892.
90. See Muhl, supra note 42, at 7; Walsh & Schwartz, supra note 16, app. 1, at 678–89.
91. See Walsh & Schwartz, supra note 16, app. 1, at 892.
92. See Muhl, supra note 42, at 7–10; Walsh & Schwartz, supra note 16, app. 1, at 678–89.
already recognize the robust form of the implied-contract exception would be free to continue doing so by enacting or retaining appropriate state laws.93 Political considerations aside, a weak version of the exception would ultimately prove less effective in that it covers only written assurances, such as policies contained in employee handbooks and manuals, and would undermine the protection this exception is theoretically capable of providing.94 For this reason, employers could easily avoid triggering this exception by simply eliminating or revising any portions of employee handbooks that could provide the bases for implied contracts, such as provisions relating to job security, discipline, or termination. This is especially true for large institutional employers with legal departments capable of striking out potentially offensive language from manuals. Thus, despite its potential superiority in terms of political feasibility, the federal implementation of a weak version of the implied-contract exception would likely only provide negligible protection for workers in the end.

The robust version of this exception, on the other hand, would undoubtedly offer greater protection for workers because it would permit employees to rely on an employer's representations, thus providing a more equitable and balanced employment relationship. Still, for the reasons discussed above, the federal enactment of a robust implied-contract exception appears quite unlikely.95

Ultimately, after considering the practical ramifications of a federal implied-contract exception to the employment-at-will doctrine, it appears that this option offers both poor political feasibility and marginal effectiveness. The robust variant offers substantial worker protection, but would likely be unattainable politically; the weak variant is more politically palatable, but provides only minimal security for American at-will employees.

B. The Implied Covenant of Good Faith and Fair Dealing

The next common law exception to the employment-at-will doctrine is the implied covenant of good faith and fair dealing (implied covenant). This exception presents an even greater deviation from the at-will scheme than the implied-contract exception and, depending on the jurisdiction, it provides "either that employer personnel decisions are subject to a 'just cause' standard or that terminations made in bad faith or motivated by malice are prohibited."96 Due to both its breadth and ambiguity, this exception is recognized in only eleven U.S. jurisdictions (see Map 2).

93. See supra note 52 and accompanying text.
94. Muhl, supra note 42, at 7–8.
95. See supra note 85 and accompanying text.
96. Muhl, supra note 42, at 10.
The implied-covenant exception is mostly confined to the western United States. Among the states that recognize this exception, there is an almost-even split regarding the breadth of this exception and the remedies available to wrongfully-terminated employees. A robust federal version of this exception, which would effectively put a de facto "for cause" termination scheme in place, would unquestionably provide the most protection for American workers. In contrast, a weaker version of the implied-covenant exception would provide terminated employees narrower causes of action, such as bad faith or malice, and would restrict the available range of remedies. Political considerations aside, a national implied-covenant exception would have a tremendous equalizing impact on the American workplace in terms of both quality and certainty because this exception would permit employees to sue their employers in contract or tort for a wide range of

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97. Id. at 4; Walsh & Schwartz, supra note 16, at 652, app. 1, at 678–89.
98. Muhl, supra note 42, at 9; Walsh & Schwartz, supra note 16, at 652, app. 1, at 678–89.
100. Id. at 649–50, 654.
wrongful-termination violations.\textsuperscript{101} In California, for instance, the jurisdiction with the most expansive implied-covenant doctrine, an employee can sue her employer for everything from fraudulent inducement\textsuperscript{102} to the intentional infliction of emotional distress.\textsuperscript{103} By broadly expanding the grounds on which employees may sue, a federal implied-covenant exception would encourage employer forthrightness and fairness as well as provide workers with a stronger sense of security in their employment. In other words, reform of this type would provide a leap, rather than a step, toward nationwide workplace equality.

