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Improving Corporate Accountability by Strengthening Employment Law

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IMPROVING CORPORATE ACCOUNTABILITY BY STRENGTHENING EMPLOYMENT LAW

INTRODUCTION

In recent years, companies have been compared to teenagers who, without special incentives to do their homework, simply will not do it.[1] For example, Delaware's Chancellor Strine,[2] who has witnessed the evolution of corporate decision making on a daily basis for the past forty years in the state that is the legal home to more than half of all U.S.-listed companies, draws this analogy in *In re MFW Litigation*.[3] Procedural protections such as programs to assess risks and to prevent, detect, and respond to misconduct, when implemented correctly, can deter excessive risk taking as well as fraud.[4] Yet, Strine says the fact that these protections are good for the company is not in itself sufficient to prompt action.[5] He notes that if there is no *extra* incentive for a corporation to put in place all of the necessary protections, it will not do so.[6]

Evidence shows that existing procedural protections in the United States are neither sufficient nor been implemented to

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1. *See, e.g.*, *In re* MFW Shareholders Litig., 67 A.3d 496, 500–01 (Del. Ch. 2013).

2. The Wall Street Journal named Strine "one of corporate law's biggest personalities," and in January 2014, he was appointed Chief Justice of the Supreme Court of Delaware. Liz Hoffman, *Leo Strine Nominated to Head Delaware Supreme Court,* WALL ST. J., Jan. 08, 2014, http://online.wsj.com/news/articles/SB10001424052702304347904579308432948927494?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702304347904579308432948927494.html.

3. *In re* MFW Shareholders Litig., 67 A.3d at 500–01.

4. Generally, risk management and fraud-prevention programs consist of some form of processes and procedures. For an example of one such program drafted by a leading global consultancy firm, see KPMG FORENSIC, FRAUD RISK MANAGEMENT (2006), http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Documents/Fraud-Risk-Management-O-200610.pdf (describing the various processes required to minimize fraud risk).

5. *In re* MFW Shareholders Litig., 67 A.3d at 501.

6. *Id.*

prevent excessive risk taking[7] and fraud.[8] Moreover, well respected scholars such as Partnoy and Crotty trace the causes of the 2008 financial crisis to excessive risk taking and fast-paced decision making.[9] At the same time, the predominant employment relationship within the United States is an "at-will" system, under which employers can dismiss workers for any reason.[10] This means most individuals do not have any redress when they lose their jobs,[11] even if layoffs are due to risky decisions or worse, fraud by company executives.

In the United States, risky decisions that amount to negligence or recklessness and cause harm to both people's property and bodies usually fall within the purview of torts.[12] While it could be argued that the harm resulting from a loss of employment equals or even exceeds the harm that tort law considers in ensuring remedies for those who have suffered physical injury,[13] under the law the loss of a job is seen as a purely economic loss that tort law does not recognize.[14] Moreover, corporate law of limited liability often overrides tort norms.[15]

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7. JAMES CROTTY, STRUCTURAL CAUSES OF THE GLOBAL FINANCIAL CRISIS: A CRITICAL ASSESSMENT OF THE "NEW FINANCIAL ARCHITECTURE" 4 (2009).

8. Jason Ryan, *Fraud 'Directly Related' to Financial Crisis Probed,* ABC NEWS, Feb. 11, 2009, http://abcnews.go.com/TheLaw/Economy/story?id=6855179&page=1.

9. Frank Partnoy, *Don't Blink Snap Decisions and Securities Regulation*, 77 BROOK. L. REV. 151, 163 (2011). Drawing a link between executives' focus on short-term time horizons and fast-paced decision making, one scholar noted that New York Stock Exchange turnover reached or exceeded 100 percent annually in all but one of the seven years immediately preceding the 2008 financial crisis, thus contributing to the bubble that eventually burst. James Crotty*, The Bonus-Driven "Rainmaker" Financial Firm: How These Firms Enrich Top Employees, Destroy Shareholder Value and Create Systemic Financial Instability* 12 (Polit. Econ. Res. Inst., Working Paper Series No. 209, 2011).

10. Deborah A. DeMott, *Investing in Work: Wilkes As an Employment Law Case*, 33 W. NEW. ENG. L. REV. 497, 497 (2011).

11. *See generally*, Ellen Dannin, *Why At-Will Employment is Bad for Employers and Just Cause is Good for Them,* 58 LAB. L.J., no. 5, 2007.

12. RESTATEMENT (SECOND) OF TORTS § 281 (AM. LAW INST. 1965).

13. Norman Beale, Susan Nethecott, *Job-loss and Family Morbidity: a Study of a Factory Closure,* 35 J. ROYAL C. GEN. PRAC. 510 (1985) (discussing scientific studies linking significant health deterioration with job losses).

14. Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773 (2006).

15. Daniel Greenwood, *Torts in Corporate Law: Do Corporations Have Fiduciary Obligation to Commit Torts?* 3–4 (University of Utah Legal Studies

This Note argues that stronger employment protection laws, such as those that exist in Europe, provide alternative avenues through which corporate processes can be made meaningful, rather than merely mechanistic, resulting in improved corporate accountability.

One solution, as seen in Germany and described below in Part III(C) of this Note, is the introduction of broad-based employment protection systems, coupled with the representation of labor interests in corporate decision making. A second method, which might be more politically palatable in the United States, is to expand the public-policy exception to employment "at-will,"[16] to include situations where termination takes place due to the wrongdoing of the employer and would entitle the employee to reinstatement or compensatory damages. If employees had broader protections, corporations would be forced to slow down their decision making, thus allowing sufficient lead time for required employee-notification periods and possible appeals. In addition, employee-termination costs must not be manipulated in the same way as other expenses, as executives manipulate such costs to optimize short–term results. With more protective employment laws, employees would have more leeway to monitor and speak out against company's actions that impact their continued employment, without worrying about potential retaliation. Finally, if employees become part of the decision-making process, the stakes represented at the table will become more reflective of the corporation's long-term interests.

