HOW WOULD TODAY’S EMPLOYEES FARE IN A RECESSION?

Edwin R. Render†

I. INTRODUCTION

Over the past fifty or sixty years, many changes have occurred in the national economy that affect the way employees work, as well as their job security and general well-being. The major changes include the decline of “basic” industries, the decline of organized labor, changes in the way goods and services are produced and delivered, the rise of the two-income family, the rise of the service economy, the deregulation of the “new economy” industries — such as airline, trucking and telecommunications — and the globalization of the economy. During the course of these changes, the United States faced periods of both economic expansion and recession.

These changes did not occur independent of each other. In fact, many occurred simultaneously. Some changes, while associated with a particular time period, actually began before the period with which they are associated. Often the importance of any one particular change was not recognized until it had already happened. For example, the “new economy” really preceded the 1990’s, and “basic industries” were no longer “basic” before the end of the 1970’s.

This paper discusses how these changes may affect employees in the event of a recession. By and large, the paper deals with these changes in chronological order. The first section of the paper outlines the major events of the last five decades of the twentieth century. This is followed by a description of the changes and how they may affect employees. The changes that have occurred in the economy over this period are well-documented. This essay adds nothing to our knowledge of the changes.

What has not received much attention in the legal literature is how the changes which occurred in the workplace over the past fifty years might affect workers in the event of a recession and how existing law and legal doctrines might work in the event of a recession. A great deal has been

† Edwin R. Render is a professor of law at the Louis D. Brandeis School of Law, University of Louisville, Louisville, KY. He is also an arbitrator with a national reputation.
written about the demise of organized labor, the increased diversity of the workforce, the interaction between work and family, the impact of contingent and part-time employment, the effect of technological changes on workers, and the effect of structural changes in the economy on workers.\textsuperscript{1} Some scholars argue that completely rethinking the law of the employment relationship is long overdue.\textsuperscript{2} What seems to be missing from much of this academic discussion is a more mundane question: what would a serious recession be like for workers, particularly those at the middle and lower end of the wage scale? Stated differently, how would workers fare today in a serious recession in comparison to, say, 1957?\textsuperscript{3} Will programs like employment compensation be adequate? Will anti-discrimination laws assist employees? This paper's fundamental argument is that many of the changes that have occurred in the American workplace and in society in general over the past five decades will make a recession more painful for employees than past recessions have been.\textsuperscript{4}


3. The term recession can be defined in various ways: it could mean a decline in economic activity or a negative Gross Domestic Product for two successive quarters. For purposes of this paper, the best definition of a recession is an unemployment rate in excess of six percent. GLADYS W. GRUENBERG ET AL. FOR THE NAA COMMITTEE ON ACADEMY HISTORY, THE NATIONAL ACADEMY OF ARBITRATORS: FIFTY YEARS IN THE WORLD OF WORK 4 (1998).

4. One would suppose that the increased complexity of the American economy would make a widespread recession less likely today than it was in the past. One might also think that increased knowledge about the economy in general and business cycles in particular would enable policymakers to adopt policies that would avoid a harsh recession. Perhaps the best evidence of this contention is the sheer length of the present economic expansion. See generally The New Economy, THE ECONOMIST, Sept. 23, 2000, at 5. Notwithstanding this progress, there are still reasons for workers to be concerned about the effects of a
II. A Bit Of History

The end of World War II brought great change to the American economy. Thousands of women and service men joined the civilian workforce. Plants that had produced goods for the war effort were either closed or modified to produce products for civilian use. Between 1945 and 1947, unemployment doubled. In response, Congress passed the Full Employment Act of 1946, which provided for federal intervention when unemployment rose above the "normal" level which, at that time, was three percent.

In the post-World War II era, most of the American workforce was engaged in manufacturing, construction, mining and, to a lesser extent, agriculture. During this era, the phrase "basic industries" fairly accurately described the manufacturing sector. These industries were heavily unionized.

The manufacturing sector has changed dramatically over the years. In 1950, manufacturing accounted for 29.3% of the gross domestic product. By 1990, this figure had fallen to 18.44%. In 1950, 26.46% of the American workforce was engaged in manufacturing, whereas in 1990 the figure was 16.58%. These trends are continuing today. Foreign competition did not present a problem for American industry in the 1950's, but that decade was not without economic problems. The decade ended with the 1957-58 recession.

The 1960's was a period of general economic growth. In 1961, civilian employment was 67.3 million. However, most of the increase in employment occurred in the service industries. During the 1960's many industries moved from the Northeast and Midwest to the South and Southwest. Unions experienced difficulties in organizing relocated industries. During this decade, the number of women in the workforce increased rapidly. Unions also had difficulty organizing women. During recession, and that is what this paper examines.


8. Id.

this period of economic expansion, some industries still had high levels of unemployment due to structural and technological changes.\(^{10}\)

During the 1970’s the United States faced severe inflation in the United States. The consumer price index rose 112%.\(^{11}\) While the private sector, real wages fell.\(^{12}\) Civilian unemployment reached 8.5% in 1975,\(^{13}\) and unemployment in the auto industry reached 20% by late 1974.\(^{14}\) By 1979, Chrysler faced the real possibility of bankruptcy.\(^{15}\)

Many of the problems facing the United States economy in the 1970’s continued into the 1980’s. The structural changes, such as the relative decline of the importance of manufacturing, continued. The problems of some industries became more complex due to foreign competition. Manufacturers continued laying off workers and closing plants. In the final quarter of 1980, the Big Three auto makers all lost money.\(^{16}\) Then, the demand for steel dropped world-wide. In 1980, U.S. Steel Corporation lost money.\(^{17}\) The telecommunications, airline, and trucking industries all deregulated in the 1980’s.\(^{18}\) The 1980’s was also the decade of the PATCO strike. Technological changes in many industries reduced the need for employees.\(^{19}\) During the 1980’s, the service sector and information technology fields came to be widely recognized as an important, if not a dominant, sector of the economy.

The 1990’s began with a recession.\(^{20}\) The problems of the 1980’s, such as foreign competition, deregulation, plant closures, downsizing, and restructuring of businesses, continued.\(^{21}\) The current economic expansion

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10. See generally Phyllis Groom, An Account of American Labor in 1964, 87 MONTHLY LAB. REV. 1385, 1385 (1964) (stating that, in 1964, unemployment was high and there was concern regarding the effects of technological innovation on employment).
12. Id. at 417 tbl.694.
16. Id.
17. Id.
began in 1991. Throughout the decade, employment increased in most sectors of the economy. Many economists consider the service sector and information technology sector to be the major catalysts for the economy's growth. During most of the decade, many thought that the force of globalization kept wages relatively flat and prevented wage inflation.  

III. TODAY'S FASTER MOVING ECONOMY

In the basic industries during the 1950's and 1960's, recessions took some time to develop in what, in hindsight, seems like a fairly predictable manner. The automobile industry illustrates this point well. Historically, the first sign of a downturn was the slowing of sales at car dealerships around the country. Inventories of new cars rose at dealerships. Next, the auto manufacturers experienced a build-up of their own inventory of finished cars. When the auto manufacturers built up these excessive inventories, they laid off employees and reduced purchases of steel and other components. Consequently, the steel companies also laid off employees and purchased less metallurgical coal. As a result, coal companies laid off employees and cut production. These layoffs all occurred as a result of the decline in retail sales and the build up of inventory at the auto dealers. This was a fairly slow and orderly process. Several months elapsed between the time retail auto sales slowed and the time coal miners were laid off. However, the coal miners knew their layoffs were coming well in advance.

Modern manufacturing processes have increased the speed of the onset of a recession and decreased the predictability of a downturn. Most major manufacturers today use some form of just-in-time inventory and delivery.  


as it can and may stop purchasing parts or supplies at a moment’s notice. Such an event almost immediately forces the suppliers into a position where they must consider laying off employees, a result that comes about much more quickly than it did in the 1950’s and 1960’s. The recent experience of General Motors (hereinafter “GM”) illustrates how quickly an interruption in the supply of parts spreads through a large company. 24 In March of 1996, three thousand members of UAW Local 696 struck at GM’s Delphi Chassis Systems plant in Dayton, Ohio. The eighteen-day strike caused a shortage of brake parts, forcing GM to close twenty-six of its twenty-nine North American assembly operations and to lay off over 175,000 workers. 25 One would think that with businesses maintaining smaller inventories of supplies and the complex production process involving many companies, the ripple effect of an economic disruption would occur more quickly than it has in previous recessions.