Nonetheless, because it goes far in transferring workplace power from employer to employee, the federal enactment of an implied-covenant exception seems unlikely. Among jurisdictions that currently recognize the robust variant of the implied covenant, there is no consensus regarding its proper scope,\textsuperscript{104} and the implementation of a full-scale "just cause" termination scheme borders on the impossible in the present political and economic climate.\textsuperscript{105} For these reasons, a weak variant of the implied covenant remains the more-likely option. Still, a majority of courts in the thirty-nine jurisdictions that do not recognize the implied-covenant exception to the employment-at-will doctrine have explicitly rejected its adoption.\textsuperscript{106} Accordingly, with nearly eighty percent of U.S. jurisdictions having explicitly rejected the implied-covenant doctrine and in light of the fragmentation among jurisdictions that utilize this exception,\textsuperscript{107} it seems especially unlikely that a political impetus exists for the federal enactment of any variant of the implied-covenant exception.

C. The Public-Policy Exception

Finally, the third and most popular common law exception to the at-will employment scheme is the public-policy exception that protects workers if an employer’s actions violate a "well-established public policy of the State."\textsuperscript{108}
The public-policy exception is applied in a wide range of cases, including those in which an employee is terminated for "filing a workers' compensation claim after being injured on the job, or for refusing to break the law at the request of the employer." 109

Map 3 110

The public-policy exception to the employment-at-will doctrine is recognized in forty-three states (see Map 3) and, like the other common law exceptions discussed above, its scope and efficacy varies by jurisdiction. 111

109. Id.
110. Id. at 5; Walsh & Schwartz, supra note 16, at 647–49, app. 1 678–89.
111. Walsh & Schwartz, supra note 16, at 647–51; see, e.g., Merrill v. Crothall-Am. Inc., 606 A.2d 96, 100–01 (Del. 1992) (recognizing that every employment contract in Delaware has an implied covenant of good faith and fair dealing but requires a showing of fraud, deceit, or misrepresentation by the employer); Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251, 1253–57 (Mass. 1977) (limiting the covenant of good faith and fair dealing to instances where already-earned benefits were denied upon termination); K-Mart Corp. v. Ponsock, 732 P.2d 1364, 1365, 1367–70 (Nev. 1987) (restricting the covenant of good faith and fair dealing to only those instances when a relationship of trust and reliance first exists); Wilder v. Cody County Chamber
Some states recognize a weak variant of the exception that, in effect, limits its application to cases in which policies found in the state’s constitution, statutes, or administrative rules are at issue. Other jurisdictions adopt a robust version of the exception that, in addition to constitutional, statutory, and rule-based protections, also contemplates the aims of public policy more broadly, including for example, policies that provide the “proper balance . . . between the employer’s interest in operating a business efficiently and profitably, the employee’s interest in earning a livelihood, and society’s interest in seeing its public policies carried out.” Accordingly, the public policies embodied by this exception vary by state given the statutes, constitutions, and case law of each.

Nonetheless, for several reasons, a national implementation of this exception would mitigate this divergence among states. First, the current interstate discrepancy over the propriety of each version of the exception would become largely irrelevant because a national public policy could be developed from federal legislation and there would be less need to resort to common law considerations of what constitutes “fairness” or “public good.” Moreover, if federalized, discrepancies resulting from the inherent differences in states’ underlying statutory and constitutional law would become moot, as federal law would form the underlying basis of the exception, rather than state constitutions or statutes. Therefore, a federal public-policy exception could provide reform that is not only practical in terms of implementation, but also offers a relatively popular and widely-accepted method for attacking the inequalities of the employment-at-will scheme.

Ultimately, however, a federal adoption of the public-policy exception may only provide narrow protection to vulnerable workers. First, the exception may be superfluous if there is already relevant codified law that illegalizes specific employer conduct. Second, because some variant of the public-policy exception exists in forty-three states, its federalization would have the strongest impact on the remaining seven jurisdictions. Nonetheless,
although this exception may lack a certain level of breadth, it compensates in terms of its flexibility and feasibility in implementation. As illustrated in Map 3 above, broad-based support exists in most jurisdictions for a public-policy exception to the employment-at-will doctrine, even though its ability to shift the workplace power imbalance nationally may remain fairly limited.