Part I of this Note provides a background discussion on the relationship between employment laws and corporate accountability. Part II describes the corporate-governance system in the United States. Additionally, it sheds light on the state of U.S. legislation related to layoffs, with particular emphasis on the Worker Adjustment and Retraining Notification Act

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Research Paper Series, Research Paper No. 05-06, 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=776206&download=yes.

16. "In legal terms . . . since the last half of the 19th century, employment in each of the United States has been 'at-will,' or terminable by either the employer or employee for any reason whatsoever." Charles J. Muhl, *The Employment At-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., 3 (Jan. 2001). Thus, "at-will" employment means an employee may be fired at any time, regardless of whether his or her employer has just cause or provides advance notice or warning. *Id.*

("WARN Act"),[17] which is the primary source of employee protection during mass dismissals. Part III examines international norms, including those of the International Labor Organization and the European Union, while providing an in–depth analysis of the laws in one EU Member State – Germany. Part IV describes corporate-governance systems that are dominant in Europe. Part V provides a comparative analysis of corporate and employment laws in the United States and Germany. Part VI offers recommendations on improving employee protections and proposes an alternative torts fault-based system where those who commit fraud are liable to employees who lose their jobs as a result of it.

I. BACKGROUND

A. Corporate Governance – What Do Directors Owe, and to Whom?

The U.S. government's Financial Crisis Inquiry Commission[18] determined that the 2008 crisis was brought about by the combination of failures in government regulation combined with corporate mismanagement and excessive and unjustified risk taking by Wall Street executives.[19] Excessive corporate risk taking is fueled by the fact that the decision makers are shielded by the Business Judgment Rule ("BJR").[20] Further, even in instances where it is recognized that the BJR should not apply

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17. Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C.A. § 2101 (2000).

18. Congress established the Financial Crisis Inquiry Commission in May 2009 following the 2008 financial crisis and as part of the Fraud Enforcement and Recovery Act. It is an independent panel made up of ten private experts who held hearings, conducted interviews, and reviewed documents over the course of a year and published a report, which concluded that the financial crisis was avoidable. *See generally* FIN. CRISIS INQUIRY COMM'N, http://fcic.law.stanford.edu (last visited July 3, 2015).

19. NAT'L COMM. ON THE CAUSES OF THE FIN. AND ECON. CRISIS IN THE U.S., THE FINANCIAL CRISIS INQUIRY REPORT, at xviii–xxi (2011). *See generally*, MARK JICKLING, CONG. RESEARCH SERV., R40173, CAUSES OF THE FINANCIAL CRISIS (2010).

20. "[T]he business judgment rule shields directors from personal liability if, upon review, the court concludes that director's decision can be attributed to any rational business purpose." Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1374 (Del. 1995) (citing Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)).

due to violations of fiduciary duties by directors, corporate decision makers are protected by statutory provisions.[21] Risk taking is further reinforced by the fast pace of the markets and speed with which decisions need to be made.[22]

The core of corporate law in the United States is founded on an assumption that good process leads to good decisions. In many ways directors' and officers' fiduciary duties of care and loyalty can be discharged by ensuring that decisions were made through a process.[23] For example, the very definition of "duty of care" is that decisions are made in compliance with a corporate process.[24] Furthermore, a subsection of duty of loyalty – the duty of good faith – is comprised of the directors' "duty to put in place an oversight mechanism and process."[25] Finally, the cleansing options available to directors in ensuring discharge of their duty of loyalty are those of ratification by either the board, shareholders, or both,[26] which again implies a process through which decisions are made. Thus, while U.S. Courts have shied away from getting involved in business decisions, they have deemed that their function of ensuring justice is fulfilled when they confirm that directors follow a certain process.

In reviewing corporate decisions, the Delaware Court of Chancery assesses two aspects of the process: time and information.[27] Time is evaluated in terms of the duration and the number of meetings, presentations, etc., as well as in terms of the total length of time taken to arrive at a decision.[28] The Court evaluates information in terms of the quantity of expert advice available, from both internal and external experts, and

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21. For example, §102(b)(7) of the Delaware Code permits a certificate of incorporation to contain an exculpatory clause that absolves directors of liability for violating the duty of care. DEL. CODE ANN. tit. 8, § 102(b)(7) (2011).

22. *See generally* Partnoy, *supra* note 9.

23. Smith v. Van Gorkom, 488 A.2d 858, 875 (Del. 1985), *overruled on other grounds by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

24. *Id.* at 873.

25. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

26. *In re* MFW Litig., 67 A.3d 496, 504 (Del. Ch. 2013).

27. *See, e.g.*, *Smith*, 488 A.2d at 872; Moran v. Household Int'l, Inc., 490 A.2d 1059, 1075 (Del. Ch. 1985); S. Muoio & Co. v. Hallmark Entm't Invs. Co., No. 4729-CC, 2011 WL 863007, at *13–14 (Del. Ch. Mar. 9, 2011).

28. *S. Muoio & Co.*, 2011 WL 863007, at *14.

the number of studies commissioned.[29] In other words, the Court looks at the process without assessing the content,[30] and has thus created a system of corporate decision making based on a checklist, rather than true due diligence. In extreme cases, companies hire "financial advisors" and commission "studies" just to create a show of following a process to satisfy the requirement.[31] Yet even in the best cases, outside consultants are dependent on the corporations that contract them for their source of income, and might be compelled to please the company in order to ensure that they will get return business.[32]

B. What about the Workers?

However, one area where corporations do not need to follow any process is in the termination of "at-will" employees.[33] In most cases, companies can lay off thousands of people immediately and without any future liability.[34] Time is not an issue in these fast-paced decisions to terminate employees, and the information that feeds into them can be spurious. Sometimes these decisions are aimed at maximization of profits, while other times terminations seem inevitable due to a company's lack

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29. *In re* Gaylord Container Corp. S'holders Litig., 753 A.2d 462, 479 n.57 (Del. Ch. 2000).

