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## ESSAY

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### JUST CAUSE, NOT JUST BECAUSE: A PRO-WORKER REFORM FOR THE EMPLOYMENT LANDSCAPE

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*The at-will doctrine permits employers to terminate employees at any time for any reason—or no reason at all—so long as it is not an illegal one. This creates a significant power imbalance between employers and employees, chills employee speech regarding unsafe or unlawful workplace conduct, and leaves employees vulnerable to arbitrary and unjust dismissals. The current system disproportionately impacts Black, Latinx, and women workers, who are often segregated into low-wage jobs where the at-will presumption applies. As evidenced by recent legislative efforts around the country, and especially in light of COVID-19, there is growing momentum in states and localities to replace the at-will doctrine with a just cause standard. By contrast, a just cause standard requires employers to articulate a bona fide reason for dismissal, use a system of progressive discipline, and provide written notice to employees. Not only is the just cause standard consistent with due process principles of adequate notice and fair process, it also seeks to address racial and gender inequities in the workplace and beyond.*

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## INTRODUCTION

In the United States, state law generally governs the formation of employment relationships.<sup>1</sup> In every state except Montana, employment relationships are presumed to be “at-will.”<sup>2</sup> This presumption of at-will employment allows private<sup>3</sup> employers to terminate employees at any time,

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<sup>1</sup> See Reuel L. Schiller, *Regulating the Workplace: Three Models of Labor and Employment Law in the United States*, 29 *NIHON U. COMP. L.* 1, 1-2 (2012) (explaining that the creation of employment relationships is governed by state common law or contract law, although a growing body of state, federal, and local laws regulate employment relationships more generally). Under our system of federalism, states and localities act as laboratories of democracy to further regulate employment, filling in gaps where federal law is silent or codifying additional protections above the federal floor. Cf. Paul M. Secunda & Jeffrey M. Hirsch, Debate, *Workplace Federalism*, 157 *U. PA. L. REV. ONLINE* 28, 28 (2008) (debating the merits of “whether the federal government or states are best equipped to protect the rights of workers under the law”).

<sup>2</sup> *At-Will Employment Overview*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 15, 2008) [hereinafter *NCSL, At-Will Overview*], <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> [https://perma.cc/633K-UFA2].

<sup>3</sup> Federal and state employees are generally not considered “at-will.” Rather, they can only be fired for cause and are entitled to due process protections under the 5th and 14th Amendments. See, e.g., 5 U.S.C. §§ 7511–13 (creating a for-cause standard for adverse employment actions, including removal, against federal civil service employees); *Perry v. Sindermann*, 408 U.S. 593 (1972) (holding that a state-employed teacher had a due-process-protected interest in continued employment); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (holding that a state statute outlining for-cause removal provision and creating a property interest in continued employment for a civil servant

for any reason, or no particular reason, so long as it is not an illegal one—such as discrimination based on one’s membership in a protected class.<sup>4</sup> Likewise, employees are free to quit at any time.<sup>5</sup> While the at-will presumption may be modified by contract<sup>6</sup> or certain common law exceptions,<sup>7</sup> the at-will doctrine impacts the vast majority of workers throughout the country.<sup>8</sup>

The at-will doctrine creates a significant power imbalance in employment relationships that favors employers. The current at-will system provides no procedural safeguards and leaves employees vulnerable to arbitrary and unfair dismissals and discipline. This is particularly true for Black and Latinx workers and women,<sup>9</sup> who are often segregated into low-wage jobs where the at-will standard applies.<sup>10</sup>

Altering the employment landscape with wrongful discharge laws,<sup>11</sup> or creating a just cause employment standard, would tip the scales in favor of workers by requiring employers to provide a bona fide reason for dismissals. As evidenced by recent legislation in Philadelphia, New York City, and Illinois, there is growing momentum around the country to replace the at-

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requires due process in removal proceedings); see also SUSAN TSUI GRUNDMANN, U.S. MERIT SYS. PROT. BD., WHAT IS DUE PROCESS IN FEDERAL CIVIL SERVICE EMPLOYMENT? (2015), [https://www.mspb.gov/studies/studies/What\\_is\\_Due\\_Process\\_in\\_Federal\\_Civil\\_Service\\_Employment\\_1166935.pdf](https://www.mspb.gov/studies/studies/What_is_Due_Process_in_Federal_Civil_Service_Employment_1166935.pdf) [<https://perma.cc/VL34-CJV5>] (discussing the history of for cause protection in the federal civil service).

<sup>4</sup> See NCSL, *At-Will Overview*, *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> For example, high-level employees at private companies frequently negotiate just cause provisions into their individual employment agreements. See NCSL, *At-Will Overview*, *supra* note 2. Collective bargaining agreements in unionized workplaces often have just cause provisions for discipline or termination. *Id.* However, in 2021, only 10.3% of U.S. workers were union members, including less than 6.1% of private sector employees. Press Release, U.S. Bureau of Lab. Stat., Union Members—2021, at 1 (Jan. 20, 2022), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/Y379-T76N>].

<sup>7</sup> Three common law exceptions to the at-will doctrine include public policy, implied contract, and the covenant of good faith and fair dealing. See NCSL, *At-Will Overview*, *supra* note 2.

<sup>8</sup> See discussion *supra* note 3; see also Joyce Smithey, *Can You Terminate an Employee Solely for Poor Performance?*, SMITHEY L. GRP. (Jan. 25, 2021), <https://smithey.com/can-you-terminate-an-employee-solely-for-poor-performance> [<https://perma.cc/X3VQ-XJ2E>] (“[A]bout 74% of the US workforce falls under the category of at-will employees.”).

<sup>9</sup> Although the examples in this Essay predominantly focus on Black and Latinx workers, these are not the only groups impacted by the at-will system. Thus, it is important to consider how this system negatively affects other workers of color and members of marginalized communities, including women, immigrants, and folks with disabilities. See MARTHA ROSS & NICOLE BATEMAN, BROOKINGS INST., METRO. POL’Y PROGRAM, MEET THE LOW-WAGE WORKFORCE 9 (2019), [https://www.brookings.edu/wp-content/uploads/2019/11/201911\\_Brookings-Metro\\_low-wage-workforce\\_Ross-Bateman.pdf](https://www.brookings.edu/wp-content/uploads/2019/11/201911_Brookings-Metro_low-wage-workforce_Ross-Bateman.pdf) [<https://perma.cc/T77W-UHZ9>].

<sup>10</sup> See discussion *infra* Section I.B.

<sup>11</sup> This Essay uses the terms “wrongful discharge laws” and “just cause laws” interchangeably.

will doctrine with a just cause standard to provide employees with adequate notice and fair process.<sup>12</sup>

This Essay proceeds in four parts. Part I discusses the origins of the at-will employment standard in the United States and how the current system perpetuates racial and gender inequities in the workplace and beyond. Part II outlines the hallmarks of just cause laws and explains how these provisions are rooted in due process principles and equity. Part III discusses current and pending just cause laws to serve as models for future legislation. Lastly, Part IV urges the adoption of just cause laws at the federal or state level to replace the current at-will system.

## I. AT-WILL EMPLOYMENT AND RACIAL JUSTICE

### A. *The Origins of At-Will Employment in the United States*

The at-will employment doctrine was born “out of slavery’s soil.”<sup>13</sup> Following the abolition of slavery in 1865,<sup>14</sup> employers sought new ways to exert power and control over formerly enslaved Black people and immigrant laborers.<sup>15</sup> Railroad companies, which previously relied heavily on systems of forced labor, were some of the sharpest critics of the Thirteenth Amendment and Reconstruction-era efforts to empower workers.<sup>16</sup> Proponents of the at-will standard couched their argument in a perverse reading of the Thirteenth Amendment: if forced labor is unconstitutional, and thereby employees have a right to quit at any time for any reason, employers should also have a mirrored right to terminate employees at any time for any reason.<sup>17</sup> As labor

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<sup>12</sup> See *infra* Parts III, IV.

