The Role of Employment At-Will on Job Loss and Unemployment in the United States

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Abstract

The United States has lost more than 8 million jobs since the recession starting in 2008. This level of job loss and corresponding unemployment is significantly greater than what has occurred in other developed countries. Furthermore, reviewing swings in the unemployment rate in the developed countries shows the United States has exaggerated unemployment swings between times of prosperity and economic malaise compared to other developed nations. The doctrine of employment-at-will is explored as one of the causal forces in the differences between the United States and other compared economies wherein either the employer or the employee has the right to terminate an employment relationship at any time, for any reason or no reason. The "Employment at Will" doctrine is presented with an historical context. Limitations and constraints are presented influencing the frequency of its use domestically including ethical considerations. Suggestions for Human Resource Managers that deal with employment terminations are also offered. With the recession technically over (National Bureau of Economic Research, 2010), it is time to provide some insight into why job losses occurred at such a high rate in the United States.

According to the U. S. Department of Labor (2010), the United States lost more than 8 million jobs between June of 2008 and December 2009. These job losses were unprecedented except for the "Great Depression" that occurred during the 1930's. More worrisome is the prospect that many who have lost employment will remain permanently unemployed or underemployed with little likelihood of regaining previous earning levels (Van Horn, 2010). Another consequence of job loss is that workers who remain employed will be less loyal, more skeptical regarding management communications, and less likely to incur risk in decisions or embrace the entrepreneurial spirit many employers need (Gurchiek, 2010).

Despite the global nature of the recession, the American economy shed jobs at a faster and more significant pace compared to other developed

economies (U. S. Department of Labor, 2010a). The disproportionate amount of job loss in the U. S. economy is also reflected in the unemployment rates when compared to other developed economies as presented in Table 1 below. The unemployment rates allow comparisons of countries with different labor market sizes without distortions influenced by population size. The Bureau of Labor Statistics indicates rates are comparable across nations including the United States.

Table 1: Unemployment Rate Comparisons of Developed Economies

Year 2009	U. S.	Australia	Japan	France	Germany	Italy	Nether-lands	Sweden	United Kingdom
	9.3%	5.6%	4.8%	9.1%	7.8%	7.9%	3.4%	8.2%	7.7%

Source: Bureau of Labor Statistics International Comparisons of Annual Labor Force Statistics

As seen from the snapshot year of 2009, unemployment as measured by the official unemployment rate was higher domestically compared to other developed nations. Closer analysis over a ten year period reveals that the U. S. unemployment rate varies at a greater proportion compared to other developed countries. This analysis, depicted in Table 2, shows the range of unemployment rates from the highest rate to the lowest rate during the ten year period from 2000 to 2009.

Table 2: Highest, Lowest, and Range of Unemployment Rates 2000 - 2009

Rates	U. S.	Australia	Japan	France	Germany	Italy	Nether-lands	Sweden	United Kingdom
Highest	9.3%	6.8%	4.9%	9.1%	11.2%	10.2%	4.8%	8.2%	7.7%
Lowest	4.0%	4.2%	3.6%	7.4%	7.5%	6.2%	2.3%	5.0%	4.8%
Range	5.3%	2.4%	1.3%	1.7%	3.7%	4.0%	2.5%	3.2%	2.9%

Source: Bureau of Labor Statistics International Comparisons of Annual Labor Force Statistics

From these figures, an unemployment range depicting labor market unemployment variability can be derived. When the range is smaller fewer workers are dislocated in the labor market over the decade. To the contrary, a larger range indicates more displacement of workers occurs over the same time frame. These swings in unemployment reflect job losses and gains but underscore disruptions of workers through varying economic conditions. It also presents the proposition that despite the global nature of economic conditions, individual economies vary dramatically in the decisions that support job losses or gains.

From Table 2, it becomes apparent that the U.S. has a greater variability in adding or removing employees. When economic times are favorable, the U.S. economy adds jobs reflecting lower unemployment rates

compared to most other developed economies. Only Japan with a historical culture of lifetime employment (Koshiro, 2005) and the Netherlands with a more consensus oriented economic system have lower unemployment rates. The consensus system brings cooperation between employers, unions, and the Government regarding labor relations and employment decisions which supports employment even during slow economic times (Mariecke, 2008). In contrast, the U.S. economy sheds jobs at a faster pace when economic conditions are poor. Only Germany and Italy had higher unemployment rates and these rates occurred earlier in the ten-year time frame when these countries had employers who were slow to hire even during good economic times. Germany and Italy had more worker protections earlier in the decade and these protections discouraged employers from hiring employees because once they were hired they were difficult to dispose of when economic conditions changed for the worse. Consequently, Germany and Italy had higher unemployment rates earlier in the decade and do not reflect the current economic malaise (European Monitoring Centre on Change, 2005).

