

‘JUST CAUSE’ JOB PROTECTIONS:

Building Racial Equity and Shifting the Power Balance Between Workers and Employers

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NATIONAL
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PROJECT

EXECUTIVE SUMMARY

In the United States, most employers can legally fire workers without warning or explanation. This system, known as “at will” employment, can cause great harm to U.S. workers and their families when the paycheck they depend on is there one day and gone the next. By granting employers excessive control over workers’ livelihoods, at-will employment undermines workers’ ability to speak up about mistreatment and perpetuates longstanding racial inequities in the workplace and labor market. The at-will relationship creates an enormous power imbalance between workers and their employers, with far-reaching consequences in the workplace and beyond.

What happens in U.S. workplaces can have implications for the well-being of everyone in this country—as the recent pandemic has shown us—when many workers speaking up about the spread of COVID-19 on the job have faced retaliatory firings. Under the current at-will system, these workers have limited legal recourse.¹

A growing movement of workers and labor organizations around the country is calling for the adoption of “just cause” laws to prohibit terminations without warning or a good cause. Widely popular across the political spectrum, just-cause laws promote economic security and stability for workers and their families and protect workers from being punished or fired in retaliation for speaking up about critical workplace problems such as discrimination or health and safety violations.

In this report, we present new findings from three data sources that shed light on the harmful effects of at-will employment on workers and show broad public support for adopting just-cause protections around the country:

- **Census Job-to-Job Flows data** - Our analysis of the latest U.S. Census Bureau Job-to-Job Flows data illustrates the destabilizing effects on workers and their families of losing a job, especially for Black and Latinx workers (**Figure 1**).²
- **National workforce survey** - Previously unreleased findings from an October 2020 national survey of more than 3,000 people in the U.S. workforce show the extent to which fear of employer retaliation prevents workers from reporting serious workplace concerns such as health and safety violations and sexual harassment (**Figures 3, 4**).³
- **Polling from battleground congressional districts** - Results from a new February 2021 nationwide poll of voters in battleground congressional districts show just-cause policies have strong support across political parties and demographic groups (**Figures 5, 6**).⁴

In addition, we address the following questions:

How do at-will firings affect workers’ lives and the workplace environment?

- **Half of all U.S. workers** - Unfair or arbitrary firings are common in the United States, affecting almost one in two workers at some

point in their lives.⁵ Abrupt terminations can be devastating for workers and their families because many households have little savings or wealth to fall back on.⁶

- **Fear in workers and pressure to accept poor job conditions** - The ability of employers to upend the lives of their employees also creates a climate of fear in the workplace, discouraging workers from speaking up about mistreatment or poor working conditions. More than one-fifth—22 percent—of respondents said that fear of retaliation would prevent them from either speaking up about unsafe or unhealthy working conditions or refusing to work in those conditions (**Figure 4**). Thirty-one percent of women say that fear of retaliation might prevent them from reporting workplace sexual harassment.⁷

How do at-will firings perpetuate systemic racism against Black and Latinx workers?

- **More hardship after job loss** - Black and Latinx workers are more likely than white workers to face an extended period of unemployment after a job separation, even when the economy is strong. This disparity in extended unemployment between racial groups grows during recessions (**Figure 1**).⁸ Past and continuing racial and economic injustice in the United States means that Black and Latinx workers have less household savings or family wealth to fall back on during periods of extended unemployment, making the impact of joblessness more severe.⁹
- **Less power in the workplace** - In the workplace, the at-will system amplifies the power imbalance between employers and individual workers. This is to the detriment of all workers, but especially those who have the least power in the labor market and are most often segregated in dangerous and lower-paying jobs—such as Black and Latinx workers.¹⁰
- **Limited recourse for discrimination** - The kinds of unfair decision-making and abusive practices that at-will employment invites can exacerbate discrimination in discipline and firings. However, the narrow definition for what qualifies as illegal racial discrimination under existing law is insufficient to address many kinds of race-driven unfair treatment that workers of color face on the job.
- **Retaliation as barrier to rights enforcement** - Workers of color are more likely than white workers to toil under substandard conditions—facing higher rates of wage theft and workplace health and safety violations, for example. But fear of retaliation—which at-will employment heightens—chills Black and Latinx workers in particular from speaking up about such problems (**Figure 4**).¹¹

What support exists for the adoption of just-cause policies?

- **Broad public consensus** - Just-cause policies are broadly supported by voters across political parties and demographic groups. In a February 2021 poll, 71 percent of voters in battleground congressional districts—including 67 percent of Republican voters—supported the adoption of just-cause laws.¹²
- **Growing movement** - For the first time in decades, in response to workers organizing on this issue, there is new momentum to replace at-will employment with just-cause protections. Philadelphia and New York City have recently enacted just-cause legislation for targeted industries. Last month, Illinois lawmakers—in partnership with worker centers and their allies—introduced *The Secure Jobs Act*, a just-cause bill that would extend protections to all workers in the state.¹³ And a broad coalition of groups is urging President Biden to order just-cause protections for employees of federal contractors.¹⁴

What components should just-cause policies include?

We recommend that lawmakers adopt just-cause policies that ensure that employers:

- **Demonstrate a good reason for discharge, such as job performance or economic hardship;**
- **Give employees fair warning, adequate training, and a chance to improve before firing them;**
- **Apply disciplinary policies fairly and consistently; and**
- **Provide severance pay for all discharged workers.**

We need a national just-cause policy, as well as state and local laws, to guarantee workers the job stability and economic security they deserve and ensure that they feel safe speaking up about mistreatment on the job.

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AFTER THE 13TH AMENDMENT BECAME LAW, EMPLOYERS SOUGHT NEW WAYS TO EXERCISE POWER OVER THEIR WORKERS, INCLUDING FORMER BLACK SLAVES AND BONDED IMMIGRANT LABORERS. MANY EMPLOYERS USED THE THREAT OF FIRING WORKERS TO DOMINATE AND CONTROL THEM.

1 Background: Unfair Firings Under Our ‘At Will’ Employment System

Unfair firings and abuse of power are common in U.S. workplaces: A manager fires an employee because he does not like her personality even though she is meeting job expectations. An employee is let go for declining to work overtime when requested by her employer. A parent takes a day off when childcare arrangements fall through—and is fired. An employee requests a day off to recover after a physically demanding day on the job and instead is fired. A new manager wants to give a friend a job, and to make room, fires an employee who has had no performance problems. A supervisor wants to “make an example” and fires one employee for a minor infraction but allows others who have committed similar infractions to stay on. A company fires employees for participating in off-the-clock community protests unrelated to work. Or, as happens too often, a manager fires a worker and gives her no reason at all.

In such situations, workers are often surprised to learn they currently have very little legal recourse.¹⁵ The United States is unique among wealthy, industrialized nations in that employees can be fired on a whim—without a reason, notice, or severance pay. At-will firing, long a hallmark of U.S. employment law, wreaks havoc on the lives of workers and their families when the paycheck they depended on one day is suddenly gone the next. This practice undergirds an employment relationship that can make workers feel their positions are precarious and their rights are conditional.

The “at will” doctrine—the legal presumption that employers can fire workers without constraint—was not firmly established in this country’s jurisprudence until the late 19th century and was

never affirmatively adopted through federal legislation. After the 13th Amendment became law, employers sought new ways to exercise power over their workers, including former Black slaves and bonded immigrant laborers.¹⁶ Many employers used the threat of firing workers to dominate and control them.¹⁷ In the years following the end of Reconstruction, which were also marked by large-scale labor uprisings, industrial actors promoted the at-will doctrine and courts began consistently ruling against the idea that employers seeking to fire workers should be required to have a reason, giving rise to a legal framework for employment relations that persists today.¹⁸ (See **Appendix.**)

Outside of the United States, industrialized countries around the world adopted explicit worker protections against unjust dismissals throughout the 20th century.¹⁹ In the U.S. however, while attempts to limit at-will employment have yielded a patchwork of state and federal exceptions to the doctrine, by and large, employers have been successful in legal and lobbying efforts to ensure broad adherence to the “at will” principles that courts had adopted more than a century ago.²⁰

OUTSIDE OF THE UNITED STATES, INDUSTRIALIZED COUNTRIES AROUND THE WORLD ADOPTED EXPLICIT WORKER PROTECTIONS AGAINST UNJUST DISMISSALS THROUGHOUT THE 20TH CENTURY.