<sup>13</sup> Rebecca Dixon, *Hear Us: Cities are Working to End Another Legacy of Slavery—At-Will Employment*, NAT’L EMP. L. PROJECT (Oct. 19, 2021), <https://www.nelp.org/press-clips/cities-are-working-to-end-another-legacy-of-slavery-at-will-employment> [<https://perma.cc/PS8U-6PKU>]; see also IRENE TUNG, PAUL SONN & JARED ODESKY, NAT’L EMP. L. PROJECT, ‘JUST CAUSE’ JOB PROTECTIONS: BUILDING RACIAL EQUITY AND SHIFTING THE POWER BALANCE BETWEEN WORKERS AND EMPLOYERS 29-30 (2021), <https://s27147.pcdn.co/wp-content/uploads/Just-Cause-Job-Protections-2021.pdf> [<https://perma.cc/CZ4P-MLYP>] (noting that the at-will doctrine arose in the aftermath of Reconstruction).

<sup>14</sup> See U.S. CONST. amend. XIII.

<sup>15</sup> Dixon, *supra* note 13.

<sup>16</sup> *Id.*; TUNG ET AL., *supra* note 13, at 29-30 (addressing railroad companies’ post-Reconstruction attempts to increase their power over workers).

<sup>17</sup> Dixon, *supra* note 13. As legal historian Lea VanderVelde notes, this “mirrored right” argument advanced by employers and proponents of the at-will doctrine is contrary to the intent of the Reconstruction Congress:

In recent decades, it has become routine to claim that the at-will doctrine is justified because the employee gains the right to quit employment in mutual exchange for suffering the employer’s right to fire him at will. The Reconstruction Congress did

uprisings persisted in the decades following Reconstruction, conservative jurists solidified the at-will doctrine in American jurisprudence.<sup>18</sup>

The United States is an anomaly compared to other wealthy, industrialized countries.<sup>19</sup> Throughout the twentieth century, industrialized nations across the globe, including France, Germany, Greece, Italy, Japan, Portugal, Spain, and the United Kingdom, adopted legislation to protect workers against unjust dismissals.<sup>20</sup> Yet, the at-will stronghold remains in the United States.

### B. *The At-Will Doctrine Perpetuates Racial and Gender Inequities*

The at-will system, where workers face the threat of abrupt termination, has devastating effects on individuals and families, chills employees' speech about unfair or discriminatory treatment, and leads them to accept dangerous

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not see it that way: the right to quit was fundamental and constitutionally guaranteed. . . .

Throughout [congressional discussions during Reconstruction], no one articulated that this anti-subordinating constitutional protection—the right to quit—entailed a reciprocal right permitting masters the freedom to discharge workers at will. . . . Yet, a mere decade later, the concept that these two rights were connected was used to bootstrap vulnerable workers' fundamental constitutional rights into a claim that the employer could fire employees at will. The employer's unrestrained ability to fire employees emerged as a quid pro quo for the employee's right to quit in the announcement of the at-will rule.

Lea VanderVelde, *The Anti-Republican Origins of the At-Will Doctrine*, 60 AM. J. LEGAL HIST. 397, 409, 416-17 (2020) (footnotes omitted).

<sup>18</sup> Dixon, *supra* note 13.

<sup>19</sup> TUNG ET AL., *supra* note 13, at 1.

<sup>20</sup> *Id.* (citing Mariya Aleksynska & Alexandra Schmidt, *A Chronology of Employment Protection Legislation in Some Selected European Countries* 7 (Int'l Labour Org., Conditions of Work & Emp. Series No. 53, 2014), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_324647.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_324647.pdf) [<https://perma.cc/D2WF-83EC>]); Lorenz Mayr & Jon Heinrich, *Termination of Employment Under German Law*, MAYR KANZLEI FÜR ARBEITSRECHT, <https://www.mayr-arbeitsrecht.de/wp-content/uploads/2019/10/Dismissal-WhitePaper-1.pdf> [<https://perma.cc/H5WD-83EN>] (discussing Bürgerliches Gesetzbuch [BGB] [Civil Code] §§ 622 and 626, which require notice and termination in writing, and the Protection Against Unfair Dismissals Act of 1951, which outlines socially justifiable reasons for dismissals); Kazou Sugeno & Keiichi Yamakoshi, *Dismissals in Japan, Part One: How Strict Is Japanese Law on Employers?*, 11 JAPAN LAB. REV. 83, 84 (2014) (discussing post-World War II labor reform and the Supreme Court of Japan's interpretation "that a dismissal should be considered null and void as an abuse of right without objective and appropriate reasons"). In the early twentieth century, European countries began regulating prohibited reasons for dismissal, including military service, pregnancy, illness, or accident. *See* Aleksynska & Schmidt, *supra*, at 9. In 1969, Portugal adopted a just cause law which permitted employers to terminate employees who failed to fulfil their job responsibilities, repeatedly violated workplace health and safety regulations, or willfully violated the employer's property interest, among other reasons. *Id.* In 1973, France "enacted a provision on the necessity of true and serious grounds (*causes réelles et sérieuses*)" that required an employer to inform the employee of the basis of their dismissal in writing or orally during a termination meeting if the employee asked. *Id.*

working conditions or lower wages. Each of these concerns disproportionately impacts women, workers of color, and other marginalized groups.

The labor market in the United States remains highly racially segregated.<sup>21</sup> White and Asian people are concentrated in high-wage jobs, whereas Black and Latinx people are concentrated in low-wage and service jobs.<sup>22</sup> Therefore, as a baseline, the at-will system has the most direct impact on Black and Latinx workers. This system has both external effects on workers' livelihoods, and internal effects on workers' on-the-job experiences.

Externally, first, Black and Latinx workers are more likely to experience unjust dismissals: 50% of Black workers and 52% of Latinx workers responding to a 2019 Data for Progress survey reported being fired "for a bad reason or no reason at all," compared to 45% of white workers.<sup>23</sup>

Second, abrupt terminations have immediate financial consequences for individuals and their families in low-wage jobs who live paycheck to paycheck. For example, Black and Latinx individuals are more likely to experience extended periods of unemployment after a job separation, which contributes to further job instability.<sup>24</sup> From 2010 to 2019, 5.8% of Black workers and 5.3% of Latinx workers experienced steady unemployment for at least three months following a job separation, compared to 4.4% of their white counterparts.<sup>25</sup> This racial gap is exacerbated during periods of economic recession: 7.1% of Black workers and 6.8% for Latinx workers, compared to 5.2% of white workers, experienced at least three months of unemployment during the recession period of 2007 to 2009.<sup>26</sup> Furthermore, Black and Latinx people have significantly less intergenerational wealth than their white counterparts to fall back on during periods of unemployment, which exacerbates the financial hardships resulting from sudden job loss.<sup>27</sup>

21 BUREAU OF LAB. STAT., REP. 1088, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2019 (2020), <https://www.bls.gov/opub/reports/race-and-ethnicity/2019/home.htm> [<https://perma.cc/P7E3-DC26>].

22 See *id.*; TUNG ET AL., *supra* note 13, at 6 (noting that Black and Latinx workers are "most often segregated in dangerous and lower-paying jobs").

23 KATE ANDRIAS & ALEXANDER HERTEL-FERNANDEZ, ROOSEVELT INST., ENDING AT-WILL EMPLOYMENT: A GUIDE FOR JUST CAUSE REFORM 9 tbl.1 (2021), [https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI\\_AtWill\\_Report\\_202101.pdf](https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI_AtWill_Report_202101.pdf) [<https://perma.cc/MYE3-K5MP>].

24 See TUNG ET AL., *supra* note 13, at 4; see also Gillian B. White, *Black Workers Really Do Need to Be Twice as Good*, ATLANTIC (Oct. 7, 2015), <https://www.theatlantic.com/business/archive/2015/10/why-black-workers-really-do-need-to-be-twice-as-good/409276/> [<https://perma.cc/6EBP-R4PD>] (discussing the racial gap in unemployment rates and its long-term effects on job performance).