IV. PICKING SIDES: DISTILLING COMMON LAW EXCEPTIONS TO DEFINE THE CONTOURS OF A LEGISLATIVE SOLUTION

A. Underlying Basis of Legislative Reform

The question now, is: what light can these common law exceptions shed on the implementation of a broader federal statutory exception to the employment-at-will doctrine? It appears that some support may exist for reforms that provide greater levels of employment certainty and security to workers, similar to those found in the implied-contract exception. Such reforms would safeguard employees from certain instances of unforeseen termination by making an employer’s assurances enforceable. Furthermore, certainty-based reforms would provide protection to American workers because the employment-at-will doctrine offers laborers minimal, if any, job security.

It is unclear what insight the implied-covenant exception would provide into the formation of legislative labor reform. Although the federalization of the implied covenant of good faith and fair dealing could create a paradigmatic shift in the employer-employee power balance, currently such reform is both overambitious and politically unattainable. In the end, the lack of national support for the implied covenant underscores the need for incremental reform. If the goal is to provide as much workplace equality as possible, then something resembling a “for cause” system may be the most fitting option. The states’ sparse recognition of the implied-covenant exception highlights the fact that a more effective strategy would be a gradual, measured approach, rather than the wholesale imposition of an entirely different employment regime.

117. See Muhl, supra note 42, at 4-7.
119. See supra Part II.B.
120. See supra Part III.B.
Additionally, there appears to be relatively broad support for an at-will exception based on codified public policy. The protection that this reform could ultimately provide workers, however, would likely be narrow in scope and effectiveness. Still, an exception based upon public-policy considerations would allow for flexibility in implementation. Moreover, because of its broad popularity, a public-policy exception also appears to be the most politically feasible option.

B. Delineating the Exception

When considering the appropriate form for federal legislative reform to the at-will scheme, it is paramount to keep these distilled objectives in mind. The most effective and feasible federal employment reform would combine the certainty and security features of the implied-contract exception with the narrow scope and widespread popularity of the public-policy exception. Crafting a federal at-will exception along these lines would provide the most protection for American workers because it would directly address the certainty prong of the current employment predicament. Further, this legislative reform must be incremental as the implementation of a full-scale just-cause employment system in the United States is unlikely to occur in the foreseeable future. Incremental legislative reform would provide a compromise between the blunt, and often arbitrary, impact of the at-will system upon American workers and the adoption of a full-blown “for cause” scheme.

I. Legislative Background

In order to understand how such reform would be enacted, it is important to review the process Congress will use. Congress’s ability to implement legislation regarding labor and employment law is derived, mainly, from the Commerce Clause of the U.S. Constitution, which empowers Congress to regulate interstate commerce. Prior to the 1995 Supreme Court decision United States v. Lopez, Congress’s ability to enact legislation by means of the Commerce Clause was virtually unconstrained. Limitations on this power

121. See supra Part III.C.
122. See supra Part II (discussing the two-pronged employment crisis).
123. See supra Part II.B.
124. U.S. CONST. art. I, § 8, cl. 3; see BENJAMIN W. WOLKINSON & THE MSU EMPLOYMENT LAW GROUP, EMPLOYMENT LAW: THE WORKPLACE RIGHTS OF EMPLOYEES AND EMPLOYERS 412 (2d ed. 2002) (“All federal legislation covering employment is grounded on the commerce clause of the US constitution, the right of Congress to regulate interstate commerce.” (emphasis added)).
125. Compare Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that Congress may regulate a purely local activity, as long as it has a substantial direct or indirect effect on interstate commerce), with United States v. Lopez, 514 U.S. 549, 558–59 (1995) (limiting Congress’s power to regulate activity that substantially affects commerce and emphasizing the need to apply the test of substantial relation).
were imposed in *Lopez* and its progeny, but Congress still maintains a relatively high level of discretion concerning the labor reforms it can effectuate. Moreover, because labor legislation relates to employment relationships and workplaces, it bears a stronger relationship to commerce than other laws the Court has struck on Commerce Clause grounds in the past fifteen years. Through its Commerce Clause powers, Congress has implemented a variety of federal legislative initiatives that fall under the broad umbrella of labor and employment policy; these include workplace protection for whistleblowers, free trade agreements, workplace safety regulations, child labor laws, mandated minimum wage and improved workplace conditions, family and medical leave, organized labor, pension plans and retirement, and a host of anti-discrimination laws. Accordingly, Congress's ability to enact meaningful reform involving the direct allocation of workplace power to employees would likewise fall within its broad Commerce Clause powers.