30. WILLIAM A. KLEIN ET AL., BUSINESS ORGANIZATION AND FINANCE 157 (11th ed. 2010).

31. *Weinberger v. UOP, Inc.* is an extreme case where members of a majority shareholder's personnel conducted a study to assess the feasibility of acquiring a target's outstanding shares over a weekend without even visiting the company, and the financial advisor signed off on the report despite that the price – the very feasibility of which was in question – was left blank. 457 A.2d 701, 712 (Del. 1983). In 2001, Enron paid its accounting firm, Arthur Andersen, $25 million in audit fees in addition to the millions it paid in consulting fees. *Enron: The Real Scandal*, ECONOMIST, Jan. 19, 2002, http://www.economist.com/node/940091 [hereinafter *The Real Scandal*]. Andersen later admitted to overstating profits and understating debts in Enron's financial statements, and the accounting firm was indicted for shredding documents related to Enron's sudden bankruptcy that resulted from fraudulent business practices. *Id.*

32. Joel. S. Demski, *Corporate Conflict of Interest,* 17 J. ECON. PERSP. 51, 61–65 (2003) (providing an overview of dependence and conflict of interest between corporations and their consultants, financial advisers, and lawyers).

33. *See* Dannin, *supra* note 11.

34. There is a narrow exemption for terminating at-will employees under the WARN Act, *see* 29 U.S.C. § 2103 (2000), which is discussed in detail later in this note, *see infra* Part II.C.

of capital or its inability to pay its employees.[35] Lack of funds, however, might be merely a symptom, rather than a cause. While there can be legitimate factors resulting in the loss of a company's operational funds, excessive risk taking as well as fraudulent activity are also to blame.

One way to prove causation between fraud and mass layoffs or individual terminations is through a thorough analysis of accounts. Another way is through an examination of both the temporal sequence and the proximity between fraudulent activity and layoffs, which may indicate that fraudulent decisions almost certainly played some role in many of the large-scale worker terminations of the last two decades. For example, Enron laid off four thousand workers.[36] Additionally, Enron's accounting firm, Arthur Anderson, terminated seven thousand employees in 2002,[37] after it became evident that Enron executives had engaged in fraudulent business practices, utilized questionable accounting to conceal debts, overvalued the company's stock and overstated its earnings figures.[38] In late 2007 and early 2008, pharmaceutical company Bristol-Meyers-Squibb laid off four thousand three hundred workers[39] shortly after the company settled a case alleging fraudulent marketing and pricing practices.[40] Kicking off the financial crisis in 2009, AIG cut twenty thousand jobs[41] just as its executives were found to have been engaging in accounting fraud, bid rigging

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35. Wayne F. Cascio, *Downsizing: What Do We Know? What Have We Learned?*, 7 EXECUTIVE, 95, 96 (1993).

36. Rick Bragg, *Enron's Collapse: Workers; Workers Feel Pain of Layoffs and Added Sting of Betrayal,* N.Y. TIMES, Jan. 20, 2002, http://www.nytimes.com/2002/01/20/us/enron-s-collapse-workers-workers-feel-pain-layoffs-added-sting-betrayal.html.

37. *Arthur Anderson to Lay Off 7,000, Citing Enron Scandal Fallout,* TOPEKA CAPITAL-JOURNAL (Apr. 9, 2002), http://cjonline.com/stories/040902/bus_andersen.shtml.

38. *The Real Scandal*, *supra* note 31.

39. Stephanie Saul, *Bristol-Meyers to Eliminate 4,800 Jobs,* N.Y. TIMES, Dec. 6 2007, http://www.nytimes.com/2007/12/06/business/06bristol.html?_r=0.

40. DEP'T OF JUSTICE, *Bristol-Meyers-Squibb to Pay More than $515 Million to Resolve Allegations of Illegal Drug Marketing and Pricing* (Sept. 28, 2007), http://www.justice.gov/opa/pr/2007/September/07_civ_782.html.

41. Hugh Son, *AIG Cut 20,000 Jobs in 2009 on Asset Sales, Defections, Layoffs,* BLOOMBERG BUS. NEWS (Feb. 26, 2010), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aSc5QyNYLd.Q
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schemes, and stock price manipulation, resulting in cases that were later settled out of court.[42]

In each of these cases, it could be argued that the fines and penalties the companies had to pay justified the layoffs as a cost-saving move. However, had the company executives not engaged in fraud to begin with, the fines and penalties would not have been implemented. Thus, there is a direct link between the fraud and termination of employees.[43] More recently in late 2013, Caterpillar Inc. ("Caterpillar") laid off thirteen thousand employees during an ongoing investigation concerning a wholly owned subsidiary that both allegedly engaged in improper billing for unnecessary replacement of parts that were still in good repair and in dumping those parts and tools at sea to hide the evidence.[44] Several months earlier, in late 2012, Caterpillar acquired a Chinese company that within months proved to have been overstating its profits for years,[45] a fact that Caterpillar's lawyers, auditors, and executives did not catch during the company's hasty purchase of the subsidiary.[46] This example illustrates that fast-paced and risky decision making itself could result in losses that necessitate layoffs in certain cases.

The purpose of fraud-prevention processes is to ensure due diligence; however, when process is followed merely for show,

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42. Paul Smalera, *AIG Settles Longstanding Fraud Cases for $1 Billion,* CNN MONEY (July 16, 2010), http://money.cnn.com/2010/07/16/news/companies/AIG_Ohio_billion-dollar_settlement.fortune/.

43. Christopher Harress, *Caterpillar (CAT) Slashing Jobs, Closing Plants Across the World as Equipment Demands From Global Mining Industry Drops,* INT'L BUS. TIMES (Jan. 22, 2013), http://www.ibtimes.com/caterpillar-cat-slashing-jobs-closing-plants-across-world-equipment-demands-global-mining-industry.

44. James R. Hagerty, *Caterpillar Probed for Possibly Dumping Train Parts in Pacific Ocean*, WALL ST. J., Nov. 22, 2013, http://www.wsj.com/articles/SB10001424052702304607104579212410752833816; James B. Kelleher, *Caterpillar to Close Another Mining Equipment Plant,* REUTERS (Nov. 15, 2013, 5:59 PM), http://www.reuters.com/article/2013/11/15/us-caterpillar-mining-layoffs-idUSBRE9AE17O20131115.