The most significant and obvious finding from the previous discussion involves the range figures where the U. S. has no peer. Movement between unemployment and employment is in many cases more than twice as high domestically compared to many other countries. An outgrowth of these findings is that high ranges reflect a less secure workforce in terms of continuing employment. Movement between working and not working as seen in Table 2 is higher in the United States labor force.

This paper investigates differences in employment relations across developed economies. Specifically, the "Employment at Will" doctrine, prevalent in the U.S. economy, is explained and presented as one of the factors that influence variability in employment decisions. The employment at will doctrine is defined and explained from a historical perspective. Its prevalence or lack thereof is discussed, and constraints on the use of the practice are presented. Inherent in the discussion are the ethics issues that arise when employment at will is used. In addition, implications for human resource managers are considered.

Employment At-Will Defined

According to Law.com online dictionary, at will employment is a provision found in many employment contracts where the employee works at the will of the employer. Frequently employers insert At-Will Clauses in an employment agreement in order to avoid claims of termination in breach of contract, breach of the covenant of good faith and fair dealing, or discrimination. Inclusion of such terms puts the burden on the discharged

employee to show that their particular employment situation was permanent. The employer uses the provision to claim they could fire the employee at any time, no matter what the reasons (Law.com, 2007). This provision means that the doctrine actually operates in the absence of an explicit contract to the contrary. In the United States, employment at-will is the prevailing form of employer-employee relationship. That is, there is no real contract unless negotiated by a union that changes the employees hiring into part of a collective bargaining agreement between employers and their union counterparts (Stone, 2007). In the absence of union involvement, an employee may quit at any time or be fired at any time, with or without reason, with or without warning. The hiring has no fixed terms and any agreed-upon arrangement may be changed by the employer at any time. In theory, the employee could disagree with the new terms, complain, or refuse to comply, whereupon the employer could discharge the employee. Under the at-will doctrine, the employee would have no recourse.

The History of Employment At-Will

Employment at will has long been a distinctive and prevailing doctrine in American labor law. It has its roots in a parting-of-ways with English common law in the late 19th century. English common law viewed employment as a contractual relationship that bound both parties to explicit or implicit agreed upon terms. According to English common law, when the duration of the employment contract was unspecified it was construed generally to be a hiring for one year unless different intent could easily be demonstrated (Summers, 2000). As a young country in the nineteenth century, the United States largely followed English common law, *except* for the presumption of one year terms. Local courts followed no particular precedent in rulings with the result being that by 1870, individual States had no consensus across employment statues. In 1877, employment law writer Horace Wood authored "*A Treatise on Master and Servant.*" This work resolved the existing contradictions in American labor law by making a dogmatic declaration which is considered to be the source of the American employment at will rule. The rule has evolved as being inflexible in that a general hiring or indefinite hiring is *prima facie* a hiring at will. If the employee seeks to make it out a yearly hiring, the burden is on him to establish it by proof (Wood, 1877, in Dunford & Devine, 1998). Not universally accepted at first, court decisions subsequently gave credibility and authority to the doctrine and it became the prevailing common law of employment arrangements in the United States (Summers, 2000).

One such influential articulation of the employment at will doctrine was made by the Tennessee Supreme Court in 1884 in the case of Payne v.

Western & Atl. R.R. The verdict established that employers may dismiss their employees at will, be they many or few, for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong. The law cannot compel employers to employ workmen, nor to keep them employed (Schwab, 1993)

In the early part of the twentieth century through the 1950s in the United States, the common law at-will doctrine was a cornerstone of American labor law. This form of working relationship prevailed in nearly all employment situations with the exception of collective bargaining agreements with unionized workforces. During this period it was recognized that the fundamental assumptions that underpinned employment at will gave disproportionate power to employers.

Changes in the United States economy including increased industrialization and the emergence of monopolies led to a shift in Federal labor law. In 1935, the United States Congress under guidance and stewardship of then President Franklin D. Roosevelt passed the National Labor Relations Act. This major piece of legislation set the basic structure for collective bargaining where terms and conditions of employment were negotiated. Until the early 1960's a union contract was the only protection against unjust dismissals in the workplace (Epstein, 1984).