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127. See *Morrison*, 529 U.S. at 611; *Lopez*, 514 U.S. at 556–57 (holding that the level of scrutiny legislation must meet to satisfy the Commerce Clause is the "substantial effects" variant of the rational basis test, meaning that the law at issue must regulate those things that substantially affect interstate commerce); see also WOLKINSON ET AL., supra note 124, at 412–13; supra note 65 (discussing the threshold requirements for employees under other federal employment legislation, such as Title VII, and explaining that Congress's commerce power would not permit it to regulate smaller employers outside of interstate commerce).


137. See supra notes 55–61 and accompanying text.

138. See supra Part II.V.
2. The Use of Notice Provisions to Reform the At-Will System

Requiring employers to notify employees in writing before terminating them is one reform that may meet the above objectives. Currently, due to the abovementioned variability in states’ recognition of employment-law doctrines, there is no consistent interstate rule regarding pre-termination notice. Nevertheless, a uniform notice requirement could be enacted in the form of legislation based on policies found in current federal legislation. One such legislative enactment is the Worker Adjustment and Retraining Notification (WARN) Act. The WARN Act requires certain employers with over one-hundred employees to provide sixty-days' notice to workers before closing entire plants or terminating all of a facility's employees. Although the scope of the WARN Act is limited to large-scale employers and contains many exceptions—including cases involving temporary layoffs, reductions of work hours, terminations of portions of a facility’s workers—it provides workers with a higher degree of certainty in that they are better able to anticipate their impending terminations.

A federal expansion of this notice requirement could provide workplace security to a greater number of American workers by either broadening the scope of employees covered by the notice provision, such as including smaller employers or requiring notice in cases where the employer is less than certain of impending terminations, or eliminating some of the current exceptions in the WARN Act. Certainly, broader notice legislation still would include statutory exceptions, such as those allowing for immediate termination in cases of workplace crimes or gross recklessness, natural disasters, or failing companies. These exceptions aside, the enactment of a more expansive

139. See supra Part III (demonstrating the lack of uniformity among state employment laws).
141. Id. § 2102(a). In the United Kingdom, Parliament enacted the Contracts of Employment Act 1963 and the Employment Rights Act 1996, which require employers to give reasonable notice to employees before termination. Contracts of Employment Act, 1963, c. 49, § 1 (Eng.); Employment Rights Act, 1996, c. 9, § 86 (Eng.); HALSBURY’S LAWS OF ENGLAND § 631 (4th ed. 1991). Further, the Employment Rights Act mandates that employees must be given a “fair dismissal,” which is very similar to the implied covenant of good-faith and fair-dealing exception to the at-will system. See Employment Rights Act, 1996, c. 1, § 94 (Eng.); HALSBURY’S LAWS OF ENGLAND, at 80.
142. See, e.g., 29 U.S.C. § 2101(a) (2006) (restricting the applicability of the WARN Act to employers with more than one hundred employees and requiring notice for discharge, but not for various exceptions, such as lay-offs and reductions in work hours).
143. See id. §§ 2103–2104 (outlining the exemptions of the WARN Act). As with all rules, the devil is in the details; for legislation, the devil is in the exceptions. In any employment scenario, there will be workers who must be terminated immediately because of gross misconduct. Unless an employee’s presence poses a danger to others or economic ruin for the company, all workers, whether terminated with or without cause, should be governed by the same rule. Administratively, this would be the most prudent approach because it would eliminate the need for excessive legislation. Rather than determining the subjective question of whether cause
notice requirement would be a positive step toward rebalancing the employer-employee power dynamic. By requiring employers to provide notification prior to termination in more cases, employees would be better able to accommodate for unemployment, seek new jobs, and prepare unemployment insurance filings. In this regard, it would help blunt the at-will scheme's harsh blow upon workers and provide them more certainty in their employment.