45. Simon Montlake, *Alleged Fraud at Caterpillar's Chinese Acquisition Puts Spotlight on U.S. Principals,* FORBES, Jan. 21, 2013, http://www.forbes.com/sites/simonmontlake/2013/01/21/alleged-fraud-at-caterpillars-chinese-acquisition-puts-spotlight-on-u-s-principals/.

46. *Id.*

as in the Enron case, it loses this purpose. Many of the proposed solutions for ensuring adherence to the spirit, rather than merely the letter, of fraud-prevention processes focus on ensuring that decision makers suffer consequences when their decisions go wrong.[47] The counterargument is that direct liability for corporate decision making will result in corporate paralysis – an inability to take risks, which could become an obstacle to innovation.[48] Both these viewpoints have merit and require a balance somewhere in between. Another way of ensuring responsible decision making is to ensure that the costs of decisions are built in into the very process of decision making itself. If corporations are obliged to take into account the costs of terminations as well as advance notice to be given to the employees, this obligation would force a more careful and appropriately paced decision- making process.

II. OVERVIEW OF THE U.S.-CORPORATE GOVERNANCE SYSTEM AND LABOR LEGISLATION

A. Corporate Governance

There are two types of corporate-governance systems: the shareholder-primacy model and the stakeholder-pluralist model.[49] Under the shareholder-primacy model, which is dominant in the United States, corporate decision makers serve the interests of shareholders exclusively, by maximizing profits.[50] In contrast, under a stakeholder-pluralist model, decision makers have to take into account a wider range of interests, including both shareholders and stakeholders, such as employees.[51] Ahlering and Deakin, respected British experts on international labor and employment practices, argue that the corporate-

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47. *See generally*, John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS, no. 1, 2014.

48. David Rosenberg, *Supplying the Adverb: The Future of Corporate Risk-Taking and the Business Judgment Rule*, 6 BERKELEY BUS. L.J. 216, 218–219 (2009).

49. Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation* 29–30 (Eur. Corp. Governance Inst., Working Paper No. 170/2011, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1713750.

50. *Id.*

51. Tom C. Hodge, *The Treatment of Employees As Stakeholders in the European Union: Current and Future Trends*, 38 SYRACUSE J. INT'L L. & COM. 91, 103 (2010).

governance system where corporations are accountable only to shareholders necessarily produces a system with limited-employee protections.[52]

Corporate law in the United States is predominately governed by state law.[53] Although there are variations, state laws in essence only recognize two fiduciary duties owed by directors of companies – the duty of care and the duty of loyalty.[54] Note that these duties are owed solely to the shareholders, and shareholders are the only ones that can bring actions for violations.[55]

B. Overview of Relevant Laws on Employment Termination

The United States ranks last on the Organization for Economic Cooperation and Development ("OECD")[56] Employment Protection Strictness index.[57] This index measures the complex

52. Beth Ahlering & Simon Deakin, *Labor Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity*?, 41 LAW & SOC'Y REV. 865, 865–76 (2007).

53. Steven M. Davidoff, *Despite Worries, Serving at the Top Carries Little Risk*, N.Y. TIMES, June 7, 2011 http://dealbook.nytimes.com/2011/06/07/despite-worries-serving-at-the-top-carries-little-risk/?_r=0.

54. *See* Klein, *supra* note 30, at 156–63.

55. *Id.*

56. In 1960, eighteen European countries, Canada, and the United States created the OECD in order to fight global poverty and promote economic growth and financial stability through monitoring and provision of recommendations to developing countries. The OECD is now comprised of thirty-four members, representing the world's most advanced economies, which negotiate binding agreements and voluntary guidelines on a range of topics related to the economy, including trade, transparency, and social policies such as labor rights. The Organization also has a permanent Secretariat in Paris, where a staff of economists, lawyers, and other experts monitor implementation of agreements in member countries and follow economic developments outside the OECD area. On the basis of data collected by these experts, the Secretariat publishes reports that form the basis of the OECD Council's recommendations. *What We Do and How*, OECD, http://www.oecd.org/about/whatwedoandhow/ (last visited Jan. 10, 2014).

57. The OECD collects data on twenty-one different aspects of employment protection legislation or regulations in member states. On this basis, it is possible to assess the costs to employers that result from procedures designed to protect workers from individual or group dismissals relative to the costs of hiring workers on fixed-term contracts or through temporary agencies. The OECD also evaluates social costs that accrue from mass dismissals and advocates a balance between corporate efficiency and worker protection. *Indica-*

of processes that are in place before an employee can be terminated.[58] In other words, out of thirty-four OECD member states, it is easiest to be fired or laid off in the United States,[59] since with some narrow exceptions, immediate notice of termination is effective there without any limitation.[60]

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tors of Employment Protection, OECD, http://www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm (last visited Jan. 10, 2014).

58. *Id.*

59. OECD, EMPLOYMENT OUTLOOK 86–87, 110 (2013), http://www.oecd-ili-brary.org/docserver/download/8113181e.pdf?expires=1435955581&id=id&accname=ocid45121179&checksum=08F49B3268565995C6415C7D79FA575C.

60. *See id.* at 79–80.

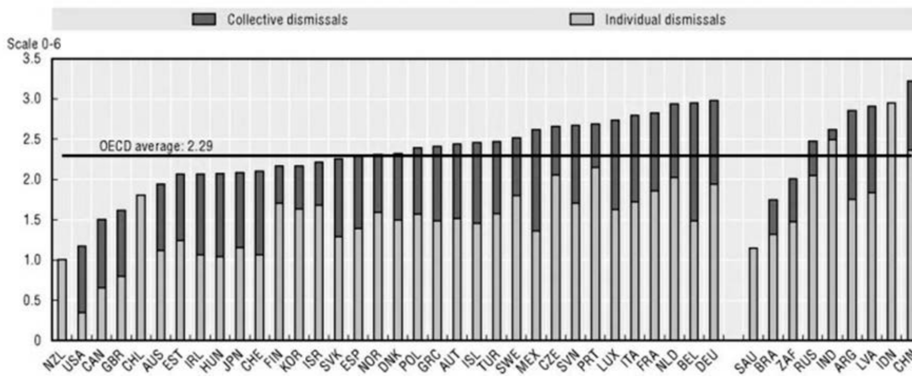

Figure 1[61]: Protection of Permanent Workers against Individual and Collected Dismissals OECD Economic Outlook Report 2013.