A related problem for employees today is that companies are quick to halt production. The recent decision by Ford Motor Company to reduce production of its “Excursion,” a large sports utility vehicle provides an example of this trend 26 that consumes more gas than other competing trucks. When gas prices skyrocketed in Spring 2000, the company responded on May 19, 2000 by reducing the number of Excursions it would produce in the 2001 year by twenty-five percent. This announcement came only four to six months before the model was scheduled to be in showrooms. 27

The suddenness of the peso crisis in Mexico in 1994 and the currency

24. Some accounts have noted that buffer-less production and just-in-time delivery of parts make plants more vulnerable to strikes. See, e.g., Abraham McLaughlin, In Wake of G.M. Strike, a Bolder “Big Labor,” CHRISTIAN SCI. MONITOR, July 30, 1998, at 1 (quoting Danny Hoffman, University of Michigan Institute of Labor and Industrial Relations as stating that, “labor strife can shut down numerous plants within minutes”); Donald W. Nauss, Progressive Parts Management Left GM Vulnerable in UAW Strike, L.A. TIMES, July 8, 1998, at D1 (stating that just-in-time inventory, “leaves manufacturers like GM that have poor labor relations vulnerable to so-called bottleneck strikes that can shut down operations companywide within days”); Floyd Norris, Did You Notice? There’s an Automobile Strike, N.Y. TIMES, July 23, 1998, at A24 (noting that “G.M., by adopting just-in-time inventory procedures, has assured that a strike at one plant can quickly affect most of the company”).


27. Id.
The recession in Southeast Asia in 1997 are also instructive. Admittedly, the causes of these crises differed from most of the causes of recent United States recessions in recent years. Nevertheless, the way the Southeast Asia crisis spread from country to country can analogize to the way a downturn in our economy could spread from sector to sector, or from one part of the country to another.

The hazard for employees is clear. In today's economy an employer may lay off employees even before it has excess inventory. If necessary, Ford has indicated that it will lay off employees sooner rather than later to protect its profit margin. These decisions affect suppliers. Since layoffs today can be sudden and unexpected, employees have less time to prepare for them than in the 1950's.

IV. THE DECLINE OF UNIONS

The decline of the former basic industries and the rise of the service sector accompanied a decline in the number of employees represented by labor unions. Between 1945 and 1960 approximately thirty-five percent of the private sector non-agricultural workforce was unionized. In recent years, that figure has fallen as low as 10.9%.

The political power of unions has similarly decreased over the past fifty years. In the post-World War II era, a high percentage of employees in the basic industries were covered by collective bargaining agreements. As a general proposition, layoffs under collective bargaining agreements in the basic industries were based on seniority, provided that the employee had the ability to perform any job or jobs available after the layoff. Because people tended to progress from job to job under a typical collective bargaining agreement, the senior employees in a plant tend to have the ability to perform many lower-rated tasks. Consequently, they could retain a job with the employer following a layoff of less senior employees. As a result of these contractual provisions, younger workers

29. Id.
30. Organizing: More Union Organizing Activity Predicted; Effectiveness is Questioned byObservers, 1996 DAILY LAB. REP. 24, at D22 (Feb. 6, 1996).
31. See generally VIEWS OF AMERICAN ECONOMIC GROWTH (Thomas C. Cochran & Thomas B. Brewer eds., 1966); PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW, 9-10 (1990) ("By the mid-eighties, then, private sector union coverage had fallen from its 40 percent share in the mid-fifties to just over 15 percent only three decades later."); The Rising, Falling Trade Unions, THE ECONOMIST, Nov. 22, 1997, at 27-28 (stating that, "unions' influence in Washington reflects less their own strength than the weakness of other parts of the Democratic Party").
tended to be laid-off first in this era.\textsuperscript{32} When a recession hit, everyone knew how the layoff provisions in the labor agreement worked, and employees had a good idea of whether they would actually not have a job.

In today's economy, employees cannot predict layoffs. Without a collective bargaining agreement, companies have considerably more discretion in laying off employees. Today, technical, managerial, and administrative employees find themselves more vulnerable to job loss, older workers then to be laid off.\textsuperscript{33}

In the recent past, non-union companies have laid off employees under one, or perhaps, two theories. Under the first theory, a company decided what functions it wished to discontinue and terminated the employees who performed those functions. An example would be where a company decides to hire a trucking company to make its deliveries rather than doing its own delivery work. Under the second theory, the chief financial officer of the organization made the decision that each department must reduce its budget by a certain amount. If a company took this approach, the highest-paid employees in the organization would be the most vulnerable to layoffs. This theory may be implemented when senior management believes it is advantageous to attain necessary budget cuts by firing the fewest people.\textsuperscript{34} For example, a middle manager may be told to cut $90,000 in salary from the budget. This type of directive gives the manager several choices, none of which may be pleasant, but which surely make the question of "who goes?" less predictable than in the past. This is particularly true in the non-union workplace. The manager can terminate one $90,000 employee, a $60,000 and a $30,000 employee, or three $30,000 employees. Managers simply did not make this kind of analysis simply was not employed in layoff decisions in the post-World War II era. The discretion that managers have under either of these theories contributes to the uncertainties in how a layoff will proceed, and who will be laid-off. This situation differs from one involving a collective bargaining agreement, where methods for reducing the work force are provided in the collective


\textsuperscript{34} This phenomenon was especially apparent during the recessions of the 1980's and early 1990's. BENNETT HARRISON & BARRY BLUESTONE, \textit{THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA} 38 (1988); \textit{A Lot More Than You Would Think}, THE ECONOMIST, Feb. 2, 1991, at 66 ("The recession is cutting a swathe through America's managerial and professional elite.").
bargaining agreement.

V. CHANGING ATTITUDES TOWARD LAYOFFS

In general, attitudes toward layoffs have also changed in the last half-century. During the 1970's, the phrase "rustbelt" was coined as a result of the many closures of unionized plants in the upper Midwest. Many employees laid-off during this period never returned to work for their former employers. This was a change for workers who had typically been recalled by employers in the past. While very painful, the process was fairly orderly process for two reasons. First, collective bargaining agreements gave the company the right to reduce the workforce. Second, the labor agreements also contained provisions providing for the order of layoffs. These layoffs had a different feel than those today. In the past, the financial community viewed laying-off employees as a bad event. They understood it as a symbol of corporate weakness; companies that were managed properly did not permanently terminate their employees. When managers in the 1970's were forced to close a plant, they had a deep sense of regret and failure. One frequently heard managers speak about wanting to keep a plant open due to a sense of responsibility to the employees.

Today, companies have a more matter-of-fact attitude toward layoffs. There is a sense that layoffs are carried out to protect shareholder value and that laying-off employees is merely part of running a profitable business. In today's economy, laying-off employees is not viewed uniformly by the financial community as a sign of weakness, but rather as a sign that corporate management is willing to take the necessary steps to improve the bottom line. Some CEOs, such as Al "Chainsaw" Dunlap, former CEO of Scott Paper Company and Sunbeam, have made their reputations by reducing their workforce.

35. See Mark Berger, Unjust Dismissal and the Contingent Worker: Restructuring Doctrine for the Restructured Employee, 16 YALE L. & POL'Y REV. 1, 3 (1997) ("Employers in the 1980s and 1990s have embarked on a relentless quest to improve corporate earnings . . . by cutting expenses of all sorts, including, the costs associated with hiring and retaining employees.").

36. See Pacific Bell to Cut Jobs in Restructuring, N.Y. TIMES, June 28, 1995, at D1 ("Pacific Bell announced plans . . . to eliminate 500 jobs . . . as part of a restructuring to save $32 million in annual costs."); The Pain of Downsizing, BUS. Wk., May 9, 1994, at 60-61 (reporting Nynex Corporation's decision "to slash its operating budget by 40 percent to remain competitive" which removed "15,000 to 25,000 people from the payroll").