3. The Use of Warning and Cure to Reform the At-Will System

Alternatively, and perhaps additionally, employers could be required to provide written warnings to underperforming employees prior to termination and allow these workers a cure period in which to fix their faulty performance. This approach, although somewhat similar to a notice provision, is narrower in scope and broader in potency. It is narrower in the sense that it only would apply to individual employees whose work the employer deems substandard, rather than to termination generally. On the other hand, warning and cure legislation is broader than a mere notice requirement because it would give a warned worker the opportunity to cure his poor performance and retain his position. Especially if implemented in tandem with a general notice provision, a warning and cure requirement would provide a substantial infusion of certainty and security for workers.144 Moreover, the innate benefits that a general notice provision could provide a warned worker (e.g., time to prepare for periods of unemployment, search for new employment, and file unemployment claims) would also flow from a warning and cure requirement, but to a greater degree because underperforming employees have the opportunity to re-secure their current employment.

Nonetheless, the implementation of a federal warning and cure system in the United States is unlikely given that it would effectively create a for-cause system. Administratively, such legislation would be difficult to enforce because a warning and cure requirement would give rise to at least two stages of litigation or administrative hearings—one stage relating to whether an employer had sufficient "cause" to issue a warning, and another to decide if the employee had sufficiently cured her defective work after receiving a warning so as to avoid termination. If wrongfully-terminated employees are given no recourse through litigation or other proceedings, then warning and cure legislation would prove toothless. Moreover, a warning and cure provision would likely force employers to put extensive record-keeping procedures in place to better document grounds for "cause," increase workplace tension

144. See supra Part IV (discussing how a general notice requirement would provide greater security for employees).
during the cure period, and impose additional litigation costs upon both employer and employee. Accordingly, although a warning and cure system would provide workers much protection, its application in the present American setting too closely resembles the for-cause system and, for many of the same reasons, would likely fail.145

4. Severance

Another type of legislative reform would require employers to provide severance pay and health benefits to terminated employees. Currently, there is no federal or state statute requiring employers to provide workers with severance pay upon termination.146 This exception goes one step further than the notice and warning and cure proposals by requiring employers to continue compensating terminated employees, even if new workers have been employed in their stead. Nonetheless, there are some mechanisms that provide protection for workers on this end—for example, bargaining agreements between employers and labor unions sometimes contain contracts that provide severance pay to terminated employees.147 Additionally, the Consolidated Omnibus Budget Reconciliation Act (COBRA) provides terminated employees with the option to continue healthcare coverage under the same plan they enjoyed during employment.148 These schemes, however, do not provide sufficient worker protection for two reasons. First, bargaining agreements containing severance packages would apply only to workplaces large enough to have active unions. Due to the overwhelming decline in unionization over the past half-century,149 many industries, even those of considerable scale, are unable to obtain severance agreements due to a lack of representation by organized labor. Second, COBRA requires recently terminated employees, themselves, to pay for healthcare costs if they elect to continue their coverage.150 Moreover, COBRA benefits are limited to employers with more than twenty employees,151 are available for a period of only eighteen months following termination,152 and are restricted to instances where termination results from a statutorily defined “qualifying event.”153