61. *Id.* at 86. New Zealand lacks data on collective dismissals. As figure 1 above shows, the OECD member country with the most employee protections is Germany, followed by Belgium and the Netherlands.

In reference to the diagram above, the countries on the right-hand side of the spectrum, in contrast to the United States, have established laws that limit employers' ability to terminate employees by providing protective measures. Such protective measures include requiring that employees be notified of the cause for their dismissal, have notice of their termination, and receive severance pay.[62]

Indeed, the at-will employment framework in the United States, coupled with the decline in unionization,[63] has resulted in a situation where an employee may be fired for any reason, without even being informed of the reason. Presumably, the at-will framework is set up to ensure maximum mobility of the workforce,[64] allowing parties on both sides of the bargain to terminate employment at any point, subject to contractual stipulations.[65] However the assumption that employment is a contractual relationship, where each party has a chance to bargain, is especially false in the wake of high unemployment rates and the fact that increased specialization of industries leaves many employees vulnerable to the only company (or one of very few companies) that requires a particular skill set.[66] In fact, public-opinion studies show that, given the choice, employees would not prefer an at-will employment relationship.[67]

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62. ANGELIKA MULLER, LABOUR LAW REFORMS AT THE CROSSROADS OF ILO STANDARDS AND OECD AND WORLD BANK'S INDEXES 4 (2012).

63. In 2012, the U.S. Bureau of Labor Statistics observed a continued drop in the number of unionized workers to 11.3 percent, a ninty-seven-year low. Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%,* N.Y. TIMES, Jan 28, 2013, http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html.

64. Jason P. Lemons, *For Any Reason or No Reason at All: Reconciling Employment-at-Will with the Rights of Texas Workers after Mission Petroleum Carriers, Inc. v. Solomon*, 35 ST. MARY'S L.J. 741, 766 (2004); *see also* DeMott, *supra* note 10, at 508.

65. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416 (1967).

66. *See* DeMott, *supra* note 10, at 507.

67. The results of one survey showed that 82.2 percent of participants believed it was illegal to fire employees solely to cut costs, *id.* at 511, thereby demonstrating that at-will employment violates the prevailing societal understanding and expectations of employment law. Similar views were expressed by employment law experts in the New York City area that the author of this Note interviewed. One interviewed expert noted that "the reason

Another example is presented by a review of the employment contracts of Chief Executive Officers ("CEOs"), demonstrating that these employees, who have the negotiating power to choose, very rarely go for an at-will arrangement; indeed, 86.93 percent of CEOs' contracts include for-cause employment protections.[68] In contrast, the only protection available to a regular U.S. employee is unemployment insurance, which runs a maximum of twenty-six weeks,[69] with a cap on the weekly allowance set by the state.[70] This insurance is not available to an employee if he or she is terminated due to misconduct or upon his or her own will.[71] Additionally, the employee does not receive any additional protections if the employer is found to have engaged in misconduct, representing a lopsided bargain.[72]

we have so many 'frivolous' employment discrimination claims today is because of the mismatch between people's sense of justice and what the law offers them." In other words, plaintiffs who are unjustly (but legally) terminated attempt bring claims in employment law within the narrow protections of anti-discrimination laws.

68. *See* DeMott, *supra* note 10, at 512.

69. Most states provide a maximum of twenty-six weeks of unemployment insurance. Until December 2013, if a worker was unable to find a job after twenty-six weeks, the temporary federal Emergency Unemployment Compensation program of 2008 (EUC) allowed the unemployed to collect up to fourteen additional weeks of benefits. CTR. ON BUDGET AND POL'Y PRIORITIES, POLICY BASICS, *How Many Weeks of Unemployment Insurance are Available?* (Mar. 9, 2015), http://www.cbpp.org/files/PolicyBasics_UI_Weeks.pdf; The EUC, however, expired on December 28, 2013. Rebecca Kaplan, *Extension of Unemployment Benefits Dead in Senate for Now,* CBS NEWS (Jan. 14, 2014), http://www.cbsnews.com/news/extension-of-unemployment-benefits-dead-in-senate-for-now/; Glenn Blain, *State Unemployment Benefits on the Rise*, N.Y. DAILY NEWS, Sept. 17, 2014, http://www.nydailynews.com/blogs/dailypolitics/state-unemployment-benefits-rise-blog-entry-1.1943215.

70. In New York, unemployed workers can collect a maximum of $420 each week. Celeste Katz, *State Unemployment Benefits on the Rise,* DAILY POLITICS (Sept. 17, 2014, 4:19 PM), http://www.nydailynews.com/blogs/dailypolitics/state-unemployment-benefits-rise-blog-entry-1.1943215.

71. Chad Stone & William Chen, *Introduction to Unemployment Insurance*, CTR. ON BUDGET AND POL'Y PRIORITIES 3 (July 30, 2014), http://www.cbpp.org/files/12-19-02ui.pdf.

72. *Id.* In other words, if an employee is terminated due to corporate mismanagement, or even due to an employer's illegal activity, the employee's *only* recourse is unemployment insurance.

This system creates costs to be absorbed by society, thus effectively subsidizing corporations.[73] The WARN Act is the only legislation that addresses the issue of massive layoffs by imposing a notice requirement for layoffs of over fifty people within a period of thirty days.[74] Ironically, the only notice requirement mandated by U.S. legislation may not apply in cases where the underlying reason for a layoff is fraud or excessive risk taking.[75]

C. The WARN Act

The WARN Act[76] was designed to protect workers by obligating employers to give their employees advanced notice of plant closings and massive layoffs.[77] For the WARN Act to apply, a company must have one hundred or more employees who worked more than six of the past twelve months and who averaged over twenty hours per week.[78] The WARN Act defines a plant closing as a termination of fifty or more employees at a single site due to shut-down of the plant.[79] Additionally, the WARN Act defines a mass layoff as the termination of 33 percent or more of full-time employees[80] at a single job site.[81]

The WARN Act is construed narrowly, and on its face it only applies to a very limited number of employers.[82] In fact, the

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73. *See* Armour & Gordon, *supra* note 47, at 39.

74. Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C.A. § 2101 (2000).

75. The narrowness of the WARN Act and its multiple exclusionary provisions result in many layoffs falling outside the Act's scope. This issue is discussed in detail further in this Note. *See infra* Part C.

76. This Note focuses on the federal WARN Act. State variations of the statute exist in Connecticut, Maryland, Minnesota, Tennessee, New Jersey, Illinois, Wisconsin, California, Ohio and Tennessee.

77. Zach Duffy, AFL-CIO, *The Public Availability of WARN Notices* 6 (2010), http://www.aflcio.org/content/download/11811/146071/AFLCIO_Public+Avail+of+WARN_final.pdf.

78. Worker Adjustment and Retraining Notification Act § 2101.

79. *Id.*

80. *Id.* When 50–499 employees are terminated, the WARN Act applies if those terminated constitute at least 33 percent of the company's employees. Termination of more than 499 employees is subject to the WARN Act regardless of the company's size. 29 U.S.C. § 2101.

81. Duffy, *supra* note 77, at 6.

82. *Id.*

WARN Act is consistently criticized for under-inclusiveness.[83] Not only does the WARN Act have explicit exceptions where the notice requirement does not apply, there are also definitional limitations that put many terminations outside of the purview of the Act.[84] One of these limitations is the definition of "employer" for the purposes of the WARN Act.[85] While both full-time and part-time employees are entitled to notice of termination under the WARN Act, part-time employees do not count towards the number of employees that would put the employer within the definition of "employer" for the purposes of the Act.[86] Furthermore, the WARN Act defines "part-time" employees broadly, by including those who work an average of less than twenty hours per week and those employed for fewer than six of the twelve months before the date of the required notice, regardless of number of hours worked.[87]

Another definitional limitation of the WARN Act is the term "employment loss,"[88] which has fostered much litigation since the Act was passed. Under the WARN Act, an "employment loss" is a "layoff of six months or longer, or a fifty percent or more decrease in working hours within a six-month period."[89] Further, the WARN Act specifically states what is not considered an employment loss: "[I]f a closing or layoff results from a relocation or merger with another company, and the employees are offered positions at a new or different location within a reasonable distance (with less than a six-month break in employment), then the Act does not recognize an 'employment loss.'"[90] In addition, accepting an offer to relocate within thirty days of termination puts an employee outside the definition of "employment loss."[91]

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83. *Id.*

84. Gary S. Mogel, *Proof of Failure to Provide WARN Act Notice*, *in* 27 AM. JUR. PROOF OF FACTS § 12 (3d ed. 1994).

85. *Id.*

86. *Id.* The fact that the WARN Act only applies to employers with more than one hundred full-time employees means many medium-sized businesses, which often employ only part-time workers, fall outside the Act's coverage.

87. *Id.*

88. *Id.* §5.

89. *Id.*

90. *Id.*

91. *Id.*

1. Exceptions:

In addition to the definitional limitations stated above, the WARN Act also provides for several exceptions including: temporary employment, strikes and lockouts, faltering employers, unforeseeable business circumstances, reasonable belief, and elimination of liability for good faith. First, under temporary employment, if the employer notified the employee in advance that the employment was only for a limited duration, then no notice of termination is required.[92] Second, the WARN Act does not apply[93] if a closing or mass layoff falls under the definition of a "strike or … a lockout not intended to evade the requirements."[94] In addition, an employer can terminate an employee who is considered an "economic striker" under the National Labor Relations Act.[95] Nevertheless, the employer is obliged to give notice to non-striking employees.[96]

Under the third exception, known as "faltering employer," the WARN Act stipulates that if a business would be harmed further or would be unable to make a comeback as a result of information going public, by giving notice to employees, then it "shall give as much notice as practicable and at that time shall give a brief statement of the basis for reducing the notification period."[97] The fourth exception is the "Unforeseeable Business Circumstances" exception, which excuses employers from the notice requirement if business circumstances arise "that were not reasonably foreseeable as of the time that notice would have been required."[98] Unforeseeable is defined as a "sudden, dramatic, and unexpected" action over which the employer has no control.[99] As the WARN Act is rather vague on the parameters of "unforeseeability," this provision has invited the most litigation.[100]

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92. Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C.A. § 2101 (2000).

93. Sandra J. Mullings, *Warn: Judicial Treatment of Exemptions, Exclusions, and Excuses*, 39 ARIZ. L. REV. 1209, 1213 (1997).

94. *Id.*

95. Worker Adjustment and Retraining Notification Act § 2103.

96. Mullings, *supra* note 93.

97. Worker Adjustment and Retraining Notification Act § 2102.

98. *See* Mogel, *supra* note 84, §16.

99. *Id.*

100. *Id.*

Fifth, the WARN Act allows employers who reasonably believed that the termination would be for less than six months to make such a showing in good faith, in which case they become exempt from the sixty-day notice requirement.[101] The employer is still required to notify workers as soon as it becomes apparent that an employment loss is inevitable.[102] And finally, even if a WARN Act violation has occurred, the Court can eliminate the employer's liability if the employer "proves to the satisfaction of the court that the act or omission that violated WARN was in good faith and … the employer had reasonable grounds [to] believe … that [it] was not a violation."[103] Surprisingly, this exemption has not caused excessive litigation, since courts have been firm in requiring both subjective intent to comply with the statute and that employers apply the statute with objective reasonableness.[104]

2. Remedies

The WARN Act provides an exclusive list of possible remedies. It entitles employees who have suffered employment losses to sixty days' worth of back pay and benefits.[105] In addition, employees can be reimbursed for reasonable attorneys' fees, litigation costs, and prejudgment interest.[106] No punitive damages are possible under the WARN Act. Additionally, the WARN Act specifically states that no injunction is possible from a plant closing or layoff.[107] Although the WARN Act contains an exclusive remedies provision,[108] it further specifies that remedies provided by the Act are in addition to, rather than in substitute of, those that are provided in employee contracts.[109]