In a little more than four years, Al Dunlap made more than $100 million, ran two well-known public corporations, and axed 18,000 employees. Dunlap was not the only company head to order hefty workforce cuts, but he gained attention by eagerly seeking publicity to expound his simple philosophy of
During the post-World War II era, layoffs occurred regularly in many basic industries. Automobile manufacturers routinely laid off employees when they changed car models. Construction companies laid off employees during the winter months. However, laid off employees regularly returned to work for the same employer, and such layoffs generally lasted for a short time. Conversely, since the 1970's, many terminated employees have had no hope of returning to their former jobs. Today, layoffs occur because plants close or move, workers' positions are abolished, or employers simply do not have enough work for everyone. Today, when an employer terminates employees, the probability of the employer rehiring those employees is lower than in the past. This fact takes on greater significance when one considers that unemployment compensation is designed to deal with the temporary layoffs of the past, as opposed to the current structural changes in a business.

Studies of recent terminations have also concluded that when terminated employees lose their jobs, the jobs they find after termination pay less. Laid off employees in the 1950's and 1960's typically found comparable-paying jobs upon re-employment or, more often, they returned to work for their former employers. This changed in the 1970's and 1980's with structural changes in the economy and increased foreign competition. Many blue collar workers who were laid off in the 1970's

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Id.

38. Congressional Budget Office, *Displaced Workers: Trends in the 1980s and Implications for the Future* (Feb. 1993) (finding that “[e]ach year between 1981 and 1990, an average of almost 2 million workers lost full-time jobs and were not recalled by their former employers”).

39. Hipple, supra note 33, at 15 (asserting that worker displacement occurs even in the economy of the 1990’s).


41. Hipple, supra note 33, at 20.

42. Recent studies show that, upon re-employment, lower wages persist for four to five years in a new job. Polsky, supra note 33, at 575.

never found jobs that paid as well as their previous job. This was true even though state and federal governments had various re-training programs for these workers. The experience of those who lost jobs in the 1990's has been similar despite the low rate of unemployment. Generally speaking, it is difficult to make a skilled computer programmer out of a fifty-year-old millwright or garment worker. Today the major fear of workers in their fifties is losing their jobs, a fear which is based on the belief that they will not be able to obtain an equally remunerative job if they lose their present one. Thus, if recent patterns continue, laid-off workers will be less likely to find jobs for comparable pay than employees who were laid-off in the 1950's and 1960's were.

VI. SHORTER JOB TENURE

During the post-World War II era, workers, particularly those employed by large employers, tended to change employers less frequently than they do today. Employees had good reasons to stay with one

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44. Bruce C. Fallick, A Review of the Recent Empirical Literature on Displaced Workers, 50 INDUS. & LAB. REL. REV. 5, 9 (1996) (stating that lower salaries can be expected for four reasons: "loss of human capital specific to the job or sector; loss of a high-quality match between the worker and the job; loss of industrial or union wage premiums; and loss of seniority").

45. Simon Head, The New, Ruthless Economy, XLIII N.Y. REV. BOOK, Feb. 29, 1996, at 47 (citing a speech Felix Royhatyn delivered at Wake Forest University on March 17, 1995) ("More recently laid off workers do find jobs, but at lower pay levels. Most of the workers continue to earn less even five years after being fired."); Hipple, supra note 33, at 24 (finding that around forty-two percent of displaced full-time workers who lost jobs during 1995-96 were earning less than they had previously upon reemployment at similar jobs in 1998).

46. See Minda, supra note 22, at 571 (citing the 1996 Bureau of Labor Statistics Report on Worker Displacement, stating that "[t]he risk of job loss is rising for workers in the forty-five to fifty-five year-old category, and it is this age category that has suffered most as a result of corporate downsizing").

47. Fallick, supra note 44, at 9-10 ("Five years after the separation, average quarterly earnings losses stood at 25%, with no reason to expect further improvement... [these] earnings losses were characterized as large and persistent.").

employer rather than to move from job to job. Moving up the seniority ladder led to higher-paying, and often easier, jobs. Also, the benefits employees accrued under pension plans were generally not portable.\textsuperscript{49} These considerations encouraged union, as well as supervisory, employees to remain with a single employer for substantial periods of time.\textsuperscript{50} As a result, in 1975, it was not uncommon for employees to have worked between twenty or thirty years for a single employer. In fact, it was a source of pride for a person to be able to say he or she went to work for General Motors after being discharged from the military in 1946, and retired from General Motors in 1973.

This is not the case today.\textsuperscript{51} A recent study by BNA found that fourteen percent of the work force changed jobs in 1999. Although job tenure traditionally protected against displacement, long-term workers today are at increased risk for displacement.\textsuperscript{52} In fact, young people today are advised to prepare for many job changes over their working lives.\textsuperscript{53} These frequent job changes have increased the number of short-term employees in the work force, and many of these employees risk early layoff in the event a recession occurs. Indeed, an employer may have less incentive to retain a short-term employee in the case of a recession. The personal relationship likely differs from that of an employer and a loyal, long-term employee.

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\textsuperscript{49} See generally Stuart Dorsey, Pension Portability and Labor Market Efficiency: A Survey of the Literature, 48 INDUS. & LAB. REL. REV. 276 (1995) (reviewing the studies that have implications for the labor market efficiency effects of policies to enhance pension portability).


\textsuperscript{51} See Hildreth, supra note 40, at 144 (stating that in the manufacturing arena, "[f]irms ... are now viewed as being in a constant state of flux, laying off some workers and hiring new ones almost continually").

\textsuperscript{52} See Fallick, supra note 44, at 7 ("[t]he median tenure of displaced workers increased from 6.1 years in the 1984 survey to 6.8 years in the 1990 survey ... [T]he percentage who had at least 10 years of tenure increased from 30% to 40% over the same period").

\textsuperscript{53} Work Week: Job Hopping, WALL ST. J., July 21, 1998, at A1 ("[I]n 1998 a typical American held 8.6 different jobs between ages 18 and 32, with most of the changes coming before age 27.").
\end{footnotesize}
Some argue that the idea of employee loyalty is a thing of the past. Studies have shown that employees are less loyal to employers than they were in the past.  

In the 1980’s, a bit of dark sarcasm attributed to managers was an order to employees to “work hard so the company can abolish your job.” If employees lack loyalty to employers today, they may actually leave their position before the employer experiences economic difficulty, whereas employees might not have done so in the past.  

It becomes likely, then, that increased levels of employee turnover in the recent past will make it easier for employers to lay off more employees. On the upside, one would also suppose that a forty-five year old employee who had changed jobs five or six times would feel less traumatized by a layoff than an employee of the same age who had worked for one employer all of his or her career. In recent years, employee attitudes have also changed which may represent a view opposite to that of the preceding paragraphs. Thus, it would seem that the increased willingness of corporate managers to terminate employees, combined with the decrease in loyalty of employees in today’s work force, will make the next recession different from those of the 1950’s.

VII. SHAREHOLDER VALUE AND EMPLOYEES

Not unrelated to employee loyalty is the recent phenomenon of aligning corporate management interests with shareholder interests.  

Today, corporate managers take a keener interest in shareholder value than they did in earlier decades when investors were compensated by dividends rather than by an increase in share price. Shareholders will quickly punish a corporate management that allows the share price of the company to fall. The recent firing of the president of Lucent Technologies demonstrates such a case. Today, the various types of institutional investors that control large blocks of stock in major corporations have

54. See Dave Murphy, Respect for Workers Leads to Dividends, COURIER-JOURNAL, Nov. 6, 2000, at E-5.
55. 69 U.S.L.W. 2211 (Oct. 17, 2000) (“According to a BNA survey, one in seven permanent employees switched jobs in 1999, or roughly 14 percent of the workplace, up several points from about 11 percent in 1994, and roughly 8 percent in 1992.”).
56. Ram Charan, Stand By Your CEO (Sometimes), FORTUNE, Aug. 14, 2000, at 296. (“Wall Street’s unquenchable thirst for higher and higher quarterly earnings has put incredible pressure on CEOs. When expectations are not met, the effects are devastating. As the stock price drops suddenly and steeply, the CEO’s credibility and leadership come into question. The value of stock options sinks, and employee morale with it.”).
become increasingly assertive in the activities of those businesses. For example, most major mutual fund companies in the United States have one or more employees who handle corporate relations. These individuals, and mutual fund company management, know exactly what is happening in the corporations in which their funds own stock. For instance, a recent article in the Participant, a quarterly magazine published by TIAA-CREF, made these remarks:

TIAA-CREF is concerned about corporate governance because poor practices can limit investment options. For example, consider the large size of the indexed portion of CREF's stock accounts, which involve investments of more than $100 million in each of the 50 largest companies in the United States. Because of the immense size of these holdings, and the fact that CREF must maintain them in order to balance the indexed portions of its portfolios properly, CREF cannot simply sell the stock of companies with poor corporate governance practices, since this would deprive CREF of adequate representation in that industry sector.