25 See TUNG ET AL., *supra* note 13, at 4.

26 *Id.*

27 See Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap*, BROOKINGS INST.: UP FRONT BLOG (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap> [<https://perma.cc/36XJ-6JWY>]; TUNG ET AL., *supra* note 13, at 4; see also Trymaine Lee, *Inheritance*, in THE 1619 PROJECT, 293, 293-305 (Nikole

Third, the sudden loss of income associated with abrupt terminations has devastating downstream effects for individuals and families and perpetuates societal inequities. Folks may struggle to make rent or mortgage payments, and as a result, risk losing housing.<sup>28</sup> Parents may lose access to affordable childcare.<sup>29</sup> Loss of income and other means of support can also drive individuals to drop out of school.<sup>30</sup> Each of these downstream effects create additional barriers to career advancement and perpetuate the cycle of racial and gender inequities in the labor force.<sup>31</sup> Thus, the external effects stemming from abrupt dismissals demonstrate how the at-will system grants employers significant power over workers' livelihoods beyond the workplace.

Aside from the external effects described above, the at-will system has internal effects on workers' on-the-job experiences. Fear of abrupt dismissal or other forms of retaliation creates a chilling effect, whereby workers are afraid to speak up against unsafe working conditions, workplace discrimination, or other illegal conduct that they experience or witness.<sup>32</sup> Although federal and state whistleblower laws are intended to protect employees who speak up against illegal workplace conduct, these protections are relatively narrow and hinge on employees' willingness to come forward.<sup>33</sup>

Consider an all too prevalent phenomenon—sexual harassment in the workplace. Studies suggest that over one quarter of women experience workplace sexual harassment in their lifetimes.<sup>34</sup> Sexual harassment is most prevalent in occupational settings where employees work for tips (such as accommodation and food services), are isolated from others (such as domestic workers), in fields dominated by undocumented workers or those with temporary visas (such as agriculture, domestic labor, and factory work), and in male-dominated industries.<sup>35</sup> Just Recovery's October 2020 nationally

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Hannah-Jones, Caitlin Roper, Ilena Silverman & Jake Silverstein eds., 2021) (discussing the historical underpinnings of the racial wealth gap).

<sup>28</sup> See TUNG ET AL., *supra* note 13, at 3.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*

<sup>32</sup> See *id.* at 14-18.

<sup>33</sup> See *id.* at 17 (discussing how current whistleblower statutes are too narrow and inadequately deter employers from retaliation); Jawad Khan, Imran Saeed, Muhammad Zada, Amna Ali, Nicolás Contreras-Barraza, Guido Salazar-Sepúlveda & Alejandro Vega-Muñoz, *Examining the Whistleblowing Intention: The Influence of Rationalization of Wrongdoing and Threat of Retaliation*, 19 INT'L J. ENV'T RSCH. & PUB. HEALTH no. 3, Feb. 2022, at 1, 13-14 (2022) (discussing psychological factors impacting the decision to blow the whistle, including the perceived threat of retaliation).

<sup>34</sup> ELYSE SHAW, ARIANE HEGEWISCH & CYNTHIA HESS, INST. FOR WOMEN'S POL'Y RSCH., *SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COSTS 1* (2018), [https://iwpr.org/wp-content/uploads/2020/09/IWPR-sexual-harassment-brief\\_FINAL.pdf](https://iwpr.org/wp-content/uploads/2020/09/IWPR-sexual-harassment-brief_FINAL.pdf) [<https://perma.cc/S3LW-A3JN>].

<sup>35</sup> *Id.* at 2-3; see also *Chart of Risk Factors for Harassment and Responsive Strategies*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/chart-risk-factors-harassment-and-responsive-strategies>

representative survey results indicated that 31% of women “say that fear of retaliation might prevent them from reporting workplace sexual harassment.”<sup>36</sup> Furthermore, 53% of workers across the gender spectrum who previously experienced workplace sexual harassment responded that fear of retaliation would factor into their decision to report.<sup>37</sup>

Moreover, workers fear retaliation for raising concerns about workplace health and safety, especially in light of the COVID-19 pandemic. The October 2020 Just Recovery survey found that fear of retaliation would prevent 22% of workers from raising concerns or refusing to work under unsafe conditions.<sup>38</sup> Of those, Black and Latinx workers reported higher rates of concern about retaliation: 34% of Black workers and 25% of Latinx workers feared retaliation, compared to 19% of white workers.<sup>39</sup> These trends hold true when focusing on COVID-19 related risks. A May 2020 nationwide survey conducted by the National Employment Law Project found that Black workers were twice as likely as white workers to experience or witness retaliation from their employer for raising concerns about the spread of COVID-19 in the workplace.<sup>40</sup> Furthermore, 38% of workers reported going to work despite feeling unsafe, out of fear of being penalized if they did not show up.<sup>41</sup> These rates are higher among Black and Latinx employees: 73% of Black workers and 64% of Latinx workers reported going “to work even though they believed they may have been seriously risking their health or the health of a family member[,]” compared to 49% of white workers.<sup>42</sup>

As these examples illustrate, the at-will system creates a culture of fear whereby employees continue to labor under unsafe, and often illegal, workplace conditions and conduct. This perpetuates racial and gender inequities in the workplace, as Black, Latinx, and poor immigrant—and particularly

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[<https://perma.cc/T95F-U53N>] (listing twelve risk factors for workplace sexual harassment); ALEXANDRA BRODSKY, *SEXUAL JUSTICE: SUPPORTING VICTIMS, ENSURING DUE PROCESS, AND RESISTING THE CONSERVATIVE BACKLASH* 64-67 (2021) (discussing sexual harassment and retaliation in the fast food, agricultural, and informal industries, such as domestic work).

<sup>36</sup> TUNG ET AL., *supra* note 13, at 15; *see also* RAKEEN MABUD, AMITY PAYE, MAYA PINTO & SANJAY PINTO, NAT’L EMP. L. PROJ., FOUNDATIONS FOR A JUST AND INCLUSIVE RECOVERY: ECONOMIC SECURITY, HEALTH AND SAFETY, AND AGENCY AND VOICE IN THE COVID-19 ERA 22-27 (2021), <https://www.nelp.org/wp-content/uploads/Foundations-for-Just-Inclusive-Recovery-Report.pdf> [<https://perma.cc/2W7A-RRMV>] (describing how, especially in the COVID-19 era, workers who speak out against unsafe work conditions fear retaliation from their employers).

<sup>37</sup> TUNG ET AL., *supra* note 13, at 15.

<sup>38</sup> MABUD ET AL., *supra* note 36, at 23; TUNG ET AL., *supra* note 13, at 16.

<sup>39</sup> MABUD ET AL., *supra* note 36, at 23; TUNG ET AL., *supra* note 13, at 16.

<sup>40</sup> TUNG ET AL., *supra* note 13, at 14 (citing IRENE TUNG & LAURA PADIN, SILENCED ABOUT COVID-19 IN THE WORKPLACE, NAT’L EMP. L. PROJECT 2 (2020), <https://s27147.pcdn.co/wp-content/uploads/Silenced-About-COVID-19-Workplace-Fear-Retaliation-June-2020.pdf> [<https://perma.cc/FH2J-QFU9>]).

<sup>41</sup> TUNG & PADIN, *supra* note 40, at 3.

<sup>42</sup> *Id.*

women<sup>43</sup>—workers are segregated into low-wage industries where these conditions are most prevalent, and often go unchallenged. Of course, just cause laws alone will not solve all the weaknesses with current whistleblower laws.<sup>44</sup> However, instituting a just cause standard is a step in the right direction because it would give employees a greater sense of security to come forward without fear of retaliation.<sup>45</sup> Indeed, one in five workers—and one in three Black workers—have indicated that stronger legal protections against retaliation would empower them to speak up about unsafe or unlawful workplace conditions.<sup>46</sup> In sum, no employer should have this much power over individuals, and these examples speak to a pressing need to reform the employment landscape to provide greater protections for employees.

## II. THE HALLMARKS OF JUST CAUSE LAWS

This Part explores the hallmarks of just cause laws, including the definition of just cause, the progressive discipline system, and the writing requirement for reasons for termination.