A more profound shift in the legal environment occurred in the 1960's giving whole classes of individuals' protection from dismissal without cause. The 1964 Civil Rights Act established protections based upon race, color, religion, sex, and national origin. The Age Discrimination in Employment Act soon followed where older worker protections were also legislated. More recently the 1990 Americans with Disabilities Act included protections for disabled employees. These federal laws aimed to prohibit employment discrimination including unjust terminations to the protected classes of employees covered in the previously mentioned legislation (Shaughnessy, 2003)..

Shaughnessy (2003) lists three additional exceptions to the employment at will doctrine that are commonly recognized by states. The first is the Public Policy Exception where it is illegal to fire an employee who refuses to violate public policy. Whistle blowing, acting against employees who file worker's compensation claims, or acting against employees protected in legislation previously mentioned are examples. The second exception to employment at will is the implied contract exception where the courts have said that an employee could not be dismissed if the dismissal contradicts oral or written statements regarding the terms of employment made by the employer. The implied contract must be construed

as legally binding. The third exception to employment at will is the covenant of good faith and fair dealing exception. With this exception, courts interpret the employment relationship as based on an agreement between both parties in good faith and fair dealing. The requirement establishes fair and just actions by both employer and employees. These three exceptions taken together have come to comprise the common law construct of unjust dismissal or wrongful discharge (Phillips, 1992). In essence, the employment at will doctrine while still prevalent in the United States economy has some limitations (Dunford & Devine, 1998).

In contrast to the prevailing employment at will doctrine in the United States, many other countries have long restricted an employer's ability to terminate workers at will. In Europe, high levels of severance pay requirements restrict employers in their termination actions (Lazear, 1990). Another restriction commonly found includes lengthy advance notification rules when terminations are considered. Employers often feel the costs outweigh the advantages of downsizing the workforce to adjust to the current economic demands ((European Monitoring Centre on Change, 2005). Finally, the lifetime employment culture in Japan (Koshiro, 2005) and the consensus oriented economic systems of some European countries (Mariecke, 2008) previously discussed are the employment paradigms that currently operate in place of "at will" orientations. The employment at will doctrine is primarily a United States employment perspective.

Ethical Issues: For, Against, and a Comprimise

Employment at will recognized by both federal and state courts as conferring disproportionate power on the employers, has its staunch defenders. Epstein (1984) declares that the employment at will doctrine is supported in the texts of freedom of contract and the system of voluntary exchange. He describes the employer-employee relationship in terms of freedom of contract and voluntary exchange, and cites the Payne v. Western & Atlantic Railroad case as underscoring his point. Despite the fact that the Payne decision was nearly 100 years old at the time, Epstein argues for its relevance to today by noting the survival and prevalence of employment at will in the American labor economy. According to Epstein (1984), without employment at will, an enormous amount of undesirable complexity enters into the law of employment relations. Foremost is the increased frequency of civil litigation which works to the disadvantage of both the employers and the employees whose conduct they govern.

Despite the continued emphasis of employment at will, Roehling (2003) provides an in-depth analysis of the ethical issues that render the at-will doctrine problematical. He identifies and discusses three primary ethical

concerns with the at will employment relationship which are considered below:

1. *Manipulation of employee perceptions and informed consent* - does the employee fully understand the nature of the terms (or lack thereof), and has the employer created the impression of employer obligation while retaining the legal right to discharge?

2. *Potential decrease in minority hiring* - due to fair employment laws, employers now must show just cause in the discharge of any protected class of employee. Employers who place a premium on at will employment can perceive minorities as more difficult to dismiss and be reluctant to hire them in the first place.

3. *Employers who utilize at will relationships in their workplace must still analyze discharge decisions within ethical boundaries*. The ethical implementation of at will can present difficulties for employers who must take into consideration the following:

a. the discrimination prohibitions issued by federal and state courts;
b. whether or not the organization has, knowingly or unknowingly, made representations of job security, and
c. whether or not the discharge is based on personal characteristics unrelated to performance (Roehling, 2003).