Ending a Continuing Legacy of Racial Inequity

In the context of the current U.S. labor market—which remains highly segregated by race, with white workers concentrated in higher-quality jobs—the excessive power that employers have to abruptly upend workers’ livelihoods disadvantages workers with the least power in the labor market and serves to perpetuate longstanding racial inequity in the workplace and in our economy.²¹

In addition, while enforcement agencies depend on workers coming forward to report legal violations, the lack of protection against unfair termination of workers stymies enforcement of workplace laws by chilling workers from blowing the whistle on employer violations of their rights—such as the right to a minimum wage, to a healthy and safe workplace, and to be free from discrimination and harassment.

Replacing at-will employment with a just-cause termination standard would help ensure that employers provide good reasons and fair warnings before terminating workers—practices that well-managed and fairly run workplaces already follow. Just-cause policies should also require employers to give workers advance notice of performance problems and a chance to address them—for example, by following the well-established practice of “progressive discipline.” It is important to note, however, that for certain kinds of serious misconduct, such as behavior that threatens the safety and well-being of others, a just-cause policy would allow an employer to bypass the progressive discipline process and immediately discharge or suspend an employee.

Additionally, just-cause policies promote greater transparency and fairness and prevent unfair disparate treatment by protecting employees from being selectively dismissed for infractions that are tolerated from other employees. And, when workers are fired, such policies can give workers a right to reinstatement (or alternatively, a right to severance pay) if there was not just cause for dismissal—a key protection for fired workers that many are surprised to learn employers are not currently required to provide. Finally, adopting just-cause protections would make it easier for workers to speak up about problems without fear of retaliation.

JUST-CAUSE
POLICIES SHOULD
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The Movement for Black Lives and the groundswell for racial justice have advanced the call to dismantle systemic racism in institutions across our government, economy, and society. Ending the system of at-will employment is central to this work.

2 Unfair and Arbitrary Firings Are Common and Can Devastate Workers and Their Families

Government data show that job loss is a common experience for U.S. workers, even during periods when the economy is rapidly expanding. According to our analysis, in 2019, the average rate of involuntary separations (firings and layoffs) in the United States was 14.4 percent across nonfarm industries.²²

A 2020 Data for Progress nationwide survey suggests that many of those involuntary separations are likely unfair firings. Nearly half of workers surveyed (47 percent) said they had been fired at one time or another, “for no reason or a bad reason.” Black and Latinx workers of all educational levels reported higher levels of unfair dismissals, suggesting these workers experience racial inequities in at-will firings in many different kinds of jobs. Fifty percent of all Black workers and 52 percent of all Latino workers reported experiences with unfair dismissal, compared to 45 percent of white workers.²³

A recent survey of New York City fast-food workers provides further evidence of how commonplace arbitrary firings are, showing that 24 percent of workers surveyed had been fired or laid off and that 65 percent of those workers reported that in at least one instance they had not been given a reason for termination. Over a quarter of those reporting job losses had experienced multiple job losses within the fast-food industry.²⁴

Abrupt and arbitrary firings wreak havoc on workers and their families. According to the Federal Reserve, about 4 in 10 adults in

this country would have trouble covering an unexpected expense of \$400.²⁵ Even when the economy is expanding, when workers experience job loss, it can be difficult for them to get back on their feet. More than a third of job separations result in workers not having a stable job for at least three months, even when the labor market is strong.²⁶ During the period from 2015 to 2019 (the latest data available), 38.3 percent of job separations of prime-age workers (between the ages of 25 and 54) resulted in workers being without a stable job for at least three months.²⁷ During the last recession, from 2007 to 2009, this figure was even higher: 49.5 percent.²⁸

Job loss and instability have cascading negative impacts on workers and their families. Faced with a steep loss in income, fired workers suffer severe economic dislocation. The above-mentioned survey of New York City fast-food employees found that 62 percent of respondents who were terminated or forced to quit by employers experienced at least one financial hardship: For example, 22 percent of respondents applied for food stamps, and 18 percent had to stay with family or friends or in a shelter. Other workers could not afford childcare or had to drop out of school, making it even harder to advance their careers.²⁹

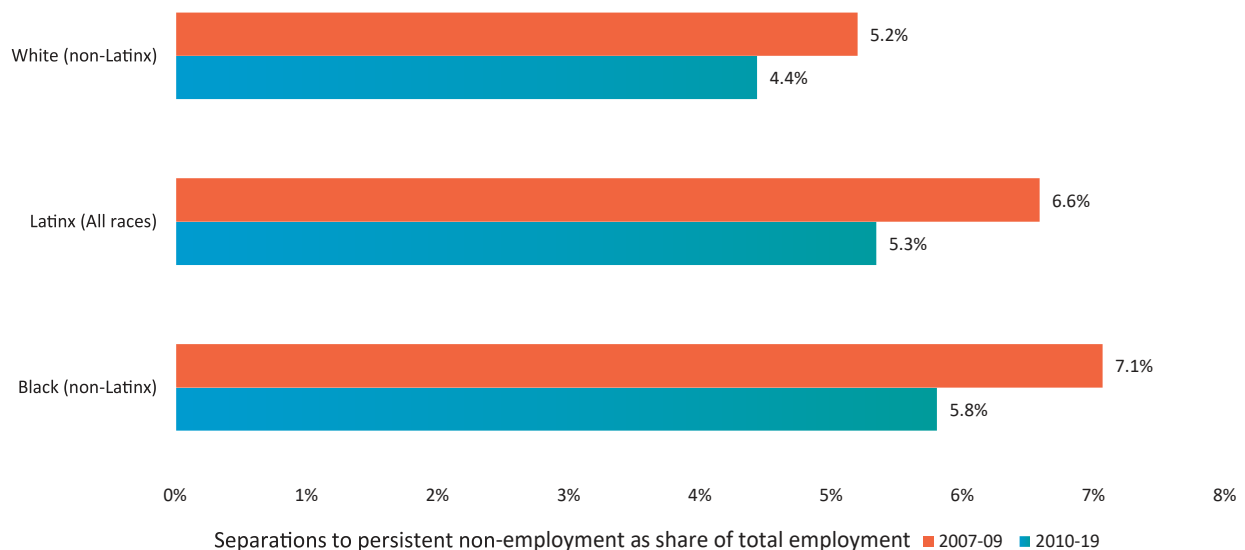
Black and Latinx Workers Are More Likely to Encounter Employment Instability After a Job Separation

Black and Latinx workers disproportionately suffer from economic insecurity related to at-will employment, experiencing higher rates of job separations that result in employment instability than white workers.³⁰ As **Figure 1** shows, from 2010 to 2019, the rate of separations for white workers resulting in lack of steady employment for three months or more as a share of total employment was 4.4 percent.³¹ For Black workers the rate was 5.8 percent, and for Latinx workers it was 5.3 percent.³² The disparity between racial groups was even wider during the last recession. Between 2007 and 2009, the rate was 5.2 percent for white workers but 7.1 percent for Black workers and 6.8 percent for Latinx workers.³³

THE DISPARITY BETWEEN RACIAL GROUPS WAS EVEN WIDER DURING THE LAST RECESSION.