### A. Defining “Just Cause”

Unlike an at-will employment relationship—which requires no cause or reason for termination—a just cause relationship requires the employer to have and articulate a good reason for termination. Just cause to terminate an employment relationship typically falls into one of three categories: (1) failure to satisfactorily perform one’s job duties or comply with an employer’s policies, (2) egregious misconduct, or (3) a bona fide economic reason.

#### 1. Failure to Satisfactorily Perform Job Duties or Comply with Policy

To ensure an objective inquiry, state and local laws outline several factors that a factfinder must consider when evaluating whether an

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<sup>43</sup> See ANNE MORRISON & KATHERINE GALLAGHER ROBBINS, NAT’L WOMEN’S L. CTR., WOMEN’S OVERREPRESENTATION IN LOW-WAGE JOBS (2015), [https://nwlc.org/wp-content/uploads/2015/08/chartbook\\_womens\\_overrepresentation\\_in\\_low-wage\\_jobs.pdf](https://nwlc.org/wp-content/uploads/2015/08/chartbook_womens_overrepresentation_in_low-wage_jobs.pdf) [<https://perma.cc/2WEF-ZN2Y>] (noting that two-thirds of low-wage workers are women, and women of color are overrepresented in this category).

<sup>44</sup> A thorough discussion and analysis about the current gaps in the federal and state whistleblower and anti-retaliation provisions is beyond the scope of this article. For some research on why whistleblowers face up-hill legal battles, see Nancy M. Modesitt, *Why Whistleblowers Lose: An Empirical and Qualitative Analysis of State Court Cases*, 62 KAN. L. REV. 165, 175-94 (2013).

<sup>45</sup> Indeed, strengthening current whistleblower laws and passing just cause laws is crucial to provide the most legal protection to employees. See TUNG ET AL., *supra* note 13, at 17-20 (advocating for stronger whistleblower laws and just cause job protections).

<sup>46</sup> TUNG & PADIN, *supra* note 40, at 4-5.

employee's failure to perform one's job duties or comply with policy constitutes just cause. These factors typically include (1) the employee's knowledge of their job duties or the employer's policies, (2) whether the employee received adequate and relevant training on those duties or policies, (3) whether the employer's policy is consistently and reasonably applied to all employees, and (4) whether the employer undertook a fair and objective investigation into the employee's actions.<sup>47</sup>

These factors are rooted in due process principles and serve as an accountability mechanism for both employers and employees. Consider the first two factors: the employee's knowledge about duties and policies, and the employer's training on such duties and policies. An employer should make their policies accessible to employees and provide sufficient on-the-job training to new employees. Having clear policies and training allows employees to understand not only their daily responsibilities, but also their employer's performance expectations. If an employee receives little to no training regarding their job duties or is not given an employee handbook, can an employer fault an employee for making a mistake or failing to comply with policy? Under the at-will system, the legal answer is yes, because the system grants employers significant discretion to discipline and terminate employees for even minor mistakes. In contrast, the just cause standard would grant extra protection to employees if their employer fails to uphold their end of the notice and training bargain.

Additionally, discrimination seeps into the workplace when an employer does not apply their policies consistently to similarly situated employees. For example, a policy may require a supervisor to give an employee a warning or notice about performance deficiencies before placing them on a performance improvement plan (PIP). If a supervisor immediately places Latinx employees on PIPs without adequate notice, but routinely gives notice to white employees, then the policy is inconsistently and unfairly applied. Likewise, a supervisor might punish Black employees more frequently or severely than white employees who engage in the same conduct.<sup>48</sup> While

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<sup>47</sup> See H.R. 3530, 102d Gen. Assemb. § 10(b)(1)-(4) (Ill. 2021) (listing factors for determining a just cause termination); PHILA., PA., CODE § 9-4703(1)(a)-(e) (2022) (outlining factors for evaluating whether a parking employee has been discharged for just cause); N.Y.C., N.Y., ADMIN. CODE § 20-1272(b)(1)-(5) (2021) (listing factors for assessing whether a fast-food employee has been wrongfully discharged).

<sup>48</sup> There is ample research documenting the racial gap in school discipline. See, e.g., Travis Riddle & Stacey Sinclair, *Racial Disparities in School-Based Disciplinary Actions Are Associated with County-Level Rates of Racial Bias*, 116 PROC. NAT'L ACAD. SCI. 8255 (2019) (stating that Black students are much likelier to face harsher punishments, including more frequent suspension and expulsion); Maithreyi Gopalan & Ashlyn Aiko Nelson, *Understanding the Racial Discipline Gap in Schools*, 5 AM. EDUC. RSCH. ASS'N OPEN no. 2, 2019, at 1 ("Nationally, 5% of [w]hite boys and 2% of [w]hite girls receive one or more out-of-school suspensions annually, as compared with 18% of

federal and state antidiscrimination statutes ideally protect employees against this behavior, plaintiffs face a high bar to show that an employer *intentionally* discriminated against them on the basis of their membership in a protected class.<sup>49</sup> In reality, “many unfair employment actions where race [or other protected characteristics] may be an element cannot realistically be challenged under our civil rights laws.”<sup>50</sup>

## 2. Egregious Misconduct

Under some statutes, an employer has just cause to discipline or discharge an employee who engages in “egregious misconduct.” One bill defines egregious misconduct as “deliberate or grossly negligent conduct that endangers the safety or well-being of the individual, co-workers, customers,

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Black boys and 10% of Black girls and 7% of Hispanic boys and 3% of Hispanic girls.”). While there is less research on the racial discipline gap in the workplace, the racial biases present in the school setting can reasonably transcend into the workplace.

<sup>49</sup> The above examples fall squarely under Title VII’s disparate treatment, rather than disparate impact, provision. Compare 42 U.S.C. § 2000e-2(a) (prohibiting, among other things, discriminatory treatment of an employee with respect to the “terms, conditions, or privileges of employment” because of their “race, color, religion, sex, or national origin”) with *id.* § 2000e-2(k) (requiring a complaining employee to demonstrate that an employer’s practice causes a disparate impact). Deviation from a neutral policy or practice is evidence of pretext in disparate treatment cases. See, e.g., *Vega v. Chi. Park Dist.*, 954 F.3d 996, 1004 (7th Cir. 2020) (“Significant, unexplained or systematic deviations from established policies or practices’ can be probative of discriminatory intent.” (quoting *Hanners v. Trent*, 674 F.3d 683, 694 (7th Cir. 2012)); *Brennan v. GTE Gov’t Sys. Corp.*, 150 F.3d 21, 29 (1st Cir. 1998) (“Deviation from established policy or practice may be evidence of pretext.”). Moreover, the use of subjective discretion to deviate from a neutral practice aligns with an intentional discrimination theory. See Melissa Hart, *Disparate Impact Discrimination: The Limits of Litigation, the Possibilities for Internal Compliance*, 33 J. COLL. & U.L. 547, 551 (2007) (“[V]ery few cases have successfully challenged subjective practices on the disparate impact theory in lower courts. Indeed . . . courts have been extremely resistant to recognizing the application of subjective judgment as a ‘neutral’ employer policy.”); cf. *E.E.O.C. v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1279-83 (11th Cir. 2000) (suggesting that longstanding, “neutral, albeit subjective” employment policies and practices that result in discrimination comport with disparate treatment, rather than disparate impact, theory).

Although Title VII permits plaintiffs to challenge facially neutral policies with discriminatory effects under a disparate impact theory, in practice, this theory is limited to scenarios such as written examinations, seniority systems, and no-beard policies. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 705 (2006) (discussing how although courts have not limited disparate impact cases to these scenarios, “the theory has proved an ill fit to challenge” practices aside from these historical examples). Furthermore, plaintiffs who bring disparate impact claims have a low success rate. *Id.* at 738-39 (noting that, in six selected years between 1983 and 2002, plaintiffs had a 25% success rate in district court and 19% success rate in appellate courts on a disparate impact theory).