Phillips (1992) argues for a middle way in the debate over employment at will. He notes that the American legal and economic policy makers are currently engaged in a polarized debate over the ethics, implementation, and limits of the employment at will doctrine, where neither side fully considers the others arguments. This creates a need for a compromise, a position between the two extremes of the discussion. While the utilitarianism of at will cannot be ignored, it does not have to be, and should not be, the only criterion for analysis of employment decisions. He focuses more on the rights theory where the right of employees not to suffer arbitrary dismissal is advanced. Individual dismissal issues must be considered on their own merits and arguments for a dictated legal, historical, or cultural solution are not very compelling. This is true regardless of whether the preferred solution is to infer an "at will" or just cause employment relationship. Each extreme induces one to conclude that because there is no right discharge policy for everyone, dismissal policies should try to balance the rights and protections of employment and the sizing of the workforce to balance with current economic conditions (Callahan, 1990). That is, no one approach should be made to fit all. Some employees and employers can be fully cognizant of and benefit from the at will nature of their particular situation such as what is found in nonstandard employment

relations including part time, temporary, and contract work relationships (Kalleberg, 2000). Other employees benefit from the legal protections afforded to certain classes of workers described previously and from the protections offered within the boundaries of collective bargaining and union contracts.

Implications for Human Resource Professionals

So what does the tension between at will employment and just cause doctrine mean for the Human Resource professional? The type of work arrangement would be a major factor to consider. As already mentioned, nonstandard work arrangements lend themselves more easily to falling under the at will employment relationship. Schwab (1993) has noted the variations of work arrangements from an employment life cycle perspective. He offers the view that the danger of employer opportunism is greatest for late-career workers and it is also a problem for some young employees. In response, laws have been passed to offer employment protections for workers at both the beginning and end of the work life cycle, while maintaining a presumption of at-will employment for midcareer employees. As mentioned previously, the Age Discrimination in Employment Act provides protections to older employees. For young employees, the Fair Labor Standards Act Employment of Minors provisions offers protections to these workers. Even within the United States, no one size fits all with regard to at will employment.

With it then being understood that at will employment may suit for some working relationships and not for others, it seems that the HR professional should first be clear on which relationship they are managing. If top-level management of the organization has decided that the employment terms are to be at will, the obligation of the HR professional is to clearly communicate that to the intended hire. If a contract is in place, its terms should be explicit. An often unacknowledged but important role that HR professionals play is that of managing employee expectations (King, 2000). HR personnel set the tone of the organization through policies and procedures. Policies concerning job security are critical to new employees and is especially true for white collar workers. A white collar worker whose employment is not of a temporary nature like a temporary employment agency may reasonably have some expectation of job security. If a position is vulnerable to elimination through restructuring or downsizing, it is vital that the HR function of the organization indicate that to current employees or to prospective or new employees.

The expectation of job security an employee may have is based on a psychological contract. The psychological contract is formed from an

individual's belief in or perception of reciprocal obligations between that person and another party (King, 2000). For varying reasons, an employer and an employee may have a different view of the working relationship and its terms, which, in the absence of a written contract, may be totally subjective. Rousseau (1989) suggests that it is the individual's belief in an obligation of reciprocity that constitutes the contract. This belief is unilateral or held by the employee and does not constrain those of the employer. If the employee is terminated they perceive that their psychological contract has been violated. This leads to typical responses such as frustration, anger, resentment, and a sense of injustice. Other employees who remain employed may also garner these same reactions when observing employer termination actions. Creating an angry ex-employee or continuing to employ angry employees is something that HR professionals would do well to avoid. Potential litigation, ill-will, lack of commitment and a reduced entrepreneurial spirit are all negative outcomes for the employer. Often a tarnished public image goes along with terminations that are viewed as unjust. The way to deflect the possibility of such damage is clear and consistent communication on a frequent basis. At both the initiation of the employment relationship and continuing throughout the employment exchange, honest and clearly presented dialog is better especially in the face of employment uncertainty when trying to minimize negative consequences (King, 2000). Maintaining a high level of trust and rapport with employees enhances communications and helps employees perceive management assurances as credible even in employment at will situations (King, 2000).

With growing legal protections afforded by courts against wrongful discharge, personnel practices within the human service organization increasingly will have to withstand the test of court scrutiny (Tambor, 1995). HR personnel must realize that all human resource management practices including but not limited to dismissal, can subject the employer to legal review and the associated costs of litigation.

Conclusion

The employment at will doctrine is presented here as a one reason the United States adds or loses jobs at higher rates compared to other developed economies. It is not good or bad but rather the basis for offering or rejecting employment. During good economic times, the United States economy has created more jobs at a faster pace than other countries. Speed in hiring is not tempered by concerns regarding future employment reductions and the corresponding problems associated with it. Conversely, the United States reduces employment during slowing economic times where sizing the work force to meet economic demands can be viewed as a competitive advantage. The history and culture supporting employment at will is well established in

the domestic economy. It may also help to explain why job losses and gains vary more in the United States when compared to other developed economies.

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