The same article states that TIAA-CREF will send its "senior consultant" for corporate governance, Mr. West, to visit the company if TIAA-CREF's interests are involved. In addition, it notes that "[i]n most of these cases Mr. West will visit these companies and talk to the chief executive officer...[g]enerally, we find that companies don't want to disagree with us because TIAA-CREF carries unusual weight in corporate ‘America.’" Thus, though TIAA-CREF did not assert that a direct relationship exists between corporate governance and share price, one can reasonably assume that corporate managers would pay less attention to TIAA-CREF on matters involving share price than they would on matters of corporate governance. TIAA-CREF is by no means the largest mutual fund in the United States. One would also suppose that mutual funds the size of TIAA-CREF also carry considerable weight in corporate America regarding downsizing and layoffs. If one aggregates the cumulative influence of all money managers who control substantial holdings in large, as well as smaller, corporations, it is easy to see that if Wall Street wants a company to layoff its employees, that will probably happen.

59. Useem, supra note 50, at 26. Institutional holdings of stocks have grown from sixteen percent of the market in 1965 to forty-six percent of the market in 1990, bringing increased pressure on American companies to improve competitiveness. Id.

60. TIAA-CREF, PARTICIPANT, HOW TIAA-CREF WORKS FOR BETTER CORPORATE GOVERNANCE, May 1999, at 10-11.

61. Id.

62. Id.

63. Louis Uchitelle & N.R. Kleinfield, On the Battlefields of Business, Millions of
Furthermore, such layoffs seem to occur more suddenly than they did in the 1950's and 1960's. There are many accounts of money managers and investors exerting this kind of influence over any number of businesses, and of management responding very quickly to their demands. One would also expect that corporate managers would do exactly the same thing if there was an economic slowdown.

A similar source of pressure on corporate managers to lay off employees at the first sign of trouble can be found by examining the way in which many corporate executives are paid. Many corporate officers' salaries are partially tied to the company's share price. Surely the pressure to keep share prices high can contribute to early layoffs when profits and share prices decrease. Today, corporate managers appear to be more willing to terminate employees than corporate managers were in the 1950's, perhaps in part because of these salary considerations.

VIII. CONTINGENT EMPLOYEES

Operations focusing on share value have led to an increase in the number of part-time and contingent workers in the United States. The globalization of the economy greatly increases firm competition, which, in turn, forces employers to improve productivity. However, that productivity must be balanced against the costs of hiring and retaining full-time workers. Often, a compromise is reached by hiring a part-time or contingent workers whose costs are, by definition lower, since their hours and time spent in a position within a firm are limited. The increased presence of these types of workers can be attributed to the desires of an employer and to the decreased need for people to perform certain tasks due to technological advancements. Almost by definition these employees

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64. Matt Ritchel, www.layoffs.com, N.Y. TIMES, June 22, 2000, at C1. This was especially true in the new economy's "dot com" businesses. Dozens of these companies slashed their workforces in 2000 to meet a goal investors demanded—turning a profit. Id.

65. Berger, supra note 35, at 11 (finding that estimates in 1995 of the percentage of contingent workers in the American workplace varied from as low as 4.9% to 30%); Jane Waldfogel, Book Note, 50 INDUS. & LAB. REL. REV. 531 (1997) (reviewing CHRIS TILLY, HALF A JOB: BAD AND GOOD PART-TIME JOBS IN A CHANGING LABOR MARKET (1996)) ("In 1993, 19% of American workers were part-time, as compared to only 13% in 1957.").


67. The distinguishing characteristic of the contingent worker is that his job assignment is temporary. Berger, supra note 35, at 6.

68. G. Paschal Zachary, Worried Workers: Service Productivity is Rising Fast—and So
can, and will, be terminated in order to protect a company's stock price. Such termination can be made on a moment's notice.

IX. NON-COMPETITION AND NON-DISCLOSURE AGREEMENTS

The vast majority of blue-collar employees who lost their jobs in the 1970's were not covered by non-competition and non-disclosure agreements. They remained free to find work wherever they could, which included working for a competitor. Today, many skilled employees, particularly those in high-tech industries, sign such agreements, which could create some hardship for employees in the event of a recession. These agreements may effectively preclude employees from obtaining work similar to their job without having to endure the added expenses of relocating or, waiting a specified time before taking on a new job. It may also prevent them from using their valuable skills in a new job. This could cause severe hardships in many "new economy" businesses where there are many highly-skilled employees working for competing companies in a concentrated geographical area. One would suppose that the best source of an alternative job for such a worker would be doing the same type of work with another employer who is likely to be a competitor of the terminating employer. In these cases, the employer has done nothing wrong and may have a real interest in preventing an employee from going to work for a competitor.0

There are many judicial decisions both enforcing and denying the enforcement of covenants not to compete. These covenants come in many forms and restrict the conduct of former employees in different ways.71

is the Fear of Lost Jobs, WALL ST. J., June 8, 1995, at A1 (discussing the replacement of employees by machines).


70. RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981) tests restraints on employment by a rule of reason:

A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonable in restraint of trade if the restraint is greater than is needed to protect the promisee's legitimate interest or the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.

Id.

71. See DONALD J. ASPELUND & CLARENCE E. ERIKSEN, EMPLOYEE NONCOMPETITION LAW § 3.01 (1989) (describing the types of restrictive covenants that are generally upheld, including those related to the sale of a business, partnership agreements, and employment
While the law in this area is not fully developed, if courts enforce non-competition agreements against employees who are terminated for economic reasons, employees burdened with such agreements will be worse-off than were most employees in earlier layoffs. Even if the law develops more favorably for employees, nothing would prevent an employer from requiring an employee to sign a non-competition agreement that precluded the employee from working for a competitor within a reasonable time from a termination for valid business reasons. There is very little uniformity in the way courts analyze covenants not to compete. In some states they violate public policy, whereas other states have moved away from this per se rule of invalidity and have adopted a reasonableness approach.

Most of the litigation arising out of non-competition and non-
Disclosure agreements involve situations in which the employees voluntarily left their employers. However, several cases have been litigated in which the employer initiated the termination. Some courts in these cases enforced a covenant not to compete against a former employer. While the law in this area remains unsettled, if courts enforce non-competition agreements against employees who are terminated for economic reasons, employees burdened with such agreements will be worse-off than most employees in earlier layoffs. Even if the law develops in a more favorable way for employees, nothing would prevent an employer from requiring an employee to sign a non-competition agreement that precluded the employee from working for a competitor within a reasonable time following a termination for valid business reasons. Courts would not have a problem with an employer requiring an employee to sign a non-compete agreement that conforms to the latest judicial decisions in the jurisdiction. These agreements might make a former employee reluctant even to seek work with a competing company.

76. E.g., Nat’l Homes Corp. v. Lester Indus., Inc., 404 F. 2d 225 (4th Cir. 1968) (affirming the enforcement of a non-compete clause against a defendant who voluntarily resigned).

77. The former employer prevailed in the following cases: Gismondi v. Franco, 104 F. Supp. 2d 223, 236 (S.D.N.Y. 2000) (upholding a non-compete clause preventing defendant from practicing medicine within a fifteen mile radius of the plaintiff for a period of three years where the defendant was terminated with cause); Reynolds & Reynolds Co. v. Tart, 955 F. Supp. 547, 558 (W.D.N.C. 1997) (affirming the finding of a magistrate that the non-compete clause was supported by adequate consideration); J.E. Hanger, Inc. v. Scussel, 937 F. Supp. 1546, 1559-60 (M.D. Ala. 1996) (issuing a preliminary injunction preventing defendant from competing for two years after termination within a fifty-mile radius of the former employer); Am. Nat’l Ins. Co. v. Coe, 657 F. Supp. 718, 725-26 (E.D. Mo. 1986) (issuing a preliminary injunction preventing defendant from selling life insurance in the St. Louis geographic area); Stack v Allstate Ins. Co., 606 F. Supp. 472, 477-78 (S.D. Ind. 1985) (upholding the validity of a covenant not to compete for two years after termination).