These difficulties are compounded by the disproportionate threat to Black and Latinx people of housing dislocation through eviction or foreclosure.³⁴ The generational effects of historical economic inequality in the United States also mean that Black and Latinx workers have less accumulated wealth to rely on during spells of unemployment.³⁵

FIGURE 1. BLACK AND LATINX WORKERS FACE HIGHER RATES OF PERSISTENT NON-EMPLOYMENT AFTER A JOB SEPARATION, ESPECIALLY DURING RECESSIONS



Source: NELP calculations of data from Job-to-Job Flows, U.S. Census Bureau, 2007-2019

3 At-Will Employment Puts Pressure on Workers to Accept Harmful Working Conditions and Drives Down Job Quality, Especially for Black and Latinx Workers

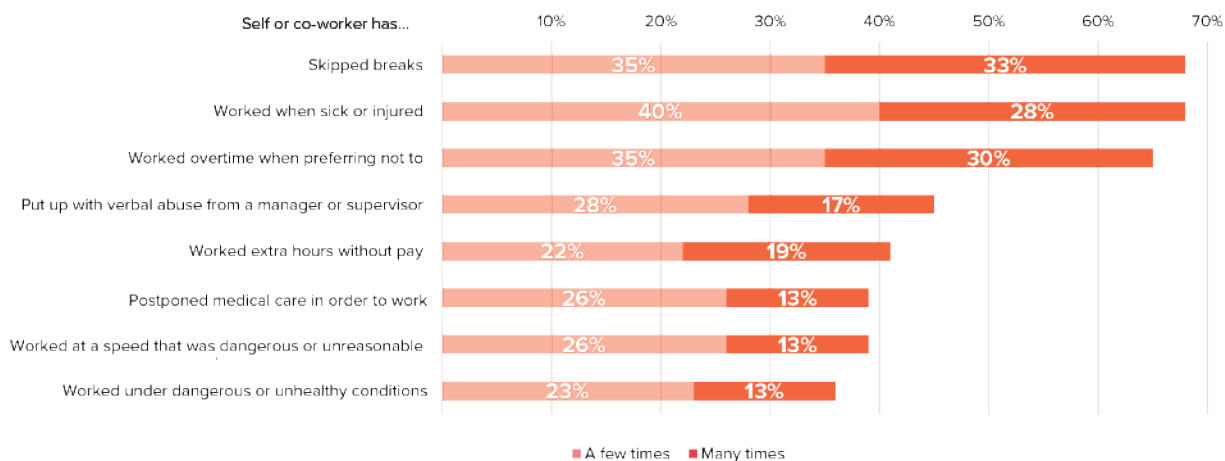
The at-will employment system gives managers with firing authority excessive power to disrupt the lives of employees, which can create pressure for workers to accept harmful working conditions to avoid job loss—especially those with the least individual power in the labor market. Some may feel pressure to accept illegal situations such as wage theft or health and safety hazards. But even if employers are not violating any actual laws, at-will employment can create pressure for workers to behave in ways that are detrimental to their well-being—such as deprioritizing their health needs, consenting to undesired overtime hours, refraining from taking time off, or enduring verbal abuse.

Empirical data bear this out. A recent survey conducted in Illinois to assess the consequences of at-will employment confirmed that many workers accept harmful and even illegal working conditions because of fear of being fired. More than two in three workers (68 percent) reported that they or a co-worker had the experience of working when sick or injured to avoid being fired. Forty-one percent reported that an employer pressured them or a co-worker to accept wage theft—working extra hours without pay to avoid being fired. Two out of three workers also reported themselves or a co-worker working overtime when they preferred not to or skipping breaks to avoid being fired.³⁶

Additionally, more than one in three workers reported not asking for pay increases or benefits they felt they deserved because of fear of possibly losing their jobs. Thirty-one percent also say that they or a co-worker opted against joining with fellow employees to push for job improvements because of fear of being disciplined or fired.³⁷

IN ADDITION, LATINX WORKERS ARE MUCH MORE LIKELY THAN OTHER WORKERS TO REPORT PRESSURE TO ACCEPT HARMFUL CONDITIONS TO AVOID DISCIPLINE OR TERMINATION, SUCH AS WORKING WHEN SICK OR INJURED, WORKING UNWANTED OVERTIME, PUTTING UP WITH VERBAL ABUSE, OR WORKING AT AN UNREASONABLE SPEED OR UNDER DANGEROUS CONDITIONS.

FIGURE 2. WHAT WORKERS DO TO AVOID BEING DISCIPLINED OR FIRED



Source: NELP analysis of data from the Just Recovery Survey, October 2020

Latinx and Black workers were much more likely to report that their current employer would punish or fire someone for actions such as taking sick leave (32 percent and 26 percent, respectively, compared to 22 percent of white workers) or asking for a schedule change (26 percent and 19 percent, respectively, compared to 15 percent of white workers).³⁸

In addition, Latinx workers are much more likely than other workers to report pressure to accept harmful conditions to avoid discipline or termination, such as working when sick or injured, working unwanted overtime, putting up with verbal abuse, or working at an unreasonable speed or under dangerous conditions.³⁹

At-will employment may also affect utilization of job benefits such as childcare. A national survey of working parents conducted in August 2020 showed that many workers refrain from accessing childcare benefits out of fear of job loss: 42 percent reported fearing they could be risking their jobs if they took advantage of childcare offerings or benefits available to them through their workplace, and 39 percent worried that they would be terminated if they asked for help related to their childcare challenges.⁴⁰

In sum, by amplifying the power imbalance between employers and individual workers, the at-will system drives down job quality, especially for those workers who have the least individual power in the labor market and are most often segregated in dangerous and lower-paying jobs—such as Black and Latinx workers.

4 A Lack of Transparency, Consistency, and Clear Performance Standards in Disciplinary Decisions Heightens Workers' Fear

A core problem of the at-will employment system is that employers are not required to set rules, establish clear performance standards, or even inform workers of how decisions are made regarding discipline and termination. Additionally, firings don't have to be fair. Two employees can commit the same infraction, and an employer can let one go and keep the other without justification as long as that decision doesn't violate any other law.

This can foster a harmful climate of fear and uncertainty for workers. For example, Jennifer Bates, a worker at Amazon's Bessemer, Alabama, warehouse, describes the lack of transparency in Amazon's disciplinary policy. Amazon enforces a policy they refer to as "time off task" in which workers are tracked and penalized for every second they are not actively doing assigned tasks—for example, using the bathroom or washing their hands. However, Bates says that Amazon does not give workers clear guidelines on how the policy is enforced.

*"I've seen them come take them off the line. You've racked up too much. What do you mean? Nobody told me anything about time off task. Because they don't tell you that hey, you only got this amount of time off task a day. No one ever knew that it was a thing, until people started getting written up about it or getting fired up about it. **And to this day, no one even knows what is the maximum time off task. Now is that written and given to us? Has management given it to us? We don't have that.**"⁴¹*

New York Times reporter Michael Corkery, who has spoken to Amazon workers around the country, corroborates Bates' portrayal of the policy. "I've talked to a lot of other Amazon workers that are also confused by how the time off task policies work. Even Amazon, when I've asked them about it, their answers tend to be ambiguous. And it's just led to a great deal of confusion and fear for some workers... about how this works."⁴²

Bates goes on to describe the stress and psychological impact of the lack of transparency in the disciplinary policy.

"It's not just physically. It's a mental strain on—I'm speaking for myself, but mentally, you have to think about even if I can go to the bathroom. I've almost used the bathroom all myself, trying to wait till break time so I won't have time off task. You have to mentally think, I'm tired. Do I take the chance to walk way up there to get me something to eat?"

This description paints a vivid picture of how an employer can exploit an opaque disciplinary policy—predicated on at-will employment—to profit from workers’ fear and coerce their labor, and how these practices take a toll on workers’ physical and mental health.

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What’s more, the absence of requirements for clear performance standards and transparency under the at-will system means that workers can be fired for reasons unrelated to their job. For example, in one instance, a company pressured a worker to resign after an elected official complained about her off-duty political activities.⁴³ In other cases, employers have terminated workers for smoking cigarettes during their off hours.⁴⁴ In these situations, workers lose their jobs for reasons completely unrelated to job performance or business necessity—yet such practices remain legal without just-cause protections.