As demonstrated above, the limited protections given by the WARN Act have very limited coverage. Given that the recordkeeping of the WARN Act is only done at the state level, there

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101. *Id.*
102. *Id.*
103. *See* Mullings, *supra* note 93, at 1254.
104. *Id.*
105. *See* Mogel, *supra* note 84, §26.
106. *Id.*
107. *Id.*
108. Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C.A. § 2104 (2000).
109. *See* Mogel, *supra* note 84, §26.

is no national data that would allow us to assess the proportion of terminations covered by the Act.[110] However the only available calculations at national level, conducted by the Government Accountability Office in 2003, showed that in more than 65 percent of instances employees were given two weeks or less notice, while employees in 32 percent of terminations were not given any notice at all.[111] Thus, U.S. employment law is in direct contrast to international law, EU legislation, and the laws of individual EU member states, where employees enjoy considerable protections against termination.

III. INTERNATIONAL AND EU LABOR AND EMPLOYMENT LAW

A. International Law

The International Labor Organization's ("ILO")[112] Termination of Employment Convention ("Convention No. 158")[113] and its supplement, the Termination of Employment Recommendation ("Recommendation No. 166"), are the two main ILO instruments dealing with unilateral termination by employers.[114] Together, these instruments outline valid and invalid reasons for termination and prohibit termination without cause.[115] Termination for economic reasons is one of the permissive reasons and requires reasonable notice and a consultation process before dismissal.[116] The exact term used in the Convention to

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110. Duffy, *supra* note 77, at 7–8.

111. *Id.* at 5.

112. ILO is the United Nations Specialized Agency on Labor and Employment mandated to coordinate and monitor international employment standards. Part of its work is done through reporting and research on implementation and compliance with Conventions that set out international labor and employment standards discussed in this section. *About the ILO*, INT'L LAB. ORG., http://www.ilo.org/global/about-the-ilo/lang--en/index.htm (last visited Aug. 13, 2015).

113. Thirty-six countries have ratified the Convention between 1983 and 2002. However, the United States and United Kingdom have not ratified the Convention. *Ratifications of C158–Termination of Employment Convention*, INT'L LAB. ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312303 (last visited Oct. 12, 2013).

114. *See* Muller, *supra* note 62, at 2.

115. Convention Concerning Termination of Employment at the Initiative of the Employer, art. 4, June 22, 1982, 1412 U.N.T.S. 160.

116. *Id.* art. 13.

refer to an economic justification for terminating employment is "operational requirements," but neither the Convention No. 158 nor the Recommendation No. 166 specifically defines these.[117] In one report on the Convention No. 158, the ILO explains that "operational requirements generally include reasons of an economic, technological, structural or similar nature."[118] The report continues that, "Dismissals resulting from these reasons may be individual or collective and may involve reduction of the workforce or closure of the undertaking."[119]

B. European Union

EU labor laws are consistent with ILO Convention No. 158. Per EU regulations, it is illegal in all the EU-Member States to terminate an employee without cause.[120] Moreover, directive 98/59/EC of 20 July 1998 on the *Approximation of the Laws of the Member States Relating to Collective Redundancies* mandates certain types of notification before any mass layoff.[121] For instance, if an employer plans any layoffs, he must notify public authorities in writing at least thirty days in advance of these layoffs.[122] He must also forward a copy of the notification to the workers' representatives, so that they can send comments to the competent public authority, who uses the thirty-day period to seek solutions to avoid the layoff.[123] Individual EU-Member States may decide either to shorten this period or to mandate a longer advance-notification period up to sixty days. If a layoff is pursuant to a judicial decision, such notification is not necessary.[124]

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117. INT'L LABOUR ORG., NOTE ON CONVENTION NO. 158 AND RECOMMENDATION NO. 166 CONCERNING TERMINATION OF EMPLOYMENT 2 (2009), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/meetingdocument/wcms_100768.pdf.

118. *Id.*

119. *Id.*

120. DIRECTORATE GENERAL EMPLOYMENT, SOCIAL AFFAIRS AND EQUAL OPPORTUNITIES, EUR. COMM'N, TERMINATION OF EMPLOYMENT RELATIONSHIPS 3 (2006).

121. *Id.* at 87.

122. *Id.*

123. *Id.*

124. Council Directive 98/59 on the Approximation of the Laws of the Member States Relating to Collective Redundancies, 1998 O.J. (L 225) 18 (EC).

Member States have a choice of adopting one of several definitions of redundancy, namely "layoff" or "collective dismissal." The first definition of layoff is dependent on the size of the company. In establishments normally employing more than twenty and less than one hundred workers, the termination of ten or more workers is deemed a layoff.[125] In establishments normally employing at least one hundred but less than three hundred workers, a termination must affect at least 10 percent of workers to be considered a layoff.[126] Finally, if a company employs three hundred or more workers, a termination of thirty or more workers would count as a layoff.[127] Under the second formulation, a layoff has occurred if "over a period of ninety days, at least twenty workers are made redundant, whatever the number of workers normally employed in the establishments in question."[128] Even before layoffs occur, employees through their representatives have a right to request specific information with regard to the planned layoffs, such as reasons for the layoff, the type and number of workers affected, the criteria used by management to decide which workers to terminate, the proposed compensation, etc.[129]

It is national courts that hold EU-Member States accountable for compliance with this EU-level directive.[130] For example, in *USDAW v Ethel Austin Ltd,* the United Kingdom's Employment Appeal Tribunal held that U.K. legislation did not comply with EU law on redundancies.[131] The result of the *USDAW* ruling is that collective dismissal regulations apply whenever twenty or more employees are terminated within ninety days, irrespective of branch locations.[132]

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125. *Employee Involvement – Collective Redundancies*, EUROPEAN COMMISSION,
http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=215 (last accessed January 17, 2014).

126. *Id.*

127. *Id.*

128. *Id.*

129. Council Directive 98/59 *, supra* note 124, at 16, 17.

130. *Id.* at 17.