145. See supra Part III.
146. See OUTTEN ET AL., supra note 64, at 111.
147. See id. at 109, 111. If an employer does offer severance plans, the terms are governed by ERISA. Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001–1461 (2006); OUTTEN ET AL., supra note 64, at 111.
149. See infra Part V; supra text accompanying notes 30–36.
150. 29 U.S.C. § 1162(3).
151. Id. § 1161(b).
152. Id. § 1162(2)(A)(i).
153. Id. § 1161(a) (“The plan sponsor of each group health plan shall provide . . . that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled, under the plan, to elect . . . continuation coverage under the plan.”); see id. § 1163 (defining and explaining “qualifying event”).
Of course, a federal severance-pay statute would contain many limitations, exceptions, and exemptions that would exclude many workers from coverage. Excluded workers could include those employed by very small employers; non-employees such as independent contractors; and employees terminated for "just cause," natural disaster, or a company's failure. Requiring employers to provide severance pay to terminated workers would impose significant costs upon them, especially for the myriad of employers already suffering during the present economic downturn. Additionally, inflicting unaffordable expenses on already-foundering employers may, in the end, harm more workers in the aggregate if these employers are unable to continue operating due to additional expenses. Moreover, even with broad limits, however, the implementation of a federal severance-pay provision is unlikely because the costs it necessarily imposes on both employers and employees would effectively erode most congressional support.

C. Settling on Notice

The most appropriate method of enacting direct-allocation reform is the one that espouses the objectives of the common law exceptions to the employment-at-will scheme; given such, a federal notice requirement is the best approach. Notice legislation would provide incremental reform that is capable of balancing the competing objectives of effectiveness and feasibility, as well as directly allocating workplace power to employees by granting workers greater levels of certainty in their employment relationships and allowing them to collect damages in cases where employers fail to provide proper notice of termination.

Although a federal notice requirement may not go as far in balancing the employer-employee power dynamic as other legislative proposals discussed in this Article, what it lacks in terms of potency, it makes up for in practicality. Whereas a warning and cure requirement for underperforming employees would be fatally unadministrable, resulting in litigation, and a severance requirement would be prohibitively expensive and politically infeasible, a notice requirement would not implicate any of these problems, or would at least do so to a lesser degree. Furthermore, enacting a national notice requirement would not burden employers with additional expenses because, ostensibly, the only costs involved would be those needed to furnish written notice to employees facing termination. Moreover, a notice requirement would be much less likely to require federal "for cause" litigation or hearings than would a warning and cure provision. Nevertheless, litigation may arise

154. See, e.g., supra notes 141–44 and accompanying text.
155. See supra Part III.
156. See supra Part IV.B.1.
157. See supra Part IV.B.2.
158. See supra Part IV.B.3.
regarding the statutory exceptions to this notice requirement; for example, if a worker challenges whether she was properly terminated without notice for criminal behavior, gross recklessness or negligence, company failure, or natural disaster. Still, this risk is insignificant for two reasons. First, only a small minority of cases would trigger these types of claims. Second, federal notice legislation could be accompanied by the creation of an administrative agency charged with overseeing its implementation, which could provide a lower-cost, administrative alternative to litigation.\footnote{For example, such an agency could function like the Equal Employment Opportunity Commission (EEOC) that fields and investigates complaints of employer discrimination. U.S. Equal Employment Opportunity Commission: Authority & Role, http://www.eeoc.gov/eeoc/index.cfm (last visited July 23, 2010). Alternatively, it could operate like the National Labor Relations Board (NLRB) that investigates allegations of unfair labor practices and brings credible claims before a federal administrative law judge or panel of judges. NAT’L LABOR RELATIONS BD., THE NATIONAL LABOR RELATIONS BOARD AND YOU: UNFAIR LABOR PRACTICES, available at http://www.nlrb.gov/nlrb/shared_files/brochures/engulp.pdf.}

Further, all of the proposals outlined above, whether notice, warning and cure, or severance, involve a tradeoff between political feasibility and effectiveness. Of all the proposals, a notice requirement would be the smallest, most incremental step toward a system resembling a for-cause scheme. In itself, this incrementality may seem to be a rather feeble form because, relative to the other reforms, it would not initially grant much power to workers. However, this shortcoming would be mitigated by the fact that a notice requirement would also bolster indirect-allocation reforms, making them increasingly widespread, effective, and lasting.\footnote{See infra Part V.}