<sup>50</sup> TUNG ET AL., *supra* note 13, at 12. For more information about the likelihood of administrative or judicial relief in employment discrimination cases, see Maryam Jameel, Leslie Shapiro & Joe Yeradi, *More Than 1 Million Employment Discrimination Complaints Have Been Filed with the Government Since 2010. Here’s What Happened to Them.*, WASH. POST. (Feb. 28, 2019), <https://www.washingtonpost.com/graphics/2019/business/discrimination-complaint-outcomes> [<https://perma.cc/MF3T-SXX9>].

or other persons, including discrimination or harassment . . . or that causes serious damage to the employer’s or customers’ property or business interests.”<sup>51</sup> While just cause laws generally require employers to use progressive discipline for performance- or conduct-based terminations,<sup>52</sup> employers may bypass this requirement in instances of egregious misconduct to immediately rid their workforce of bad apples.<sup>53</sup>

### 3. Bona Fide Economic Reasons

Statutes generally define “bona fide economic reason” as a full or partial reduction in operations due to a reduction in supply, revenue, or profit.<sup>54</sup> Businesses can take a turn for the worse, and employers should not be compelled to retain employees during times of economic hardship. However, some statutes require employers to discharge employees in the reverse order of seniority, when terminating on the basis of a bona fide economic reason, which further protects workers based on their length of service.<sup>55</sup>

#### *B. Progressive Discipline*

Existing and proposed wrongful discharge laws require employers to use progressive discipline in order to support a just cause termination. One such bill defines progressive discipline as:

An employer’s disciplinary system that provides a graduated range of reasonable responses to an employee’s failure to satisfactorily perform his or her job duties or comply with employer policies, with the disciplinary measures ranging from mild to severe, depending on the frequency and degree of the failure, and the employee being afforded a reasonable period of time to address concerns.<sup>56</sup>

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<sup>51</sup> H.R. 3530, 102d Gen. Assemb. § 5 (Ill. 2021).

<sup>52</sup> See *infra* Part II.B.

<sup>53</sup> See H.R. 3530, § 10(d) (“Under progressive discipline, an employer may discharge an employee immediately for egregious misconduct.”); N.Y.C., N.Y., ADMIN. CODE § 20-1272(c) (2021) (carving out an exception to the prohibition on wrongful discharge when “termination is for an egregious failure by the employee to perform their duties, or for egregious misconduct . . .”).

<sup>54</sup> See H.R. 3530, § 10(e) (stating that a discharge is based on bona fide economic reasons where “the discharge results from a reduction in production, sales, services, profit, or funding of the employer . . .”); N.Y.C., N.Y. ADMIN. CODE § 20-1271 (defining “bona fide economic reason” as “the full or partial closing of operations or technological or organizational changes to the business in response to the reduction in volume of production, sales, or profit”); PHILA., PA., CODE § 9-4701(2) (2022) (defining “bona fide economic reason” as “the full or partial closing of operations or technological or organizational changes to the business, resulting in a reduction in revenue or profit”).

<sup>55</sup> See N.Y.C., N.Y., ADMIN. CODE § 20-1272(h); PHILA., PA., CODE § 9-4704(3).

<sup>56</sup> H.R. 3530, § 5.

Instituting a system of progressive discipline is a critical procedural aspect of just cause laws. Progressive discipline provides adequate notice to the employee about their deficient performance and affords them an opportunity to seek guidance and feedback about the employer's expectations. It also provides a reasonable grace period for the employee to correct their performance deficiencies. If the employee's performance issues persist after warnings and discipline, then the employer would be justified in terminating the relationship and the employee will not be completely blindsided by the termination.

### C. The Writing Requirement

Just cause laws generally require employers to provide the reasons for the employee's termination in writing either at the time of discharge or soon thereafter.<sup>57</sup> While this is good practice under the at-will system, it is not required. Further, under the just cause system, factfinders may only consider the reasons proffered in the written explanation.<sup>58</sup> Thus, this requirement prevents the creation of post-hoc justifications for an employee's termination during litigation or arbitration.

## III. EXAMPLES OF JUST CAUSE LAWS

This Part provides an overview of just cause statutes adopted in Montana, Philadelphia, and New York City, as well as pending legislation in Illinois.<sup>59</sup> The Montana Wrongful Discharge from Employment Act is arguably the most employer-friendly model. By contrast, Philadelphia, New York City, and Illinois have taken a more progressive approach. The Philadelphia and

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<sup>57</sup> See N.Y.C., N.Y. ADMIN. CODE § 20-1272(d) (requiring a written explanation within five days of termination); PHILA., PA., CODE §§ 9-4703(3), 4704(1) (requiring a prompt, written explanation with precise reasoning); H.R. 35350, § 10(e)(3), (f) (requiring specific, written explanation within three days of termination).

<sup>58</sup> N.Y.C., N.Y. ADMIN. CODE § 20-1272(d) (barring a factfinder from considering reasons not included in the written explanation); accord PHILA., PA., CODE § 9-4703(3); H.R. 35350, § 10(f).

<sup>59</sup> In February 2021, Representative Mike Sylvester introduced a bill to end at-will employment and adopt a just cause standard in Maine. An Act to End At-Will Employment, H.R. 398, L.D. 553, 130th Leg., 1st Reg. Sess. (Me. 2021). On June 10, 2021, lawmakers in the House of Representatives voted to reject the bill. See Caitlin Andrews, *Maine Bill Aiming to End At-Will Employment Fails in House*, BANGORDAILY NEWS (June 10, 2021), <https://bangordailynews.com/2021/06/10/politics/maine-bill-aiming-to-end-at-will-employment-fails-in-house> [<https://perma.cc/QFX8-KK6K>]. As an alternative, the House narrowly passed a bill directing the Department of Labor and the Department of Economic and Community Development to study the effects of ending at-will employment in the state. *Id.*; H.R. 481, Comm. Amend. to L.D. 553, 130th Leg., 1st Reg. Sess. (Me. 2021). However, the bill died between houses on June 15, 2021. See *Summary of LD 553*, STATE OF ME. LEGISLATURE, <https://legislature.maine.gov/LawMakerWeb/summary.asp?paper=HP0398&SessionID=14> [<https://perma.cc/S7UY-AKYA>].

New York City laws are limited in scope, as they only apply to workers in specific occupations. The Secure Jobs Act, currently pending in the Illinois state legislature, is the most pro-worker model in terms of its scope and progressive provisions.

#### *A. Montana: An Employer-Friendly Model*

In July 1987, Montana became the first—and currently, only—state in the country to enact a just cause law.<sup>60</sup> The state legislature recently amended the statute to make it more employer-friendly, effective April 2021.<sup>61</sup> However, there has been growing momentum in states and localities to adopt more progressive just cause laws to protect workers, especially in light of the COVID-19 pandemic.

Under the current version of the Montana Wrongful Discharge Act, a discharge is unlawful if:

- (a) [I]t was in retaliation for the employee’s refusal to violate public policy or for reporting a violation of public policy;
- (b) the discharge was not for good cause and the employee had completed the employer’s probationary period of employment; or
- (c) the employer materially violated an express provision of its own written personnel policy prior to the discharge, and the violation deprived the employee of a fair and reasonable opportunity to remain in a position of employment with the employer.<sup>62</sup>

The statute defines good cause as “any reasonable job-related grounds” including “the employee’s failure to satisfactorily perform their job duties,” “disruption of the employer’s operation,” and “material or repeated violation[s]” of the employer’s express policies.<sup>63</sup> In 2021, the legislature expanded the definition of good cause to also include “other legitimate business reasons determined by the employer while exercising the

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<sup>60</sup> Wrongful Discharge from Employment Act, 1987 Mont. Laws 1764-67 (codified as amended at MONT. CODE ANN. §§ 39-2-901 to -914 (2021)).

<sup>61</sup> McKenzie McCarthy, *Changes to the Montana Wrongful Discharge Act*, MONT. ASS’N OF CNTYS. (July 1, 2021), <https://www.mtcounties.org/news/state-news/changes-to-the-montana-wrongful-discharge-act> [<https://perma.cc/L7WN-PHPE>].