The employee prevailed in the following cases: Marion v. Hazelwood Farms Bakeries, Inc., 969 F. Supp 540, 543 (E.D. Mo. 1997) (denying the employer's motion for a preliminary injunction to prevent defendant from accepting employment in violation of a non-compete clause); Sifco Indus., Inc. v. Advanced Plating Tech., Inc., 867 F. Supp. 155, 158-59 (S.D.N.Y 1994) (holding non-compete agreements unenforceable where employees were terminated).

A trend in the law seems to be that courts will be less likely to enforce covenants not to compete if the employer has fired the employee, especially if the employer does so without cause. This leads some to theorize that there will be increased litigation over the characterization of the employment termination. See Rothstein et al., supra note 72, at §7.3.

78. Regardless of why termination occurs, courts today may be reconsidering exactly what constitutes “reasonable time” in the dot-com age. See Earthweb Inc. v. Schlack, 71 F. Supp. 2d 299, 316 (S.D.N.Y. 1999) (refusing to enforce a one-year non-compete provision for the vice president of content for an Internet company stating, “[w]hen measured against the IT industry in the Internet environment, a one-year hiatus from the workforce is several generations, if not eternity”).
X. CHANGES IN RETIREMENT PLANNING AND SAVING HABITS

The changes in pension and retirement planning that have occurred since the post-World War II era could have a dramatic impact on a future recession. During the 1950's and 1960's nearly all major industries had a "defined benefit" pension or retirement system. These plans generally meant that if an employee worked for a company for a certain number of years, he or she would receive a pension based on the number of years of service and some percentage of his or her earnings when that employee retired. Many of these plans were sponsored and managed by labor unions. Prior to the passage of the Employees' Retirement Income Security Act (hereinafter "ERISA"), many of these pension plans lacked vesting provisions and most were not portable. When employees were laid off during the post-World War II era, the money in a defined contribution plan did not immediately become available to the employee. However, it was generally expected that large employers would re-hire employees when business conditions improved. The employees' pension credits in the companies' plans remained in the plans during a layoff, and when the employees returned to work, they continued building credits. These circumstances combined to provide a strong incentive for employees to return to their former employer following a layoff.

When companies either closed or reduced operations in the 1970's, employers and the unions frequently negotiated early retirement packages. The defined benefit pension plan of the company often found itself an important component of these packages. For example, if a company wanted to terminate a group of employees who were between the ages of fifty and fifty-five, it could negotiate a severance package such that the company would pay the employees a certain amount of money until each employee reached age fifty-five. At that time, the employee would be entitled to a pension.

Employers have clearly moved away from defined benefit plans in recent years. The introduction of defined contribution plans and their increased use since the 1980's will force different and difficult choices for employees in the event of an economic downturn. If employees have defined contribution or 401(k) or 403(b) plans, they have an asset that may

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80. See generally Even & Macpherson, supra note 48, at 707; Fallick, supra note 44, at 10 (exploring trends in unemployment rates for displaced workers as compared with non-displaced workers).
81. I.R.C. §72(t)(1) (2000); see also Albert B. Crenshaw, Firms Shift Pension Risks to Employees, WASH. POST, Feb. 20, 2000, at H02 ("In 1975 . . . 27.2 million workers . . . were covered by defined benefit plans. Twenty years later, although the workforce had increased by 45% . . . the number covered by defined-benefit plans was down by 14%, to 23.5 million.").
be used to ameliorate the impact of the loss of work. Under such plans, employees may take their contributions out of the retirement plans under some circumstances before reaching age fifty-nine and a half by incurring a ten percent penalty. The same rules apply to Individual Retirement Accounts (hereinafter "IRA's") and Simplified Employee Pension Plans (hereinafter SEP's). Since many employees are laid-off before reaching age fifty-nine and a half, they may take some or all of their money out of their defined contribution plan. However, doing so goes against the conventional advice of financial planners and may decrease employees' retirement income.

If employees cannot find other work, the portability features under the current law will permit them to continue to contribute to their plan when they return to work for another employer that has a plan. However, employers frequently require employees to work for the company up to one year before they are eligible to participate in a pension plan. A defined contribution plan is one in which each employee contributes to his or her own account and the employee's benefit is based on that contribution and its accumulations. Thus, changing jobs will decrease the total amount one can contribute to a pension plan over one's working career. If an employee loses two or three jobs during his or her career and has to use his or her accrued pension savings for living expenses, or is not in a retirement plan for a number of years, that employee could have little or no savings at the time of retirement.

XI. A HIGH-RISK CULTURE

Today's employment environment, and that of the 1950's and 1960's, also differs in that it has become almost fashionable for average employees to take risks totally unacceptable in post-World War II America. Entrepreneurship is almost worshiped today. A person who starts a business and makes a fortune is a hero. Middle-income employees are encouraged to take risks with their savings that no financial advisor would

82. John Jaye, Note and Comment, Insurance: The Retirement CD and Recent OCC Action Regarding Banks-in-Insurance, N.C. BANKING INST. 194 (1997) (comparing various retirement saving plans and noting that 401(k) plans only allow the employee to withdraw prior to age fifty-nine and a half under certain circumstances and then only with a ten percent penalty).

83. Id. at 203 (discussing penalties for early withdrawal from an IRA); see also Richard J. Kovach, The Simplified Pension: An Increasingly Attractive Alternative Among Qualified Retirement Plans, 8 AKRON TAX J. 109, 142 (1991) (noting that I.R.C. § 72(t) applies a ten percent early withdrawal penalty to IRA's and SEP's).

84. JACOB MERTENS, THE LAW OF FEDERAL INCOME TAXATION, § 25B:25 (1998) (discussing the definition of a "year of service," which is often a condition of participation in an employee benefit plan).
have recommended a generation or two ago. Employees frequently receive stock in the company for which they work as part of their normal compensation. The increased number of families owning stocks and mutual funds is viewed as a sign of national strength. People are encouraged to become their own stockbroker and to invest in instruments that a few years ago were seen as too risky. However, in these practices, there are risks for employees.

If there is a widespread recession, the value of many of these newly-acquired assets may decrease dramatically. The impact of a stock market crash on employees who have a large portion of their savings in stocks will be devastating. When the stock prices of high-tech companies fell sharply in early 2000, it caused considerable discomfort to employees holding these stocks. These devaluations required employees to rethink home and automobile purchases, despite the expanding economy and the fact that the Federal Reserve Board was considering raising interest rates. Imagine what it would have been like had the entire economy been spiraling into a recession or depression. Workers may have increased their net worth in recent years by taking risks that an earlier generation of employees would not have taken; however, if the economy goes into a recession, these employees may be worse-off than the earlier generation of employees.

In comparison to earlier generations of employees, employees today are also saving less. In recent years, the per capita rate of savings has decreased to approximately zero. At the end of 1999, private net savings reached a record-low of negative 5.5% of the Gross Domestic Product.

85. Felix Royhatyn, a senior partner at the Wall Street investment bank of Lazard Freres, sees this shift as “a huge transfer of wealth from lower-skilled, middle-class American workers to the owners of capital assets and to a new technological aristocracy with a large element of compensation tied to stock values.” Felix Royhatyn, Speech at Wake Forest University (Mar. 17, 1995).

86. See Sandra Block, People Crave Stock Options but Don’t Understand Them, USA TODAY, Aug. 25, 2000, at B1 (noting that, of the estimated twelve million American workers who own employee stock options, thirty-nine percent surveyed know little or nothing about how these stocks work).


88. Head to Head, Neck and Neck, THE ECONOMIST, Sept. 12, 2000, at 27-28 (“[T]his [Presidential] election is taking place at a time when half of all households own shares.”).