5 Growing Use of Electronic Monitoring Heightens the Climate of Fear in the Workplace

Today, employers increasingly subject workers to extensive data collection and intrusive workplace monitoring and surveillance.⁴⁵ A recent Wall Street Journal column describes the widespread use of these technologies:

“Industrial laundry services track how many seconds it takes to press a laundered shirt; on-board computers track truckers’ speed, gear changes and engine revolutions per minute; and checkout terminals at major discount retailers report if the cashier is scanning items quickly enough to meet a preset goal. In all these cases, results are shared in real time with the employee, and used to determine who is terminated.”⁴⁶

The growing presence of electronic monitoring in the workplace—including the use of computers, cameras, phone surveillance software, scanners, active badges, and digital ratings to track employee activities—can exacerbate workers’ fear and uncertainty and further diminishes their power in relation to their employers.⁴⁷ One survey estimates that about one in three workers currently have employers who use electronic monitoring for decisions about discipline and termination.⁴⁸ As this trend grows, more workers are also evaluated, disciplined, and fired through automated decision-making processes that may involve little human input.⁴⁹ New forms of technological control also intensify productivity demands and make jobs more precarious.⁵⁰

Workers at Amazon, which has pioneered and promoted new forms of on-the-job electronic monitoring, have experienced this acutely. Ilya Geller, who worked as a stower in an Amazon warehouse in New York, describes how the company uses electronic monitoring tools to operationalize the grueling “time off task” system described by Bates above. She said:

“You’re being tracked by a computer the entire time you’re there. You don’t get reported or written up by managers. You get written up by an algorithm. You’re keenly aware there is an algorithm keeping track of you, making sure you keep going as fast as you can, because if there is too much time lapsed between items, the computer will know this, will write you up, and you will get fired.”⁵¹

Recent studies have shown the harmful effects of these practices, including pressuring workers to work at dangerous speeds and causing high injury rates.⁵² Despite these problems, it is likely that use of these technologies will continue to spread, given that Amazon itself is actively marketing and selling the surveillance systems it has developed to other employers—including companies such as the agriculture giant Cargill and the guitar manufacturer Fender.⁵³

Policymakers interested in reducing the harms of at-will firings for workers must also develop policies to address electronic monitoring and automated decision-making, because they have the potential to undermine laws aimed at limiting at-will firings. As Geller describes above, by providing second-to-second monitoring of workers' actions, surveillance technologies can detect a momentary pause on the part of a worker and give employers the option of turning it into an infraction leading to discipline or termination. In addition, these technologies create information asymmetries, often leaving workers with inadequate information about how data are used for discipline and termination.

The enormous power created by these new technologies should be decoupled from the processes of workplace discipline and termination to guard against abuses and reduce the increased power imbalance between workers and employers. As described further in our policy recommendations below, curbing the use of automated decision-making and data collected through electronic monitoring for the purposes of discipline and termination, together with greater protection against abrupt and arbitrary firings, would help ensure that these new technologies are not used in ways that harm workers or erode job quality.

THE ENORMOUS POWER
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AND TERMINATION

WORKER STORY: Fired at Bank of the West after following a manager's bad orders

Carl Smith was a cash management specialist at Bank of the West. He worked at the bank's office building in Tempe, Arizona. He had been a standout employee, achieving top numbers in his department multiple times over the previous year.

In January 2020, Smith got a new manager who quickly became abusive to Smith and his co-workers. While they felt understaffed and overworked, their new manager continued to demean and belittle them, creating a toxic workplace. In August 2020, she screamed at the entire team. For the first time in his career, Smith filed a complaint with human resources to try and get his manager to stop harassing him and his co-workers. Nothing changed.

Then in late August, Smith's manager instructed him to provide classified customer information to a client. Smith knew this was inappropriate and could create an opportunity for fraudulent access to a client's account, but he was in a bind. He knew that if he refused to follow her orders, she could easily fire him. When a fraudulent transaction ensued, Smith's manager blamed him, even though he was following her instructions. In November 2020, Smith was fired by Bank of the West.

If a just-cause policy had been in place to protect Smith, he would have had more leverage to refuse the manager's wrongful orders. Smith also would have had greater legal recourse to protect his job as he sought to redress harassment and mistreatment from that manager. Instead, the Arizona unemployment agency has denied him unemployment benefits. Smith, who is Black, has a young daughter and has had to draw down his savings to make ends meet while searching for a new job.⁵⁴

A photograph of the exterior of a Bank of the West building. The word "WEST" is written in large, blue, three-dimensional letters on the white facade. To the right of the letters is a colorful sculpture of a bear. Below the letters, there is a dark entrance area with a brick pillar on the right. The address number "7130" is visible above the entrance. The sky is blue with some clouds.

WEST

6 Just-Cause Protections Offer Workers Additional Legal Recourse for Racial Discrimination

The kinds of unfair decision-making and abusive practices that at-will employment invites can exacerbate discrimination in discipline and firings. However, much unfair treatment on the job that leads to workers of color being disciplined or fired may not meet the very narrow definition for what qualifies as illegal racial discrimination.

That's because standards of proof in discrimination cases are demanding and often hinge on judge or jury assessments of whether circumstantial evidence is strong enough to suggest that discriminatory intent drove the employment decision. In cases involving racially hostile work environments, they require a worker to show that the behavior is sufficiently severe or pervasive in order to qualify as illegal discrimination.⁵⁵ Meeting these high standards is not easy—and, as a result, many unfair employment actions where race may be an element cannot realistically be challenged under our civil rights laws.

Furthermore, the problem is not only with the narrow definition of discrimination under existing law. Widely held beliefs about meritocracy in the U.S.—which minimize the existence of discrimination and make the public reluctant to ascribe discriminatory motive to others, including employers—can negatively affect the ability of plaintiffs charging discrimination to win their claims.⁵⁶

Confirming the difficulty facing workers of color seeking legal recourse through discrimination claims, numerous empirical studies show that only a tiny fraction of workers alleging discrimination are successful in their efforts.⁵⁷ For example, complaint data from the U.S. Equal Employment Opportunity Commission (EEOC) for fiscal years 2010 through 2017 show that the agency closes most cases without concluding whether discrimination occurred.⁵⁸

Adopting just-cause job protections would give workers of color additional protections against unfair terminations that may be more readily enforceable.⁵⁹ Unlike our anti-discrimination

laws, where a worker must show that his or her termination was discriminatory, just cause instead requires the employer to show that there was a good reason and a fair process leading up to the discharge.

Data on employment law cases show that, in general, workers have more success challenging terminations under wrongful discharge laws than under anti-discrimination laws. In one study of California employment law cases, only 16 percent of race discrimination termination cases brought by non-white plaintiffs were successful, compared with a 59 percent success rate for wrongful discharge cases.⁶⁰ While the evidence isn't conclusive given limited data on the race of wrongful discharge plaintiffs, it suggests that just-cause protections may offer people of color experiencing racial bias in firings a viable means of legal redress, because they may have an easier time proving that an employer lacks good cause for termination than they would proving that an employer has discriminatory intent.

Adopting just-cause policies that set minimum standards for fair process and treatment— together with strengthening current anti-discrimination and anti-retaliation laws—are a crucial step toward building racial equity in the workplace.

7 At-Will Firings Facilitate Employer Retaliation Against Whistleblowers and Prevent Effective Enforcement of Workplace Laws

Because local, state, and federal enforcement agencies have limited resources to conduct workplace investigations, government typically depends on workers to report legal violations, such as discrimination, wage theft, health and safety hazards, public health dangers, sexual harassment, consumer safety, or fraud. All of us—from consumers who depend on whistleblowers to warn us about unsafe products, to shareholders who might learn of unsound practices only from workers, to communities that need to know whether corporations operating in their midst are endangering their health and well-being—depend on workers feeling safe enough to speak up about bad corporate actors. However, when worker whistleblowers come forward to raise concerns, they face considerable risk of being punished or fired. This chills workers from speaking up, allowing employers to break a wide range of laws.⁶¹

The problem of retaliatory firings has come into sharp focus during the recent pandemic as employers have threatened or fired workers who have sounded the alarm about inadequate COVID-19 protections. In a nationwide survey of more than 1,100 workers conducted in mid-May of 2020, more than one in eight workers reported possible retaliation in their companies against themselves or co-workers for raising COVID-related workplace concerns. Black workers were more than twice as likely as white workers to have seen possible retaliation by their employer.⁶²

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REPORTING WORKPLACE
SEXUAL HARASSMENT.