<sup>62</sup> § 39-2-904(1)(a)-(c). Under the original statute, a discharge was wrongful if the employer simply violated its own personnel policy. § 39-2-904(3) (1987). Now, in light of the 2021 amendment, the employer’s violation of its policy must be material *and* deprive the employee of a fair process. Compare *id.* § 39-2-904(1)(c) (2011) with *id.* § 39-2-904(1)(c) (2021) (requiring a material violation of a written personnel policy that deprived the employee of fair process).

<sup>63</sup> MONT. CODE ANN. § 39-2-903(5)(a)-(c) (2021).

employer's reasonable business judgment."<sup>64</sup> Thus, the amended language grants employers significantly broader discretion to terminate employees than in prior years, but still requires the employer to articulate a reason.

### B. Philadelphia and New York City: Occupation-Specific Models

Thanks to union lobbying efforts, Philadelphia and New York City passed progressive just cause legislation to protect employees in certain low-wage occupations.<sup>65</sup> In 2019, the Philadelphia City Council enacted the Wrongful Discharge from Parking Employment Ordinance, which instituted a just cause standard for parking employees.<sup>66</sup> The law is estimated to provide protections for nearly 1,000 employees throughout the city.<sup>67</sup>

In 2021, New York City enacted similar legislation aimed at the fast food industry.<sup>68</sup> The New York City law defines just cause as an "employee's failure to satisfactorily perform job duties or misconduct that is demonstrably and materially harmful to the fast food employer's legitimate business interests."<sup>69</sup> The law outlines several factors for determining just cause and requires employers to use progressive discipline, except in instances of an employee's egregious misconduct or egregious failure to perform their job duties.<sup>70</sup> Further, it stipulates that employers must conduct discharges based on bona fide economic reasons in order of reverse seniority.<sup>71</sup>

To be clear, these local laws are more progressive and pro-worker than the Montana statute described above. However, the Philadelphia and New York City laws are limited in coverage because they only apply to workers in specific occupations—parking and fast food, respectively. This leaves other nonunionized low-wage workers without adequate workplace protections. Therefore, the best model in terms of its sweep and scope is the Illinois bill, discussed below.

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<sup>64</sup> Compare *id.* § 39-2-903(5)(d) with *id.* § 39-2-903(5) (2011). See also McCarthy, *supra* note 61 (explaining that the 2021 amendments "give[] the employer more discretion on the decision to terminate").

<sup>65</sup> See Juliana Feliciano Reyes, *City Council Approves 'Just-Cause,' a Cutting-Edge Worker Protection Law, for the Parking Industry*, PHILA. INQUIRER (May 16, 2019), <https://www.inquirer.com/news/just-cause-firing-bill-philadelphia-parking-lot-workers-seiu-32bj-20190516.html> [<https://perma.cc/5UJM-GSCV>]; Mayor de Blasio Signs "Just Cause" Worker Protection Bills for Fast Food Employees, CITY OF N.Y. (Jan. 5, 2021), <https://www1.nyc.gov/office-of-the-mayor/news/005-21/mayor-de-blasio-signs-just-cause-worker-protection-bills-fast-food-employees> [<https://perma.cc/4FEL-9PDV>].

<sup>66</sup> PHILA., PA., CODE § 9-4700 (2022). The law defines parking employees as "any person employed on the premises of a public parking garage, public parking lot, or for a valet parking operator." *Id.* § 9-4701(6).

<sup>67</sup> Reyes, *supra* note 65.

<sup>68</sup> Wrongful Discharge of Fast Food Employees, N.Y.C., N.Y. ADMIN. CODE § 20-1271-75 (2022).

<sup>69</sup> *Id.* § 20-1271.

<sup>70</sup> *Id.* § 20-1272(b)-(c).

<sup>71</sup> *Id.* § 20-1272(h).

### C. Illinois: A Progressive, Pro-Worker Model

In February 2021, Illinois State Representative Carol Ammons and Senator Celina Villanueva introduced the Illinois Employee Security Act, also known as the Secure Jobs Act.<sup>72</sup> Not only does this bill contain the hallmarks of other just cause laws, including defining just cause as the three categories described in Section II.A,<sup>73</sup> using a system of progressive discipline as described in Section II.B,<sup>74</sup> and requiring written reasons for the termination as discussed in Section II.C,<sup>75</sup> this bill provides greater protections for employees in several respects.

First, in contrast to the Philadelphia and New York City laws, the Illinois just cause bill would apply to most employers and employees in the state, including local governments and school districts, while excluding federal and state employees.<sup>76</sup> Indeed, this expansive scope would fundamentally alter the employment landscape in the state, providing protections to potentially millions of workers.<sup>77</sup>

Second, in addition to the three standard categories of just cause,<sup>78</sup> the bill specifies other conduct that does *not* constitute just cause. The bill

<sup>72</sup> H.R. 3530, 102d Gen. Assemb. (Ill. 2021); S. 2332, 102d Gen. Assemb. (Ill. 2021). See David Roeder, *Labor Allies Target 'At-Will' Employment Rules*, CHI. SUN TIMES (Mar. 31, 2021, 3:22 PM), <https://chicago.suntimes.com/business/2021/3/31/22360796/labor-allies-target-at-will-employment-rules-secure-jobs-act> [<https://perma.cc/N5NF-K2NH>]. The bill is supported by several pro-worker organizations and labor unions, including the Raise the Floor Alliance, SEIU Healthcare, and the Chicago Teachers Union. *Id.* As of February 18, 2022, the bill has gone back to the Rules Committee after being assigned to the House Labor & Commerce Committee. *Bill Status of HB3530*, ILL. GEN. ASSEMB., <https://www.ilga.gov/legislation/BillStatus.asp?DocNum=3530&GAID=16&DocTypeID=HB&SessionID=110&GA=102> [<https://perma.cc/J52A-R5M9>]. For a detailed report on how the Secure Jobs Act would transform the employment landscape in Illinois, see UGO OKERE, KARA RODRIGUEZ, PAUL SONN, IRENE TUNG & SOPHIA ZAMAN, NAT'L EMP. L. PROJ. & RAISE THE FLOOR ALL., *SECURE JOBS, SAFE WORKPLACES, AND STABLE COMMUNITIES: ENDING AT-WILL EMPLOYMENT IN ILLINOIS* (2021), <https://s27147.pcdn.co/wp-content/uploads/Secure-Jobs-Safe-Workplaces-Stable-Communities-Ending-At-Will-Employment-Illinois.pdf> [<https://perma.cc/MV6B-2EHF>].

<sup>73</sup> H.R. 3530 § 5.

<sup>74</sup> *Id.* § 10(c).

<sup>75</sup> *Id.* § 10(f).

<sup>76</sup> *Id.* § 5 (incorporating the definition of employee and employer from Illinois Wage Payment and Collection Act, 820 ILL. CONS. STAT. 115/1 (2021), which excludes state and federal employees from its definition). The law also does not apply to casual employees, defined as “employee[s] who perform[] work in or around a private home that is irregular, uncertain, or incidental in nature and duration.” *Id.*

<sup>77</sup> See Naomi Lopez Bauman, *Labor-Union Membership in Illinois: Public vs. Private*, ILL. POL'Y (Apr. 1, 2015), <https://www.illinoispolicy.org/labor-union-membership-in-illinois-public-vs-private> [<https://perma.cc/55HB-XJEQ>]. On average, between 2010 and 2014, approximately 4.6 million public and private employees in Illinois did not belong to a union, and thus were potentially subject to at-will employment. *Id.* Of course, this figure also includes employees potentially covered by individual employment agreements containing just cause provisions. However, the precise number of Illinois workers covered by these agreements is unclear.

<sup>78</sup> H.R. 3530, § 5.

stipulates that “[j]ust cause may not be based on off-duty conduct unless there is a demonstrable and material nexus between the conduct and the employee’s job performance or the employer’s legitimate business interests.”<sup>79</sup> This language is key to protecting workers from retaliation based on off-premise and off-duty conduct that their employer disagrees with or finds offensive, such as political expression or marijuana use.