V. THE INTERPLAY BETWEEN DIRECT- AND INDIRECT-ALLOCATION APPROACHES: WHY DIRECT-ALLOCATION REFORM IS NECESSARY

A federal notice requirement would not empower workers in isolation; this direct-allocation reform would instead operate in conjunction with the already implemented instruments of the indirect-allocation approach of the American labor market.\footnote{See News Release, U.S. Dep’t of Labor: Bureau of Labor Statistics, Union Members – 2009 (Jan. 22, 2010), http://www.bls.gov/news.release/pdf/union2.pdf [hereinafter Bureau of Labor Statistics].} These could work in symbiosis with one another because unions will inevitably benefit from the aggregate increase in negotiating leverage. In addition, the enactment of direct-allocation reform would compensate for some of the underlying problems facing the current indirect-allocation approach, thereby protecting American workers on a wider scale. Direct allocation is, therefore, necessary to fill the gap between the current state of American employment-law jurisprudence and the unions’ objective of expanding coverage in the future.
Direct-allocation reform is more plausible when contrasted with the uncertain future of pending union legislation. The EFCA is one of the most significant union-enabling pieces of legislation to be considered by the Congress in recent years. The provisions of the EFCA, which provide harsher penalties for employers that violate the rights of workers, are immediately necessary. Due, in part, to the overwhelming decline of unionized workers over the past half-century, key indicators of workplace quality, such as average wages compared to inflation, health benefit coverage, and work/life balance, have continued to lag behind other industrialized nations. Proponents of organized labor argue that the need for immediate pro-union reform is plain. As former Secretary of Labor Robert Reich recently lamented

The decline of unions is not the only reason for the long-term slowdown in American wages. Much of what Americans used to make can now be made more cheaply abroad or by automated machines. But the vast personal-service sector of the economy is not affected by imports or automation, including millions of jobs in big-box retailers, fast-food outlets, hotel chains, hospitals, construction, and transportation. Few of these jobs are unionized. All too often that's because employees who want to form unions are threatened by their employers. And if they don't heed the warnings, they're fired, even though that's illegal. The sooner [the EFCA is] enacted, the better—for American workers and for the American economy.

Despite its necessity, the EFCA's enactment seems increasingly unlikely. Although its passage in the Senate seemed promising at first, political wrangling, including key Senators withdrawing support, may cause its

162. See Alec MacGillis, Union Bills Declining Changes give Rise to Alternatives, WASH. POST, Mar. 29, 2009, at A5 (referring to the Employee Free Choice Act as the "landmark pro-union proposal" before Congress).
163. Id.; see also Employee Free Choice Act, H.R. 1409, 111th Cong. §§ 1–4 (2009).
164. Reich, supra note 34.
167. Reich, supra note 34. Some critics have suggested that the bill was introduced, at least in part, for political reasons, rather than its ability to aid workers. Matthew Austin, Why EFCA Was Introduced Now, THE OHIO LABOR LAWYERS, Mar. 11, 2009, http://theohiolaborlawyers.worldpress.com/2009/03/11/why-efca-was-introduced-now/. House and Senate Republicans attempted to preempt the EFCA with the "Secret Ballot Protection Act," which would have made it an NLRA violation to certify a union that was not elected through the secret balloting process. Id.
failure. Accordingly, Congress is not expected to pass the EFCA at any point in the immediate future. Moreover, advocates of EFCA admit that, even if the bill were enacted, it "likely would not increase union membership until the economy improves, since workers are currently more concerned about job security than wages and benefits."

Even if pro-union reforms similar to the EFCA are effectuated, without reform along the lines of direct-allocation legislation unions may not be able to adequately address the problems discussed by Secretary Reich. Presently, labor unions in the United States are in a fragmented and deteriorated state—in 2005, seven major unions left the AFL-CIO, creating a major rift in inter-union relations. Since that point, organized labor has struggled to reunite into a federated organization, and individual unions are deeply divided about the future focus of such a federation. Although a centralized, amalgamated union configuration would most likely expand union representation to a certain degree and offer somewhat more comprehensive representation for American workers, in its current fractured form, the union system can accomplish neither.