Additionally, new findings from an October 2020 nationally representative survey of the U.S. workforce (n=3,100) reveal the extent to which fear of retaliation prevents workers from speaking up about workplace problems. For example, of women surveyed, 31 percent say that fear of retaliation might prevent them from reporting workplace sexual harassment. Troublingly, those who have previously experienced sexual harassment report being the most scared to report. Of workers of all genders who have experienced sexual harassment in the workplace, 53 percent responded that fear of retaliation would factor into their decision about reporting it. Of those who had not experienced sexual harassment, only 19 percent of workers responded the same.⁶³ These findings underscore how fear, harassment, and retaliation function in tandem and are consistent with previous research on workers' experiences of sexual harassment and related retaliation.⁶⁴

WITH ALARMING FREQUENCY DURING THE COVID-19 CRISIS, WORKERS HAVE BEEN DISMISSED FROM THEIR JOBS WITH LITTLE OR NO WARNING FOR RAISING HEALTH AND SAFETY CONCERNS.

FIGURE 3. FEAR OF EMPLOYER RETALIATION FOR SPEAKING UP ABOUT SEXUAL HARASSMENT



Source: NELP analysis of data from the Just Recovery Survey, October 2020

The same survey shows high rates of concern about retaliation for raising workplace health and safety concerns. More than a fifth—22 percent—of respondents said that fear of retaliation would prevent them from either speaking up about unsafe or unhealthy working conditions or refusing to work in those conditions. Black and Latinx workers were the most concerned about employer retaliation for speaking up about unsafe workplace conditions: 34 percent of Black workers and 25 percent of Latinx workers reported concerns about employer retaliation, compared to 19 percent of white workers.⁶⁵

Other data show that Black and Latinx workers are also most likely to report that their current employer would fire or discipline an employee for filing a complaint with a government agency (32 percent of Latinx workers and 26 percent of Black workers, compared to 22 percent of white workers).⁶⁶

While retaliatory firings affect all workers, Black, Latinx, immigrant, and women workers are too often segregated in low-wage industries with high rates of injury, wage theft, and other workplace problems and are disproportionately harmed when enforcement of workplace violations is weak.⁶⁷ For example, during the recent COVID-19 pandemic, Black workers were twice as likely to have experienced wage theft as white workers.⁶⁸ Workers in low-quality jobs have the most to lose under our current employment law system, in which at-will employment impedes the functioning of employment law enforcement more generally.

Workers Need Stronger Whistleblower Laws and Just-Cause Job Protections

Unfortunately, whistleblowers raising workplace concerns have limited legal recourse under existing federal and state law.⁶⁹ Many whistleblowers fail to obtain legal redress.⁷⁰ Our federal, state, and local laws offer a patchwork of protections for workers facing retaliation, but in general are too narrow and lack remedies adequate to deter employers from taking retaliatory action. A recent NELP analysis of minimum wage laws in the 50 states showed that only six states and the District of Columbia currently have anti-retaliation laws that are adequate to deter employer violations, and that compensate workers suffering retaliation.⁷¹

Certainly, policymakers at all levels of government should strengthen these weak whistleblower laws and dedicate more resources to their enforcement. However, doing so would still fail to adequately protect whistleblowers in the context of an at-will employment system that makes it difficult for fired workers to prove retaliatory intent on the part of their employer. The burden of proof is on the employee, and because employers can fire workers for almost any reason or no reason at all, workers who are punished after coming forward to help enforce the law have a hard time mustering sufficient evidence to support a retaliation claim.

FIGURE 4. CONCERN ABOUT EMPLOYER RETALIATION FOR SPEAKING UP ABOUT UNSAFE WORKING CONDITIONS



Source: Mabud, et. al.

Establishing just-cause termination rights would provide greater protections for whistleblowers by setting a baseline standard for the employment relationship, ensuring fair disciplinary processes, and requiring employers to document disciplinary decisions for all employees. With fewer arbitrary firings and a more stable workforce, retaliatory actions would be harder for employers to disguise.

In addition, a just-cause policy can and should expressly guarantee that action by an employee to raise good-faith concerns to the employer, fellow employees, or even to the public about workplace problems is always protected and would never constitute just cause for discipline or discharge. These kinds of legal protections have been empirically shown to have a positive impact on workplace conditions. For example, a recent study finds that states that have recognized public policy exceptions to the at-will doctrine have been more effective in protecting workers (especially those with union representation) from workplace injuries than states without the exception.⁷²

With just-cause protections in place, employees may be less afraid to raise workplace concerns. Workers surveyed about COVID-19 at work, for example, have indicated that stronger legal protections would encourage them to speak up more at work about job hazards. One in five workers surveyed—including one in three Black workers—responded that stronger legal protections from discipline and termination would make it easier for them to speak up at work.⁷³

Together with strengthening existing whistleblower protections in workplace laws, expanding current law to include a just-cause standard for termination is a crucial step for ensuring that workers can effectively exercise basic workplace rights and safely blow the whistle to protect themselves, their co-workers, and the public when necessary.

WORKER STORY: Fired from an Amazon warehouse for raising COVID concerns

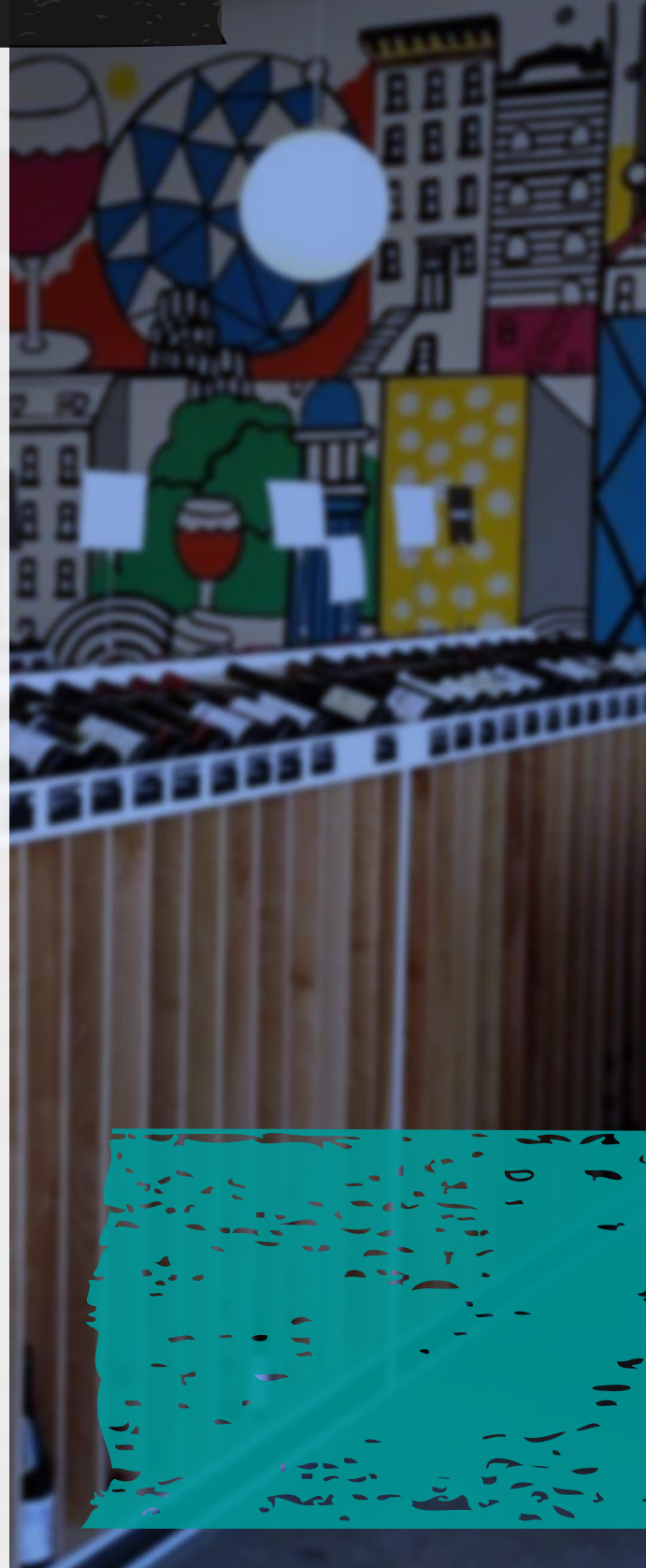
Bashir Mohamed worked nights at an Amazon warehouse in Shakopee, Minnesota, southwest of Minneapolis. As news of the spread of COVID-19 became more alarming, Mohamed grew concerned about his own and his fellow warehouse workers' safety. Pre-pandemic, Mohamed had pushed for improved conditions at the warehouse. Now he began to warn his co-workers about the dangers of the virus, and to advocate for Amazon to implement better cleaning practices to mitigate the risk of contagion. He also expressed concern about the lack of social distancing at work. In April 2020, Mohamed was fired. Amazon claimed that Mohamed had refused to talk to his supervisor and had violated social distancing guidelines.⁷⁴

If a just-cause policy were in place, Amazon would be required to give Mohamed fair warnings before firing him. The burden would be on Amazon to provide proof backing up the company's reason for firing him and demonstrate that it had applied its disciplinary policies uniformly rather than targeting Mohamed because he was vocal about safety issues. If the company could not do so, it would be required to reinstate him and compensate him for the unfair firing.