For example, an individual may be motivated to express their views on political and social issues by participating in public protests or posting on social media in their spare time. Contrary to popular belief, the First Amendment does not restrain private employers.<sup>80</sup> Likewise, political affiliation is not a protected class under federal antidiscrimination law,<sup>81</sup> and only a handful of states make it unlawful for employers to discriminate on the basis of one’s political affiliation or political activities.<sup>82</sup> Indeed, employers have significant discretion to fire employees for off-duty speech, including expressive conduct.

Some states, however, have statutes that prohibit employers from taking adverse actions against employees for lawful, off-duty conduct.<sup>83</sup> For example, New York recently amended its law to prohibit adverse employment actions based on an employee’s lawful, recreational marijuana use while off-duty and off-premises.<sup>84</sup> Presumably, under the Illinois bill, employers could still take action against employees for off-duty, unlawful conduct, so long as there is a “demonstrable and material nexus” to the employee’s job performance or the employer’s business interest.<sup>85</sup>

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<sup>79</sup> *Id.* § 10(a).

<sup>80</sup> U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

<sup>81</sup> 42 U.S.C. § 2000e-2(a) (protecting against employment discrimination on the basis of race, color, religion, sex, and national origin, but not political beliefs).

<sup>82</sup> California, New York, and the District of Columbia laws protect against employment discrimination on the basis of political affiliation or political activities. *See* CAL. LAB. CODE §§ 1101–02 (West 2021); D.C. Human Rights Act, D.C. CODE § 2-1402.11 (2022); N.Y. LAB. LAW § 201-d (McKinney 2021). The New York law is relatively narrow, as it only defines “political activities” as running for office, campaigning, or participating in fundraising activities. *Id.* § 201-d(1)(a).

<sup>83</sup> *See, e.g.*, COLO. REV. STAT. § 24-34-402.5(1) (2022); N.Y. LAB. LAW § 201-d(2)(b), (c).

<sup>84</sup> N.Y. LAB. LAW § 201-d(2)(b), (c); *see also* ADULT USE CANNABIS AND THE WORKPLACE: NEW YORK LABOR LAW 201-D, N.Y. DEP’T OF LAB. (2021), <https://dol.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf> [<https://perma.cc/3BPW-3HUA>] (describing the implications of the recent amendment to the New York Labor Law).

<sup>85</sup> H.R. 3530, 102d Gen. Assemb. § 10(a) (Ill. 2021). For example, employers would be permitted to terminate employees who participated in the unlawful attempted insurrection at the United States Capitol on January 6, 2021, so long as they can demonstrate a material nexus to their business interests. Sarah J. Platt & Jimmy F. Robinson, Jr., *Can Employers Fire Rioters? Employers’ Rights in Policing Employee Off-Duty Conduct and Employment Law Consequences of the Capitol Riots*, NAT’L L. REV. (Jan. 15, 2021), <https://www.natlawreview.com/article/can-employers-fire-rioters-employers-rights-policing-employee-duty-conduct-and> [<https://perma.cc/G9QG-QBLE>].

Further, drafted against the backdrop of the COVID-19 pandemic, the bill provides additional protections relating to worker health and safety. Specifically, the bill states that there is never just cause to terminate an employee based on their communications about “workplace practices or policies, including but not limited to health or safety practices or hazards related to COVID-19” or “an employee’s refusal to work under conditions that [they] reasonably believe[] would expose [themselves or others] to an unreasonable health or safety risk, including, but not limited to, risk of illness or exposure to COVID-19.”<sup>86</sup> These are protected activities under the Act, and employers cannot retaliate against employees for raising such concerns or refusing to work on these bases.<sup>87</sup> These provisions are not only grounded in concerns about workplace safety and public health, but also in whistleblower and free speech principles, so that citizens have access to information about matters of public concern.<sup>88</sup>

Third, the bill provides employees protection against blacklisting. Blacklisting occurs when an employer prevents or attempts to prevent a former employee from obtaining employment with another employer through verbal or written statements.<sup>89</sup> Of course, employers are permitted to provide truthful statements about a former employee’s discharge to a future employer.<sup>90</sup> Under common law, the typical recourse against blacklisting by a former employer is through defamation or tortious interference with contractual relationship claims.<sup>91</sup> Lawsuits are expensive and time consuming, so the anti-blacklisting provision is particularly beneficial to low-wage

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<sup>86</sup> H.R. 3530 § 10(h)(1), (2). Section 10(h)(1), the whistleblower aspect of the law, includes a broad range of recipients and mediums regarding workplace safety communications. Such communications may be made to the employer, an agent, other employees, government agencies, or members of the public, arguably including the media. *Id.* Furthermore, employees may blow the whistle via print, online, social media, or other media, presumably including verbal communications. *Id.*

<sup>87</sup> *Id.* § 10(h).

<sup>88</sup> *Cf.* Ruth Ann Strickland, *Whistleblowers*, FIRST AMEND. ENCYC., <https://www.mtsu.edu/first-amendment/article/1029/whistleblowers> [<https://perma.cc/5JTF-GLK5>] (stating that whistleblowers “expose . . . illegal conduct that could affect public safety,” among other things); *Connick v. Myers*, 461 U.S. 138, 146-48 (1983) (establishing First Amendment test for public employee speech on matters of public concern, in which courts must look to the “content, form, and context” of a statement, and determine whether it “relat[es] to any matter of political, social, or other concern to the community” to garner constitutional protection).

<sup>89</sup> H.R. 3530, § 35.

<sup>90</sup> *Id.*

<sup>91</sup> *See* DAVID J. CARR, ED.-IN-CHIEF, NON-COMPETITION, TRADE SECRETS, PROPRIETARY INFO., & DUTY OF LOYALTY SUBCOMM. OF THE EMP. RTS. & RESPS. COMM. OF THE AM. BAR ASS’N LAB. & EMP. SECTION, BLACKLISTING: 2011, at 4 (2011), [https://www.troutman.com/images/content/4/4/v1/4446/Blacklisting\\_2011.pdf](https://www.troutman.com/images/content/4/4/v1/4446/Blacklisting_2011.pdf) [<https://perma.cc/34AQ-A7DK>] (“[P]laintiffs have recovered against employers engaging in blacklisting by pursuing common law claims such as defamation, slander, invasion of privacy, intentional infliction of emotional distress, and tortious interference with an employment relationship.”).

workers who might not otherwise have the means to fight an uphill legal battle against Goliath.<sup>92</sup>

Finally, the bill provides for severance pay upon termination.<sup>93</sup> An employee would “accrue one hour of severance pay for every 12.5 hours worked during [their] first year of employment, and for every 50 hours thereafter[,]” payable at employee’s hourly rate upon discharge.<sup>94</sup> This is not a new concept—high-level individual employment agreements often provide severance pay.<sup>95</sup> For low-wage workers in particular, guaranteed severance pay could mitigate immediate financial hardships, such as rent and childcare payments, and provide a cushion during the search for new employment. As discussed in Section I.B, Black and Latinx workers are more likely to experience extended unemployment periods, and the racial wealth gap impacts their ability to stay afloat financially during those periods.<sup>96</sup> Thus, guaranteed severance payments would help alleviate the financial burdens faced, particularly by Black and Latinx workers, in the wake of job loss.

#### IV. THE NEED FOR JUST CAUSE LEGISLATION

The recent legislative efforts in Philadelphia (2019), New York City (2021), and Illinois (2021) discussed above indicate there is growing momentum to do away with the at-will standard and provide greater employment protections to employees. Indeed, recent polling indicates there is strong support for the adoption of just cause laws across party lines, income levels, and geography: “71 percent of voters in battleground congressional districts—including 67 percent of Republicans and 75 percent of Democrats—expressed support” for such legislation.<sup>97</sup> This trend holds true across income brackets: 75% of workers with annual household income under \$50,000, 70% of workers with annual household income between \$50,000 and \$100,000, and 66% of workers with annual household income over \$100,000 expressed support for a just cause standard.<sup>98</sup> Furthermore, “[t]hree out of four suburban and rural likely voters favored just cause laws, as did 66 percent of

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<sup>92</sup> Thirty states have anti-blacklisting statutes on the books, though their scope, application, and available remedies vary. *See id.* at 22 & n.7. Anti-blacklisting statutes can simply deter employers from engaging in this behavior. To the extent the statutes do not deter, it is easier for plaintiffs to state a claim for blacklisting than defamation because blacklisting claims do not require proof of harm. *See id.* at 23.