89. See Greenspan Lays out his Cards, THE ECONOMIST, July 29, 2000 at 27 (discussing Alan Greenspan’s view that the U.S. economy was slowing to a sustainable pace); see also Ashley Dunn & P.J. Huffstutter, Pinching Pennies at “Dot-Coms, L.A. TIMES, July 29, 2000, at A1 (describing how new “dot-com” companies were experiencing pressure to preserve economic resources); Benny Evangelista, Pleasanton’s Peoplesoft to Cut 430 Jobs, S.F. CHRON., Jan. 29, 1999, at C1 (discussing layoffs by the world’s second largest business software maker).


91. Id. at 80 (noting that “[o]ver the past four decades, private net savings has never
meaning that people spent more than they earned. If employees do not save, and if they have to spend their retirement savings, in the event of a layoff, their future is not bright.

XII. THE DUAL-INCOME FAMILY

Today's world also differs significantly from the 1950's in the increased number of two-income families. Although the number of women in the workforce continuously increased since World War II, the 1960's saw a dramatic increase in the number of women and minorities in the workforce, which has continued to increase. Today, dual-income families constitute a majority of the workforce. One would suppose that a two-income family would be able to survive a recession better than a single-income family if the wage earner in a single-income family became unemployed. However, as noted above, it is clear that in the past few years savings rates among Americans have decreased to a level that many economists find troublesome. If two-income families are spending everything they earn, the loss of one job could be just as catastrophic to that household as was a loss of a job in the single-income family in earlier times.

It was noted earlier that temporary layoffs in the 1950's and 1960's were a reoccurring event in many basic industries. The employees at that time expected to be laid-off from time to time, and many of them prepared for a layoff by contributing regularly to their savings accounts. If today's two-income families are spending all of their disposable income on the assumption that both spouses will always have employment, the loss of one job could prove devastating.

XIII. WELFARE REFORM

The welfare reform legislation of 1998 has brought and continues to bring a substantial number of new employees into the labor market. These employees represent a significant portion of the population that is

92. During the post-World War II era, the workplace was dominated by men. A two-income family was the exception rather than the rule. Today the reverse is true. See U.S. Bureau of the Census, 1998 STATISTICAL ABSTRACT, tbl.657 (showing that in 1960, only 31.9% of married women worked, compared to 61.2% in 1998).

93. Id.

94. Tamar Lewin, Now a Majority: Families With Two Parents Who Work, N.Y. TIMES, Oct. 24, 2000, at A20 ("[F]amilies in which both parents are working have become the majority . . . . According to a new Census Bureau report, based on data from 1998, both spouses were employed at least part time in 51 percent of the married couples with children, compared with 33 percent in 1976.")
completely unprepared to deal with a recession. These employees tend to have two characteristics that make them especially vulnerable in a recession. First, many probably have not worked long enough to have acquired jobs that companies consider indispensable. Second, their overall wage is fairly low. Many of these employees would be among the first to be laid off if a company needed to reduce its workforce. One would suppose that the loss of a job for these people would be devastating since they probably have not been in the workforce long enough to have built substantial savings. In past recessions, these people were simply not in the workforce. This new group of employees appears to be among the most vulnerable to a recession—both in terms of the likelihood of losing their jobs and of not having financial resources to cope with the loss of a job.

XIV. UNEMPLOYMENT COMPENSATION

Employees cannot depend on unemployment insurance to compensate them adequately for the duration of a long recession. Although all the states have unemployment compensation programs, unemployment compensation was not designed to aid workers through long-term recessions or structural changes in the economy. The federal government as the “employer-of-last-resort” was seen as protecting against long-term unemployment. Generally these programs provide for payment of approximately fifty percent of earned wages for up to twenty-six weeks. The United States monetary maximum disbursement limit is among the lowest in the world. In 1993 maximum benefits ranged from $133 per week to $468 per week for a worker and dependent. Questions exist about whether the United States’ unemployment insurance program has adequate funds to withstand a recession. Even if it does, the amount of

98. Id. at 627 (noting that problems of long-term unemployment were met by the creation of public jobs, although that alternative has never been pursued).
99. Id. at 629 (comparing unemployment benefit amounts in Germany, Italy, Great Britain, Canada, Japan, France and the United States).
100. Id. at 601.
101. Id. at 629.
102. See generally WAYNE VROMAN, TOPICS IN UNEMPLOYMENT INSURANCE FINANCING (1998) (suggesting state unemployment insurance trust funds will need to maintain large balances in order to survive a recession and analyzing various methods of financing that
compensation seems inadequate, leaving workers in trouble should a recession occur.103

XV. LEGAL RESTRAINTS ON TERMINATING EMPLOYEES

Beginning with the National Labor Relations Act,104 Congress has passed several federal statutes that have restricted an employer’s right to terminate employees. These statutes include the Civil Rights Act of 1964 as amended,105 the Age Discrimination in Employment Act,106 the Whistleblower Protection Act,107 and the Worker Adjustment and Retraining Notification Act (hereinafter “WARN Act”).108 Many states have passed parallel legislation. The major problem with all this legislation, with the exception of the WARN Act, is that it was not intended to deal with or restrict employers from laying off employees for economic reasons. Neither will the recent state court inroads on the employment-at-will doctrine be of much assistance in a recession.

Under § 8(a)(3) of the National Labor Relations Act, an employer may not discriminate against employees on account of union activity. In Radio Officers Union of Commercial Telegraphers Union v. N.L.R.B.,109 the Supreme Court noted that § 8(a)(3) did not “outlaw” discrimination in employment as such; it only outlawed discrimination that encouraged or discouraged membership in a labor organization is proscribed.110

Title VII would be of little assistance to employees facing layoff in the

such trust funds might find useful); Paul L. Burgess, Unemployment Insurance in the United States: Analysis of Policy Issues, (O'Leary, Christopher and Wandner, Stephen A., Eds.) (1997) 2 U. PA. J. LAB. & EMP. L. 215, 218 (1999) (book review) (noting that although current trust fund levels for the unemployment insurance program are higher than they were during the late 1970's and early 1980's, some researchers have found that the reserves would be quickly exhausted in the event of a recession of post-World War II severity).

103. See generally Unemployment Compensation: UI Advisory Council Renews Debate Over Hike In FUTA Taxable Wage Base, 1995 DAILY LAB. REP. 105 d18, (June 1, 1995). A report prepared for a meeting of the Advisory Committee for Unemployment stated, "[l]ast increased in 1983, the taxable wage base has 'not kept pace with the increase in covered wages'. . . [and] the ratio of taxable wages to covered wages had eroded to 36 percent, the lowest level in history. The proportion of wages on which taxes are paid has declined as a result." Id.; Statements Adopted by AFL-CIO Executive Council, Bal Harbour, Fla., 1995 DAILY LAB. REP. E-1 (Feb. 23, 1987) (stating "the value of unemployment compensation has declined as a percentage of the average weekly wage every year since 1981; and the nation's UI system is playing a smaller role as an automatic stabilizer for the economy during periods of high unemployment.").

110. Id. at 39-40.
event of a recession. In the context of intentional discrimination under Title VII, the Supreme Court has made it clear that an employer can defeat this claim by producing evidence of a non-discriminatory reason for the termination. In the disparate impact context, under the Civil Rights Act of 1991, an employer can defend of the basis on business necessity. Thus, in most circumstances, employers could terminate employees for economic reasons without running afoul of Title VII of the Civil Rights Act.

In recent years the Age Discrimination in Employment Act, 29 U.S.C. § 639 (1999), has probably been invoked more frequently than any other federal anti-discrimination statute in termination of employment cases.

Nevertheless, older members of society may be especially vulnerable in a recession. The changes in production methods made by companies during the 1970's and early 1980's have already been noted—the way goods and services are produced and delivered was rethought during this period, the service sector increased in importance, and manufacturing decreased as a percent of the United States’ gross domestic product. Layers of management were eliminated in many manufacturing businesses. Companies were downsized or right-sized. New manufacturing techniques were introduced, with many American manufacturers and service-oriented companies introducing the “team” concept along with cross-training, as opposed to the narrow job classifications and contractual prohibitions against working outside one’s assigned classification of the 1950s. There has been an increase in recent years in the use of information technology in both manufacturing and services. These changes will affect older workers who have been in one job or industry for several years more severely than younger workers. Older workers have more difficulty finding comparable work and relocating. There is also a perception that it is not economically salient to spend money to retrain an older worker when the

111. See Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (holding that an employer may defeat a claim of employment discrimination by showing a legitimate, nondiscriminatory reason for the job applicant’s rejection); McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973) (establishing the prima facie case for employment discrimination).