WORKER STORY: Fired for refusing to work under hazardous conditions during COVID-19

In March 2020, Therese Whelan became terrified that she and her co-workers at Topsy, a New York City wine store, were at high risk for contracting COVID-19. The entire city was shutting down as the pandemic raged, but liquor stores remained open. Customers crowded into Topsy, 200 a day. No one maintained social distance. Topsy's owner did not provide the workers with masks or gloves. Whelan and the other employees feared for their safety and the safety of their households—one employee had an autoimmune disorder and others lived with vulnerable family members. They asked the owner to shift to doing only takeout and delivery and to end cash transactions in order to minimize the risk of contagion. The owner refused. After this, Whelan stayed home from work. She was immediately fired.⁷⁵

Under current law, Whelan has little recourse.⁷⁶ However, a strong just-cause policy with robust enforcement mechanisms could explicitly prohibit firings for refusal to work under hazardous conditions and provide a private right of action to seek reinstatement.



8 Momentum for Just-Cause Protections Is Growing

Over the past two years, momentum to replace at-will employment with a just-cause standard has been growing. In 2019, parking lot workers in Philadelphia won the right to fight unfair firings when the city council adopted a just-cause law for their sector.⁷⁷ In 2020, New York City approved similar protections for fast-food employees in the city.⁷⁸ And just last month, Illinois lawmakers—in partnership with worker centers and their allies—introduced *The Secure Jobs Act*, a just-cause bill that would extend protections to all workers in the state.⁷⁹

On the national level, just-cause policy has also received recent attention.⁸⁰ During his 2020 presidential campaign, Sen. Bernie Sanders called for replacing at-will employment with national just-cause protections.⁸¹ And since the election, a broad-based coalition of worker groups has urged the Biden administration to adopt a just-cause standard for federally contracted workers through an executive order.⁸²

In a new February 2021 poll, 71 percent of voters in battleground congressional districts—including 67 percent of Republicans and 75 percent of Democrats—expressed support for the adoption of just-cause laws (**Figure 5**).⁸³ Likely voters in contested congressional districts were asked the following question: “In most jobs in the United States, a worker can be fired without any warning or explanation. Do you favor or oppose ‘just cause’ laws, which require that workers must receive advance notice and a good reason before they can be fired?”

The results reveal that support for just-cause laws is strong, not only across political party lines but also across income and geography. Voters in the lowest income bracket demonstrate the highest rate of support, with more than three-quarters of respondents with annual household incomes under \$50,000 favoring just-cause laws. But higher-income voters also express strong support: 70 percent of those with household income between \$50,000 and \$100,000 and 66 percent of those with household incomes above \$100,000 responded favorably. Support for this issue also bridges the urban, suburban, and rural divide. Three out of four suburban and rural likely voters favored just-cause laws, as did 66 percent of urban likely voters.

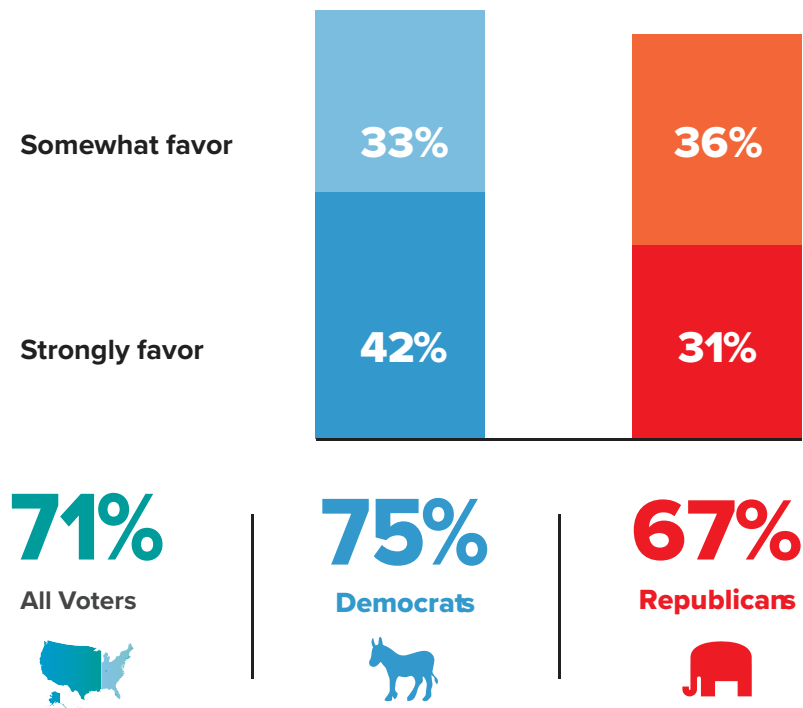
These results are consistent with previous polls, including a 2020 Data for Progress poll that found just cause was supported by 67 percent of likely voters, including 73 percent of Democrats and 64 percent of Republicans. Support for a policy “preventing employers from firing workers for any reason other than legitimate work performance issues” was also consistent across gender, age, education, race, and geography.⁸⁴

Despite renewed attention, just-cause is not a recent invention. It has a long history in the United States, and it remains commonplace in many contexts today. For one, just-cause is the standard that typically governs discharge and discipline under labor union contracts.⁸⁵ When union density was at its highest in the 1950s, at least a third of workers labored under union contracts. With private-sector union density now barely over six percent, many U.S. workers have lost that essential safeguard.⁸⁶

Similarly, under most federal and state civil service systems, public employees—non-union and union alike—are protected by a just-cause standard and can only be discharged for cause.⁸⁷

Moreover, just-cause remains common in executive compensation packages. Under such agreements, executives who are fired are entitled to substantial severance packages, unless the company can show they were fired for cause.⁸⁸ In a variety of states, the courts have recognized a patchwork of limited wrongful termination protections.⁸⁹ In addition, since 1987, Montana has had a just-cause law, albeit one

FIGURE 5. SUPPORT FOR JUST-CAUSE LAWS ACROSS POLITICAL PARTY LINES

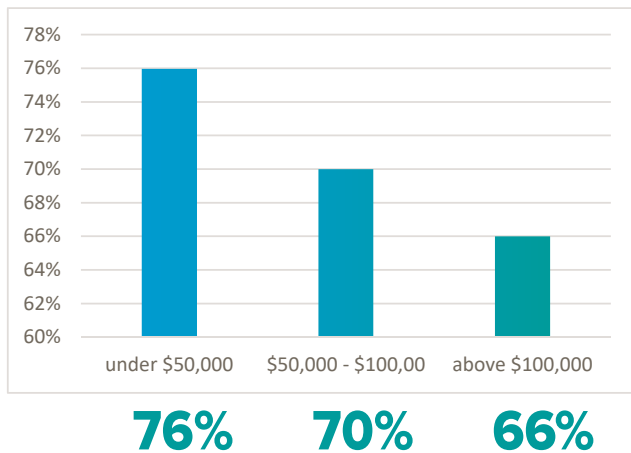


Source: Hart Research Poll, 2021

with insufficient protections because employers and insurers lobbied for it as a means to limit employer liability after a series of state supreme court decisions that expanded the right of at-will employees to sue their employers for wrongful discharge.⁹⁰ None of the existing state-level protections give workers comprehensive just-cause protection from unfair firings.⁹¹

The United States lags behind many other nations in providing just-cause protections against arbitrary and unfair firings. Australia, Brazil, Japan, Mexico, the United Kingdom, and most of the European Union, among many other countries, require employers to provide workers with a sufficient reason for termination.⁹² In the words of one legal scholar, “[t]he United States remains the last major industrial democracy that has not heeded the call for unjust dismissal legislation.”⁹³

FIGURE 6. SUPPORT FOR JUST CAUSE LAWS ACROSS INCOME AND GEOGRAPHY



Empirical studies of both the United States and other countries have shown that just-cause protections can provide important benefits to workers and their families.