<sup>93</sup> H.R. 3530 § 15.

<sup>94</sup> *Id.*

<sup>95</sup> *See* TUNG ET AL., *supra* note 13, at 22.

<sup>96</sup> *See supra* Section I.B.

<sup>97</sup> TUNG ET AL., *supra* note 13, at 21.

<sup>98</sup> *Id.*

urban likely voters.”<sup>99</sup> These data illustrate there is a broad coalition of support for just cause legislation and the time is ripe to act.

There has been some discussion about just cause laws at the federal level. During his 2020 presidential campaign, Senator Bernie Sanders called for a national just cause law in his pro-worker platform.<sup>100</sup> Other groups have urged President Biden to adopt a just cause standard for federal contractors via Executive Order.<sup>101</sup>

Indeed, Congress can pass a just cause statute pursuant its powers under the Commerce Clause.<sup>102</sup> The obvious advantage to a federal law is uniformity, as the same standard would apply to all covered employers and employees, regardless of geographic location. However, a federal law might fail for two reasons. First, despite the broad support described above, a federal bill is politically unlikely. Even if legislators introduced and passed a bill in the currently Democrat-controlled House of Representatives, the bill would likely die in the Senate, given its current partisan makeup and the filibuster.<sup>103</sup> Second, and more importantly, regulation of employment

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<sup>99</sup> *Id.*

<sup>100</sup> Bryce Covert, *Bernie Sanders Plan to Reshape Employment Includes an Under-the-Radar Idea that Would Be a Huge Win for American Workers*, BUS. INSIDER (Jan. 31, 2020, 8:57 AM), <https://www.businessinsider.com/bernie-sanders-plan-end-will-employment-good-workers-wages-2019-12> [<https://perma.cc/L9MR-NDQW>].

<sup>101</sup> Karla Walter & Anastasia Christman, *Service Contract Workers Deserve Good Jobs*, CTR. FOR AM. PROGRESS (Apr. 9, 2021, 5:30 AM), <https://www.americanprogressaction.org/issues/economy/reports/2021/04/09/179997/service-contract-workers-deserve-good-jobs> [<https://perma.cc/7R65-ARST>].

<sup>102</sup> U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause permits Congress to regulate channels, instrumentalities, and substantial effects of interstate commerce. See Diane McGimsey, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CALIF. L. REV. 1675, 1688-1701 (2002) (discussing the history of the three prongs of the Commerce Clause test). Indeed, Congress has passed—and the Court has upheld—several employment and labor laws pursuant to this power. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act against a Commerce Clause challenge); *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act against a Commerce Clause challenge); Occupational Health and Safety Act of 1970, 29 U.S.C. § 651(b) (noting the congressional basis for the Act is the commerce power); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 458 (1976) (Stevens, J., concurring) (“In my opinion the commerce power is broad enough to support federal legislation regulating the terms and conditions of state employment, and therefore, provides the necessary support for the 1972 Amendments to Title VII, even though Congress expressly relied on § 5 of the Fourteenth Amendment.”); *Equal Emp. Opportunity Comm’n v. Wyoming*, 460 U.S. 226 (1983) (upholding the application of the Age Discrimination in Employment Act to state and local governments as a valid exercise of the commerce power); *Americans with Disabilities Act*, 42 U.S.C. § 12101(b)(4) (noting the constitutional bases for the Act are the Commerce Clause and Fourteenth Amendment).

<sup>103</sup> Throughout history, Republicans have used the filibuster and cloture rule to delay or block civil rights legislation, and this trend holds true today. See Tim Lau, *The Filibuster, Explained*, BRENNAN CTR. FOR JUST. (Apr. 26, 2021), <https://www.brennancenter.org/our-work/research-reports/filibuster-explained> [<https://perma.cc/LPM5-R6PD>] (discussing the history and mechanics of the filibuster); Sarah Binder, *Mitch McConnell Is Wrong. Here’s the Filibuster’s ‘Racial History.’*, WASH. POST (Mar. 24, 2021, 6:36 PM), <https://www.washingtonpost.com/politics/2021/03/24/>

relationships is largely left to the states.<sup>104</sup> More specifically, the at-will presumption is a function of state common law, rather than federal statute.<sup>105</sup>

If Congress does not act, states can—and should. States should follow in the footsteps of Montana, and hopefully Illinois, by passing just cause laws that apply to their entire workforce. State legislators can refer to the statutes described in Part III to craft legislation containing the hallmarks of a just cause law—defining just cause to include the three traditional categories, mandating a system of progressive discipline, and requiring that employers provide written explanations at the time of discharge.<sup>106</sup> Moreover, legislators should look to the Illinois Secure Jobs Act as a gold standard, progressive, just cause law, because it provides the most protection to employees, especially in light of COVID-19.<sup>107</sup> As discussed throughout this Essay, replacing the at-will doctrine with a just cause standard is grounded in due process principles of adequate notice and fair process, and will address racial and gender inequities in the labor force.

#### CONCLUSION

For far too long, the at-will doctrine has given employers significant power over employees' livelihoods and wellbeing. It is time for the United States to join other industrialized nations to provide its employees with common sense protections against arbitrary and unfair dismissals. Though this seems like a massive undertaking given the long history of at-will employment in the United States, at bottom, the just cause standard simply

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mitch-mcconnell-is-wrong-heres-filibusters-racial-history [https://perma.cc/4DQF-V]2W) (“Of the 30 measures we identified between 1917 and 1994, exactly half addressed civil rights—including measures to authorize federal investigation and prosecution of lynching, to ban the imposition of poll taxes and to prohibit discrimination on the basis of housing sales and rentals.”); Li Zhou, *Democrats’ Failure on Filibuster Reform Will Haunt Them*, VOX (Jan. 19, 2022, 10:34 PM), <https://www.vox.com/2022/1/19/22881837/senate-filibuster-vote-voting-rights-joe-manchin-kyrsten-sinema> [https://perma.cc/4FZC-H7D9] (discussing the recent filibuster of the Freedom to Vote Act and John Lewis Voting Rights Advancement Act, as well the impact of the filibuster on other agenda items including police reform, universal background checks for firearms purchases, and LGBTQ+ workplace protections).

There have been growing calls on the left to abolish the filibuster; however, Democrats failed to garner necessary support to reform the Senate rules. See Caroline Fredrickson, *The Case Against the Filibuster*, BRENNAN CTR. FOR JUST. (Oct. 30, 2020), <https://www.brennancenter.org/our-work/research-reports/case-against-filibuster> [https://perma.cc/99N2-ZR4L] (advocating for the abolition of the filibuster); Zhou, *supra* (discussing Democrats’ failed attempt to change the filibuster rules on voting rights legislation). In consideration of this current political reality, it is unlikely to find sixty votes to successfully pass a federal just cause law.

<sup>104</sup> See discussion *supra* note 2.

<sup>105</sup> See Schiller, *supra* note 1, at 2.

<sup>106</sup> See *supra* Parts II, III.

<sup>107</sup> H.R. 3530, 102d Gen. Assemb. (Ill. 2021).

requires employers to articulate a bona fide reason for dismissal and provide adequate notice and process to employees. Indeed, decent employers already do these things. There is growing momentum, especially in light of the COVID-19 pandemic, to replace the at-will system with a just cause standard to put power back into the hands of employees and help address workplace and societal inequities. As society continues to reckon with and address racial inequities in 2022 and beyond, coalitions of grassroots advocates should come together to urge state legislators across the country to adopt just cause laws to provide increased protections for workers.