112. Section 703(k)(1)(A) of Title VII as amended by the Civil Rights Act of 1991, provides:

An unlawful employment practice based on disparate impact is established under this title only if (I) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position and consistent with business necessity.

113. BARBARA LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 853-59 (3d ed. 1996).

company can retrain a younger worker. Furthermore, the health insurance risks of hiring older workers are greater than those associated with hiring younger workers.

If recent experience with the ADEA is an accurate predictor, older workers will not be able to make effective use of the ADEA during a recession. In an age discrimination case, the plaintiff may have difficulty proving that he or she met the employer's reasonable job expectations. Employers may hold older, more experienced workers to higher standards. Further, in an ADEA action an employer may defend itself against a disparate treatment claim by proving a legitimate business reason for the termination. An example of such a legitimate business reason would be unacceptable performance.

Courts also consider economic justifications as legitimate, non-discriminatory reasons for discharge. In *Hazen Paper Co. v. Biggins*, the Supreme Court decided whether a disparate impact claim could be made under the ADEA. If courts refuse to allow disparate impact cases, it will be more difficult for plaintiffs to bring class actions under the ADEA. All these circumstances indicate that older workers facing termination as the result of a recession will not be aided by the ADEA. The Civil Service Reform Act protects federal employees from reprisal for reporting unlawful activities, stating that, "employees should be protected against reprisal for disclosing information he or she reasonable believes is evidence of a violation of any law, rule or regulation." The Whistleblowers Protection Act further protects federal employees who report official wrongdoing. However, neither the Civil Service Reform Act nor the Whistleblowers Protection Act is relevant to terminating government employees in a bona fide reduction in force. Obviously, the purpose of these and similar laws is not to provide protection for employees in a recession.

115. Minda, *supra* note 22, at 572 ("Aging workers are prime candidates for downsizing because most corporate decisionmakers, looking at the bottom line . . . tend to correlate high wages with age and length of service.").


118. *See, e.g.*, Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 174-75 (8th Cir. 1992) (upholding the plaintiff's termination and ruling that his removal was actually based on a violation of company policy).

119. *See, e.g.*, RICHARD A. POSNER, *AGING AND OLD AGE* 336 (1995). Courts, when considering an employer's explanation that an older worker, with his higher benefits and salary, was terminated because he was more expensive than a younger worker, "[s]ee . . . that the employer had a reason unrelated to age for firing the older worker—he was more expensive." *Id.* at 337.


XVI. LEADERSHIP FOR A RECESSION

I have already suggested that a future recession could occur quickly and unexpectedly. The WARN Act provides very limited protection for workers. The Act covers companies that employ at least one hundred or more part-time employees who work an aggregate of at least four thousand hours per week, including overtime hours.

A “plant closing” is defined as:

the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.

A “mass layoff” is defined as:

[A] reduction in force which

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for—

(i) (I) at least 33 percent of the employees (excluding any part-time employees); and (II) at least 50 employees (excluding any part-time employees); or

(ii) at least 500 employees (excluding any part-time employees).

The Act requires a covered employer to provide sixty days’ notice of a plant closing or a mass layoff to the affected employees or their union. This notice is not required in cases of plant closures resulting from natural disasters or plant relocations within a reasonable commuting distance, if the employer offers the employees work at the other facility.

The WARN Act also provides employees with a cause of action for back-pay against the employer for violation of the Act if the former employee’s hours of work are reduced by more than fifty percent during each month within any six-month period. While the notice provisions of

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123. Id. at § 2101(a)(1).
124. Id. at § 2101.
125. Id.
126. Id. at § 2102.
128. Id. at § 2104.
the WARN Act will assist employees for planning purposes, the Act is not designed to provide any financial assistance. Recall that the law of wrongful termination developed in response to the fact that unless an employee had a contract for a specific term or lifetime employment, the employee was terminable at will. None of the theories under which an at-will employee may seek to escape the strict at-will rule, such as public policy, an employer handbook, or an implied covenant of good faith and fair dealing, would protect an employee terminated for valid economic reasons. Moreover, the exceptions to the doctrine that have developed in recent years—refusal to perform an illegal act, whistleblowing, the exercise of a right, or the performance of a legal duty—are not related to terminations resulting from an economic downturn.

XVII. LEGAL RESTRAINTS ON TERMINATING EMPLOYEES

The decline in the number of employees covered by collective bargaining agreements has already been noted. Those agreements provided a degree of protection against wrongful or unjust discharge. An estimated 140,000 unfair dismissals occur annually in the United States. One might theorize that unfair dismissals would increase in a recession. In the non-union sector today, the major sources of protection against unjust dismissal are found in the state doctrine of wrongful termination and federal and state statutes prohibiting discrimination on the basis of race, religion, sex, age, and disability. State and federal occupational safety statutes, state workers compensation laws, the National Labor Relations Act and whistleblower statutes also limit employers' power to discharge employees. While employers spend substantial sums avoiding liability under these statutes, and although employers may view these statutes and doctrines as significant restraints on their ability to terminate employees for good reasons, it is unlikely that these statutes would benefit employees terminated due to a recession. Neither the non-discrimination statutes nor the wrongful discharge doctrine prevents an employer from laying off employees for valid economic reasons. Indeed, these statutes are not

129. Barrett v. Asarco, Inc., 763 P.2d 27, 32 (Mont. 1988) (stating that if an employer has a fair and honest reason for termination, then there is no breach of an implied covenant of good faith and fair dealing as a result of the sudden termination of employee who has reasonable expectations of job security).

130. Minda, supra note 22, at 578. Even those older employees who are union members are not protected from downsizing, as unions have largely lost their power and are "no longer in the position to resist" the downsizing and reduction-in-force strategies of today's companies. Id.


132. See, e.g., Funk v. Sperry Corp., 842 F.2d 1129, 1132-33 (9th Cir. 1988) (finding no
designed to deal with that problem.

XVIII. LEADERSHIP FOR A RECESSION

Another difference in today's economy compared with that of the 1950's is the sheer length of the present economic expansion. Today's economic expansion began in 1991. Throughout the 1950's the business cycle moved from recession to expansion more frequently than has recently been the case.

One consequence of the length of the present expansion is that people who entered the workforce for the first time in 1991 have never experienced a recession. A person born in 1970 was expected to graduate from college in 1991. If such an individual immediately entered the workforce, he or she is now a "thirty-something" who has never worked through a recession. Many millions of Americans now fall into this category. It may prove more difficult for such individuals to deal with hard times than it was for employees of the 1950's and 1960's who remembered the Great Depression and who were more accustomed to periodic economic slowdowns.

Similarly, in every decade since World War II, most workers—and certainly the country's political, business and union leadership—had lived through hard times, whether it was the Great Depression, the double-digit inflation of the 1970's, or the deregulations and strikes of the 1980's. Today fewer people in leadership positions were alive during the Great Depression. As a result, public-policymakers respond less effectively to a recession than they have been in the past. Former Presidential candidate Albert Gore was born in 1948. President George W. Bush was born in 1946. The average age of a Senator is 58.3. The average age of a member of the House of Representatives is 52.6 years old. Today's union presidents are somewhat older: AFL-CIO President John Sweeney was born in 1934; United Auto Workers President Stephen P. Yokich was born in 1935; and Teamsters President James P. Hoffa was born in 1941. However, much of the business leadership of the country, particularly in the new economy, is considerably younger. Bill Gates and Steve Jobs, the respective masterminds behind Microsoft and Apple, were both born in 1955 and had already made millions in their early twenties and thirties. The
next generation of business leaders is even younger, as evidenced by Napster founder Shawn Fanning, who, at the young age of eighteen, created the code that gave rise to his company.

The relative youth of the business and government leaders and the current long economic expansion has resulted in the devotion of very little attention to the question of government response to an economic downturn. Are the federal and state laws and policies in place adequate? How well-prepared are leaders in government, business, and the labor unions to adopt strategies for dealing with a widespread recession? If a recession occurs and policymakers are required to choose between protecting the interests of investors or workers, will they be able to make such a choice, and how will they choose? Many of these questions cannot be answered unless, and until, a recession occurs.