Economic analysis has found that more stringent laws against dismissal boost workers’ wages, particularly for women and workers of color. This may be a result of increased productivity and/or greater bargaining power for individual workers.⁹⁴ For workers, being able to count on not losing their paycheck without warning may positively impact not only their present circumstances but also the future prospects of their children. Recent research has demonstrated better educational outcomes for children of a parent working in a job with just-cause protection as compared to those whose parent did not have such protection.⁹⁵

75%
suburban and rural likely voters



66%
urban likely voters



Additionally, just-cause protections can have positive societal and economic impacts by spurring greater innovation, more efficient hiring practices, and increased workforce training. A 2012 U.S. study finds that greater employment security protection “leads to more innovation overall as well as to more innovative effort per employee and R&D dollar,” because employees feel more secure that they will be able to reap the rewards of their innovation.⁹⁶ Economists have also found that stronger job protections

Source: Hart Research Poll, 2021

encourage employers to be more careful in the hiring process, which can reduce the need for future terminations and costly turnover.⁹⁷ In addition, employment protections spur businesses to invest more in training the workers they do hire, so adopting a just-cause law may provide the added economic benefit of a more skilled workforce. A recent study found that greater employment protections increased the likelihood that private-sector workers receive on-the-job training, and this was especially true for non-white workers.⁹⁸

Some critics fear that just-cause policies impose unreasonable costs on businesses and will increase unemployment. However, while employers may face adjustment costs to tighter restrictions on dismissals, these costs are modest and short-term. An economic study on the effects of state wrongful discharge laws shows such laws do result in a slight increase in labor expenses and a decrease in profitability for firms. The authors of the study state, however, that “[t]hese costs...should not be overestimated.” Their findings show that the “effects on labor expenses and profitability appear only for the first year after the adoption” of wrongful discharge laws and that the adoption of such laws “does not appear to impose long-term firm effects.”⁹⁹ In addition, empirical analyses of state wrongful discharge cases show that the actual number of lawsuits and costs of litigation are in reality far lower than the business community and their legal advisors predict and fear.¹⁰⁰ Regarding the effect of job protection laws on unemployment, a recent comprehensive review of the international literature on this question concluded that there is no robust evidence that just-cause policies have an adverse impact on employment.¹⁰¹

SUPPORT FOR JUST-CAUSE
LAWS IS STRONG NOT ONLY
ACROSS POLITICAL PARTY
LINES, BUT ALSO ACROSS
INCOME AND GEOGRAPHY.

Arbitrary terminations upend the lives of workers and their families. But Congress and state and local governments now have an opportunity to bring unfair firings to an end and allow the United States to move forward from an employment system that our courts adopted more than a century ago. with slavery and servitude as their reference points. By passing just-cause legislation requiring employers to substantiate terminations, lawmakers can give workers the economic security they need and deserve and help advance our country towards greater racial justice.

9 Policy Recommendations

Congress and state and local governments should enact just-cause policies to guarantee the job security that workers and communities need. Such policies should include the following key components:



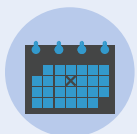
1. **A good reason for discharge.** The core of a just-cause employment system is a requirement that an employer show that there is a justifiable reason for discharging a worker. Typical reasons include unsatisfactory employee performance or failure to comply with reasonable employer policies—policies that employees are informed of in advance and that are consistently applied to all employees.



2. **Duty on the employer to prove.** Under a just-cause system, the employer is responsible for showing that a justifiable reason exists for discharging the worker—the reverse of the current system where the burden is on the employee to show that a firing was for an impermissible reason. As discussed in this report, shifting responsibility to the employer to demonstrate a good reason for discharge is widely recognized as key for meaningfully protecting workers against arbitrary and unfair firings—including against racially discriminatory firings and retaliation against whistleblowers.



3. **Certain activities categorically protected.** Just-cause policies should also clarify that certain reasons are categorically *not* grounds for discharge. Examples of categorically protected employee activities should include: (1) communicating to any person, including other employees, government agencies, or the public, about job conditions; (2) refusing to work under dangerous job conditions; and (3) refusing to take part in activities that would be illegal or violate public policy.



4. **Fair notice to workers and opportunity to address problems.** Another key component is fair notice to workers of any performance problems, and the opportunity to address them before they are discharged. This process, which is often called “progressive discipline,” is well established. Under progressive discipline, employer responses to an employee’s failure to satisfactorily perform his or her job duties or comply with employer policies must be proportional to the seriousness of the offense, take into account any mitigating or aggravating circumstances, and provide for a graduated range of responses that afford the employee a reasonable period of time to address concerns. Progressive discipline mirrors the process that many responsible employers already use: giving employees feedback and coaching on performance problems and support for addressing them before getting to the point of possibly discharging the workers. However, a just-cause policy should also make clear that certain kinds of serious misconduct allow an employer to bypass the progressive discipline process and immediately discharge or suspend an employee. Such serious misconduct should include behavior that threatens the safety and well-being of other people, such as

violence, discrimination, or harassment, as well as theft, use of intoxicants on the job, or other conduct that seriously compromises the employer’s business interests.



- 5. Equal coverage of temp and staffing employees.** Economic theory suggests that if it becomes more difficult for employers to discharge workers, they will shift employment to temp and staffing agencies if such employees are not subject to the same standards. It is therefore crucial that just-cause protections apply equally to employees working for an employer through temp or staffing agencies. A just-cause policy should expressly address these issues—for example, by requiring the same showing of just cause for ending employment of employees working through temp or staffing agencies.



- 6. Limits on probationary periods and short-term employment.** Other key issues for a just-cause policy concern probationary periods and defined, short-term employment. A probationary period, during which newly hired employees may be discharged without need to show just cause, is probably a reasonable component of a policy. However, it is important that such authorized probationary periods be short—no longer than 90 days, for example—to ensure that they do not become a significant loophole for sidestepping protections. Also, certain baseline protections, such as those against retaliation and discrimination, should continue to apply during probationary periods.

It is also appropriate to authorize employers under certain circumstances to hire workers for defined, short-term projects or staffing needs, after which their employment can end without a need to demonstrate just cause. Examples of such reasonable defined-term employment might include short-term seasonal employment in industries that need additional staffing during certain times of the year, and projects for which the need for employees or the funding to pay them will end once the project is completed. However, it is important that such an authorization for short-term employment be limited to clearly defined circumstances that prevent it from becoming a loophole by which employers can meet ongoing staffing needs through a succession of short-term positions. In addition, during the course of such short-term employment, full just-cause protections against early discharge should apply.



- 7. Protections to ensure economic discharges are not a loophole.** Just-cause policies typically recognize that employers may make economic (i.e., non-performance-based) discharges, without a need to demonstrate just cause, when economic conditions or other business changes require downsizing. But there should be standards for establishing the basis for economic discharges to prevent them from being used to sidestep limits on performance-based firings and a requirement that they be substantiated by business records.



8. Protections against intensive surveillance and monitoring, and automated decision-making. Just-cause legislation presents an important place to begin to address the harmful and discriminatory impact of intensive electronic surveillance and monitoring, and automated decision-making. Frequently operating with little human supervision or review, or opportunity for employees to question their results, employers are increasingly using such technologies in unfair ways in disciplining and discharging workers. Moreover, pervasive monitoring of workers means that small infractions can easily be found for most any employee and used to sidestep just-cause protections. While information from such technologies may have appropriate uses for improving other aspects of business operations, just-cause legislation should prohibit employers from making termination and disciplinary actions based on automated decision-making or data collected through electronic monitoring.