Nonetheless, in this current divisive political climate, opponents of organized labor continue to blame unions for the inability of large, private-sector employers, such as the American automotive and airline industries, to juggle profitability and the current demands of unions under existing collective bargaining agreements. During tenuous economic periods, opponents of organized labor argue that it is paramount for employers to maintain a high level of flexibility in employment decisions, including the ability to individually renegotiate wages, benefits, and hours of employment. Even

168. See MacGillis, supra note 162. Pennsylvania Senator Arlen Specter signaled that he would vote for the EFCA early on, but changed course and announced that he was withdrawing his support for the bill. Specter could have been the sixtieth filibuster-beating vote. Id. In addition, California Senator Dianne Feinstein indicated that she would no longer support the bill. Oliphant, supra note 39.

169. MacGillis, supra note 162.


171. Steven Greenhouse, Unions Face Obstacles in Effort to Reunite, N.Y. TIMES, Mar. 9, 2009, at A11.

172. Id.


though periods of financial downturn and high levels of unemployment are the most critical times to protect workers by retaining livable wages, benefits, and work/life balance,\textsuperscript{175} the implementation of a federal notice requirement, would provide employers with flexibility. Notice legislation would not modify employers' obligations under collective bargaining agreements, nor would it restrain employers' ability to hire or terminate workers as economic conditions dictate. Presumably then, criticism of a bill that adopts some type of direct-allocation approach would be less strident than that of union-enabling legislation like the EFCA.

Moreover, enacting a federal notice requirement would be a boon to union activity and would empower future indirect-allocation reform because a notice requirement would provide organized labor with a higher baseline position and more leverage in negotiating future collective bargaining contracts. If, for example, a labor union sought to include a severance or warning and cure provision in its initial agreement, its negotiating position would be stronger if a universal notice requirement were in place. In effect, the incremental nature of a federal notice requirement would help pave the way for further union-initiated workplace improvements. These small, yet significant reforms stand in sharp contrast to the steady declines in workplace quality and certainty over the past half-century. By enacting legislation that directly works to balance the employer-employee power dynamic on an individual level, American workers in the aggregate can become more certain of their positions and begin the process of rebuilding a more secure, equitable, and balanced employment system overall.

VI. CONCLUSION

The global financial meltdown has had a particularly devastating impact on the workforce in the United States and has inflamed the entrenched problems already facing American labor. American workers are faced with plummeting work-life quality in terms of sinking wage levels, increased working hours, and sparse healthcare benefits, but the lopsided nature of the American at-will employment scheme also leaves them with little-to-no job security. This Article has highlighted how legislation that aims to directly balance the power disparity between employer and employee would form an effective step toward the amelioration of the second arm of problems facing workers, namely those relating to workplace certainty and security. By exploring the possible alternatives of direct-allocation reform, a federal notice requirement has emerged as the most practicable approach. This legislation would not only provide greater employment certainty, but it would also offer a higher

Correspondingly, this approach potentially could bolster and fortify unions' ability to take meaningful action to address the current labor predicament. Ultimately, if labor unions and their advocates seek to reassert an expanded role in the American workplace, the need for future labor reforms is evident. Yet, due to the current fractured state of unions and a persistent political aversion to union-enabling reform, the ability of pro-union legislation alone to revitalize and reestablish wide-scale organized labor representation is doubtful. Accordingly, the implementation of a federal notice requirement would provide a more viable, politically feasible alternative. Such reform would neither be an end in itself nor a panacea for the ailments of vulnerable workers in the United States; instead, this reform offers the potential to spur broader labor reform initiatives and, as importantly, represents a positive step toward greater overall certainty, security, and equality in the contemporary American labor market.