XIX. GLOBALIZATION AND THE NEW ECONOMY

Debates raged throughout most of the 1990's about the impact of globalization on American workers, whether information technology had created a new economy and if so, how it might affect workers. The literature on globalization ranges from speculation about whether Western democracies in their present form will survive, to arguments that an emerging global culture is emerging in which English will be the universal language. The discussions about information technology and the new economy are equally wide-ranging and contentious. The discussions about globalization and the new economy are far broader in scope than this article. However, it may be useful to take note of some of the points being made in this ongoing debate which may affect employees in the event of a recession.

The Federal Reserve Board should be mentioned along with globalization and the new economy as a force that will affect workers should a recession occur. The Federal Reserve Board's views on globalization and the new economy will surely affect its decisions on raising or lowering interest rates. Furthermore, these forces will not act independently. Each could cause reaction in, and be affected by, the actions of the others.

The globalization of the world economy and its effect on the American workers was noted long before the Perot presidential campaign

136. A bibliography of material on the new economy can be found at http://economist.com/surveys/neweconomy/sources.html.
coined the phrase "that great sucking sound." Organized labor has long decried the loss of American manufacturing jobs to third world countries which it sees as resulting from globalization. Others argue that globalization benefits American workers because it holds inflation in check and it increases the ability of the United States to export goods and services in industries in which we have a competitive advantage. Moreover, free trade advocates note that there are some manufacturing sectors in the United States that are doing quite well against foreign competition.

Workers face the problem that economists still debate the ways financial markets behave in the global economy. One writer concedes that the real meaning of the Mexican crash and the East Asian financial crisis is still far from clear. Furthermore, a large withdrawal of capital from a country could cause a financial crisis almost instantaneously. A reasonable inference to draw from all of this is that the United States could be thrown into a recession very quickly for reasons that have little to do with the way our national economy is managed.

137. Jack I. Garvey, *A New Evolution for Fast-Tracking Trade Agreements: Managing Environmental and Labor Standards Through Extraterritorial Regulation*, 5 UCLA J. INT’L L. & FOREIGN AFF. 1, 7 (2000) (explaining the so-called “race to the bottom” theory: “the thesis was that the U.S. companies would relocate to Mexico to avoid U.S. environmental standards . . . such industrial flight to countries with lower standards, and therefore lower costs, causes downward pressure on standards worldwide, inducing a so-called ‘race to the bottom’”); Michael C. Wolfson & Brian B. Murphy, *New Views on Inequality Trends in Canada and the United States*, MONTHLY LAB. REV., at 3 (Apr. 1998) (characterizing “race to the bottom”: “global competition in the production of traded goods and services is forcing countries with more generous social transfers or more egalitarian wage structures to abandon these mechanisms or risk losing out”).


139. Board of Governors of the Fed. Reserve Sys., Remarks of Laurence H. Meyer, Member of the Federal Reserve Board, before the Institute for Global Management, School of Business and Public Management, The George Washington University, 1997 WL 632415, at 27 (Oct. 14, 1997) (stating that U.S. participation in global markets has positive effects such as restraining inflation in the United States); David E. Sanger, *Fare at Seattle Table Leaves Sour Aftertaste*, PLAIN DEALER, Dec. 5, 1999, at 18A (stating that “labor groups actually wanted a stronger trade organization, one that could enforce rules that would protect workers . . . on pain of economic sanctions”).


142. Id. at 110. Another writer notes that the dollar may not be the dominant currency in the future. The Euro may become an equally acceptable safe-haven for investors. Lester Thurow *New Rules: The American Economy in the Next Century*, HARVARD INT’L REV., at(1997-98).
In recent years a number of economists and other observers have argued that neither high unemployment nor inflation will be a problem in the foreseeable future. A primary reason for this conclusion is the belief that increased productivity prevents higher wages from triggering inflation.¹⁴³ Unemployment is at a record-low in the United States, even though there is substantial unemployment in other developed countries in both Europe and Asia.¹⁴⁴ For a time it was believed that American workers were not making large wage demands out of fear that their jobs would be exported to countries with lower wages and higher unemployment rates. In the early and mid-1990's, this point was frequently made about so called "low-end" manufacturing industries such as the garment industry, shoe manufacturing and toys.¹⁴⁵ More recently, economists have asked, "With unemployment at less than five percent how many American workers are looking for jobs in these industries?"¹⁴⁶ Some argue that a different set of forces is at work in the high-tech and service industries. Supposedly, the high-tech industries have increased productivity in other segments of the economy. One consequence of this increase in productivity is that the country may be able to increase wages, while maintaining low unemployment and no inflation. Others argue that measuring productivity gains in the old economy caused by recent technological advances and productivity gain in the service sector is difficult to impossible to measure.¹⁴⁷

For many years, economists believed that if the unemployment rate fell below six percent, wage inflation would follow. However, the recent developments in the United States have brought this idea into question.¹⁴⁸

¹⁴⁶. Sylvia Nasar, Labor Costs Rose Slightly in the Spring, N.Y. TIMES, July 31, 1998, at D1 (“[T]housands of jobs in industries from high technology to hotels have gone begging [for workers].”).
¹⁴⁷. Another Miracle: Productivity, THE ECONOMIST, May 15, 1999, at 30 (noting the debate raging within the Federal government about the extent to which new technology has transformed the economy); Unproductive Comparison, THE ECONOMIST, Aug. 22, 1998, at 58 (discussing misleading statistics in comparing productivity of workers among nations). There are several problems for workers with respect to the new economy. Many workers are not employed in new economy businesses, although employees in many other industries would be affected by downtime in that sector. Many employees in new economy companies are highly skilled and might be able to find other work relatively easily in the event of a recession.
¹⁴⁸. Finance and Economics, THE ECONOMIST, Apr. 24, 1999, at 76 (“In 1996 America's rate of unemployment dipped below 52% [sic] and kept on falling. Today, remarkably, it
In 1999 the Federal Reserve Board became concerned about inflation in the United States' economy, in part due to upward wage pressures. At that time the conventional wisdom was that if the Federal Reserve Board concluded that upward wage pressure threatened to cause inflation, they would raise interest rates. The Federal Reserve Board did raise short-term interest rates by .25% five times in 1999.

What policymakers do not know is a major matter of concern about globalization and the new economy in terms of a possible recession and how it might affect the workers. If the high tech industries have really created a new economy, how will that economy behave? Will the old rules regarding business cycles apply? Some thoughtful observers think they will.

Many questions about globalization, the new economy and future downturns remain. If a recession does occur what segments of the economy will be most seriously affected? Will some segments of the economy be relatively unaffected? Will the increased complexity of the global economy be a factor which will make a nationwide recession less likely?

XX. CONCLUSION

On balance it seems that there is ample reason to fear that employees will be hurt much worse in a future recession than those in past recessions. Neither state governments, nor the federal government have taken any serious measures to deal with this specific problem. There has been no meaningful public discussion about this subject. It was not a subject of discussion in the recent presidential campaign which was primarily concerned with maintaining the present economic expansion, not what to do in the event of a recession. However, this is to be expected. Most people living today do not remember the 1930's. Academia is currently uninterested in the era. I recently entered the words "recession" and "employee" in Westlaw's periodical database. These words appeared in the same sentence in only 133 texts and journal articles. That says a great deal about the current appeal of an article about a potential recession. Much of the post-World War II legislation dealing with economic hardships was designed to deal with fairly specific problems, such as the

stands at a little over 4%. Inflation should have risen sharply, but it hasn't.").


Chrysler bail-out, the savings and loans bail-out, and the adjustment assistance for unemployment resulting from foreign competition.

On the brighter side, since World War II recessions have not always been equally harsh on all segments of the economy or regions of the country. The 1946-1947 recession was fairly widespread both in terms of industries and of areas of the country affected. The effects of the Arab oil embargo were widely felt throughout the country. However, the recession of the late 1970's and early 1980's hit the Mid-West worse than it hit the rest of the country, whereas the 1990-91 recession probably hit California harder than any other state.

Hopefully, the economy has become large enough and sufficiently complex that not all of it will sink into a recession simultaneously. If it does, employees may be in for a very hard time.