9. Severance pay. When workers are discharged—whether for just cause or economic reasons—providing severance pay is crucial for mitigating the very harmful economic impacts of job loss. Without severance pay, workers and families face dramatic income cuts, causing extreme hardship, including inability to pay their rent or mortgage, potentially leading to eviction or foreclosure. To provide workers a cushion as they search for new employment, just-cause protections should guarantee a basic amount of severance pay, such as a minimum of four weeks. Guaranteeing severance pay is not only fair and broadly popular; it also helps insulate workers from the common employer practice of pressuring workers to sign away their rights in exchange for receiving any severance pay.



10. Strong remedies and relief. A just-cause policy should include strong remedies for violations, including the right to reinstatement and money damages, together with additional penalties or liquidated damages that are sufficient to deter noncompliance. Money damages must reflect the full scope of damages that workers face, as administrative or judicial proceedings can go on for years. Without such meaningful sanctions for discharges without cause, any new just-cause policy will not achieve its goal of ensuring fair process before workers are subjected to job loss.



11. Effective enforcement vehicles including *qui tam*. Government labor agencies don't have the capacity to adequately enforce employment protections by themselves. A just-cause policy should therefore include a range of enforcement tools, including empowering workers to bring enforcement actions on their own. These should include a private right of action, authorization for recovery of attorneys' fees, and authorization for "qui tam" enforcement. Similar to a private right of action, *qui tam* enforcement allows workers and members of the public to supplement government agency enforcement by stepping into the government's shoes to bring enforcement proceedings as "private attorneys general." Significantly, it can allow representative

organizations, such as unions or worker centers, to bring enforcement action, ensuring that the burden of challenging employer lawbreaking does not rest solely on individual workers, who face high rates of retaliation.



- 12. No waivers of rights permitted.** At the federal level, a just-cause policy can and should provide that workers' rights may not be waived through private agreements absent court or labor agency supervision, and explicitly prohibit employers from requiring workers to enter into a private agreement to waive their just-cause and whistleblower rights.



- 13. Rights that are enforceable before judges and juries, regardless of forced arbitration requirements and class/collective action waivers.** Finally, a federal just-cause policy can and should ensure that its protections can be enforced by workers before judges and juries. Forced arbitration requirements deny workers the right to go before a judge and jury when their employer breaks the law. Instead, workers must bring any claims in a secret proceeding before a private arbitrator who is not accountable to the public. Because many arbitrators depend on corporations for repeat business, they strongly favor employers.¹⁰² Fifty-six percent of non-union private-sector employees are now subject to forced arbitration requirements, including more than 64 percent of workers earning less than \$13 per hour, 59 percent of Black workers, and nearly 58 percent of women workers.¹⁰³ Making matters worse, class and collective action waivers, which are routinely incorporated into these requirements, prevent groups of employees from banding together to challenge employer lawbreaking.

For a federal just-cause policy, Congress has the power to explicitly override the otherwise-applicable Federal Arbitration Act. Model language in the [PAID Leave Act](#) (Sec. 306(a)(3)(B)) and [the HEROES Act](#) (Sec. 170105(d)(2)) provides a roadmap for ensuring that forced arbitration requirements and class/collective action waivers cannot be used to take workers' claims away from judges and juries.

Appendix—The ‘At Will’ Doctrine: A Relic of Employer Repression in the Aftermath of Reconstruction

The “at will” doctrine was not firmly established in U.S. legal jurisprudence until the late 19th century. In the centuries prior, there existed a range of labor relationships provided for under the law, including slavery, indentured servitude, debt bondage, and fixed-term contracts in which laborers were compelled to complete the term of employment or else face consequences such as forfeit of earnings, violence, and incarceration. Under such fixed-term contracts, if laborers were fired with cause, they could also face penalties. While there is evidence that “at will” employment relationships had existed in common law as early as the colonial era in some places such as New York, these arrangements were not yet widely codified in the United States before the post-Reconstruction era.¹⁰⁴

The legal doctrine governing employment relationships became increasingly muddled as contracts without fixed terms became more prevalent over the course of the 19th century and state courts ruled in various ways regarding the obligations of employers and employees.¹⁰⁵ Concurrently, in the mid-19th century, the movement to abolish slavery included many workers of all races who wanted to establish a regime of “free labor” that would allow workers, including emancipated slaves, to be able to better reap the fruits of their labor.¹⁰⁶

Immediately following the Civil War, the parameters of what “free labor” meant—in law and in practice—were still murky and contested, with employers actively seeking to establish control over their labor force in this new context.¹⁰⁷ For example, the decades following the Civil War in the South were marked by policies, such as the so-called “Black Codes,” that controlled Black people’s labor and surveilled and criminalized their bodies.¹⁰⁸

During this period, southern employers also began using the threat of dismissal from employment as a tool to re-assert power and dominance over the former slaves that they employed. Some freedmen were fired for simply demanding to be paid what they were owed, while others were fired for attempting to vote or for voting against their boss’s interests. The Congressional record during Reconstruction shows that various members of Congress expressed concerns about former slaveholders’ use of firings to coerce and dominate freedman and how these practices were undermining the goals of emancipation.¹⁰⁹

Beyond the South, industrial employers, and railroad companies, in particular, actively sought to innovate legal strategies during this period to avoid constraints on their ability to exercise power over their workers.¹¹⁰ Before the Civil War, railroad companies had addressed labor shortages by using immigrant workers from China and Europe who were under debt bondage for the cost of their passage to the United States. After arriving, the workers were obliged to work for the railroad under threat of violence and imprisonment.

However, along with abolishing chattel slavery in the South, the 13th Amendment had made it more difficult to enforce this kind of servitude. The railroad companies subsequently sought alternative means of labor suppression, including lobbying for a new law to aid them in controlling their immigrant workforce, but the system proposed in the bill was ultimately rejected by the Reconstruction Congress for being too similar to earlier forms of servitude.¹¹¹

Around the time that Reconstruction ended and the progressive ideals of that era began to lose ground, a New York-based railroad attorney named Horace Wood published a treatise aimed at elaborating the at-will doctrine and advancing it over other competing ideas—including proposals akin to just-cause termination standards—that were circulating at the time.¹¹² Wood published his treatise in 1877, in the midst of a massive railroad strike wave, which culminated in this country’s first nationwide workers’ uprising.¹¹³

Central to Wood’s argument was the notion that if workers had a “right to quit” without penalty (as they now did with the ban on slavery and servitude), employers should have the right to dismiss workers at any time and without cause. In the years after Wood’s treatise was published, state and federal courts began solidifying the at-will doctrine, often citing the above rationale and rejecting the notion that employers seeking to fire workers should be required to have a reason. These court decisions cemented into law a default employment framework that has since become the basis of all employment relations in this country. This framework extended to all workers the same level of protection from dismissal that was afforded to 19th century railroad day laborers—that is, none.¹¹⁴

SOUTHERN EMPLOYERS
ALSO BEGAN USING THE
THREAT OF DISMISSAL
FROM EMPLOYMENT AS
A TOOL TO RE-ASSERT
POWER AND DOMINANCE
OVER THE FORMER
SLAVES THAT THEY
EMPLOYED. SOME
FREEDMEN WERE FIRED
FOR SIMPLY DEMANDING
TO BE PAID WHAT THEY
WERE OWED, WHILE
OTHERS WERE FIRED
FOR ATTEMPTING TO
VOTE OR FOR VOTING
AGAINST THEIR BOSS’S
INTERESTS.

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ENDNOTES

- 1 Only some states have laws protecting whistleblowers who speak up about health and safety issues on the job, and most of those laws are narrow and do not adequately protect most whistleblowers. While the federal Occupational Safety and Health Act nominally protects whistleblowers, in practice it is ineffective for reasons including that it does not allow private enforcement by workers and requires workers to complain within thirty days – an unrealistically short window. Many states also recognize public policy exceptions to the employment at-will doctrine, but the health and safety violations typically must rise to the level of illegality. See, e.g., *Wright v. Shriners Hospital*, 589 N.E.2d 1241 (1992) and Deborah Berkowitz and Shayla Thompson, *OSHA Must Protect Covid Whistleblowers Who File Retaliation Complaints*, NATIONAL EMPLOYMENT LAW PROJECT, 2020, <https://www.nelp.org/publication/osha-failed-protect-whistleblowers-filed-covid-retaliation-complaints/>
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