131. USDAW v. Ethel Austin Ltd. (In Administration), 2013 WL 3197285 (2013) (UK).

132. *Id.* The defendant company in this case argued that the threshold of twenty terminations must all occur at a single location, which dramatically narrowed the application of European Council Directive 98/59.

As described above, EU directives and regulations provide many protections for workers during termination. These protections are considered a minimum, unless stated otherwise, and some Member States such as Germany go far beyond these provisions.[133] All EU Member States prohibit termination without cause. At the same time, all of them recognize "economic necessity" or "redundancy" as valid reasons for termination.[134] Therefore, the additional layer of protections granted to layoffs becomes very important.

C. National Laws in EU Member States – Germany as an example

In Germany, employers' ability to terminate workers is governed primarily by the statute Protection against Unjust Dismissal Act ("KSchG").[135] As will be demonstrated further, Germany's employee protections from and during terminations are stronger than the minimums set by the European Union. In compliance with the EC Directive, German employees can only be fired for cause.[136] In addition to employee misconduct, "operational requirements" constitute a valid reason.[137] While the statute does not define "operational requirements," it not only provides for any dismissal to be challenged in court, but also triggers a statutory requirement to notify both the employee and the Work Council[138] or worker representative (if a Work

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133. *See* Part III.B., *infra*..

134. DIRECTORATE GENERAL, *supra* note 120 at 3.

135. INT'L LABOUR ORG., *Employment Security and Employment Termination: Germany*, http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=DEU&p_classification=10&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY (last visited July 8, 2015).

136. AHRENS WALTER, LABOUR AND EMPLOYMENT 2013, GERMANY, GETTING THE DEAL THROUGH SERIES, BLOOMBERG LAW, 1, 10.

137. *Id.*

138. *Id.* Employees are not required to form a Work Council, but if they want to do so, they have the right to hold elections. For a Council to be formed, at least five workers must be regularly employed in the company's organizational labor unit. The Council's size depends on the number of employees in the unit. Work Council members, along with members of the election committee and candidates nominated to positions on the council enjoy statutory protection against dismissal and can be terminated only for serious cause. Different work councils have their own notification and consultation rights, but the Work Constitution Act grants all councils the

Council does not exist), as well as the Federal Employment Agency.[139]

In most, if not all, collective dismissal cases, "operational requirements" constitute the cause of dismissal. In Germany, the definition of collective dismissal, a layoff, is generally broader than that provided by the European Commission Directive on redundancies described above. Specifically, it applies to situations where only five employees are terminated, as opposed to the minimum of ten under EC Directive.[140] In addition, the 10 percent rule applied to relatively bigger establishments includes companies that have at least sixty employees, as opposed to one hundred, as is the case under the EC Directive.[141] In the case of larger companies, however, the EU threshold for applying layoff regulations is lower. For example, in Germany the same 10 percent rule applies for companies employing up to five hundred employees, which means a minimum of fifty employees would have to be terminated for layoff provisions to apply.[142] The EU Directive, however, defines layoff as termination of thirty workers or more for companies employing three hundred or more workers.[143]

As noted earlier, Work Councils or alternative representatives of workers participate in company decision-making processes in Germany. In the case of layoffs, the Work Council has seven days to challenge an employer's decision to terminate an employee.[144] In its termination notice, the employer must describe steps taken to pursue alternatives to the dismissal, including reassigning the employee to a different department or position.[145] It is in the employer's interest to disclose all information available to the Work Council, as any information that was not available at the stage of notification cannot be used in any labor- court proceedings that might follow.[146] The Work

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right to participate in decisions related to personnel matters, including hiring, transfers, and termination of employees. *Id.*

139. *Id.* at 11–12.

140. *Id.* at 11.

141. *Id.*

142. INT'L LABOUR ORG., *supra* note 135.

143. Directive 98/59, *supra* note 124.

144. *Id.*

145. Kündigungsschutzgesetz –KSchG [Protection Against Unfair Dismissal Act] Ch 1, General Dismissal Protection, March 2008 [hereinafter KSchG].

146. *Id. See also* WALTER, *supra* note 136, at 11.

Council can also require a social plan of dismissal, i.e. application of social criteria[147] in determining which of the employees should be terminated.[148] This social plan is intended to protect the most vulnerable workers, the elderly, disabled, or those with the most dependents, by ensuring that those least likely to be able to find a new job or those who most need the job to meet their obligations to dependents are terminated last.[149] If the social plan is not acceptable to the employee, the employer can increase the severance pay available, subject to agreement by the Work Council.[150] Even after an agreement with the Work Council is reached, the employer must comply with the statutory requirement to notify the employee.[151] The minimum requirement is four weeks' notice, which increases depending on the duration of the employee's prior tenure with the company.[152] Employees who have been with the company for more than twenty years are entitled up to seven months of notice.[153]

If an employer in not able to reach an agreement with the Work Council, the process can be brought before the Conciliation Board, which can take up to six months, during which the employer must put any dismissals on hold.[154] Thus, while the actual cause of "operational requirements" is not scrutinized

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147. The Work Council can look at age, length of employment with the company, number of children or other dependents, and any relevant disability. The result is that when a particular position must be eliminated, it is not always the incumbent of that position who is terminated. Instead, workers could be shuffled so that a young employee with no dependents is terminated, and an older or disabled employee with several children is shifted to that position in order to eliminate the slot he or she encumbered. Bernd Weller, *Landmark European Court of Justice Decision Validates Redundancy Social Selection Plans and Severance Payment Formulas in Germany Except as Regards Effect on Disabled Individuals*., A.B.A. INT'L LAB. & EMP. L. COMMITTEE NEWSLETTER, May 2013, *available at* http://www.americanbar.org/content/newsletter/groups/labor_law/int_newsletter/2013/may2013/germany.html.

148. *See* KSchG, *supra* note 145.

149. WELLER, *supra* note 147.

150. *Id.*

151. LORENZ MAYR, GERMAN LABOR AND EMPLOYMENT ISSUES WITH REGARD TO THE SET UP OF A COMPANY IN GERMANY 5 (2015), http://www.mayr-arbeitsrecht.de/fileadmin/mayr-arbeitsrecht/Arbeitshilfen/englisch/German-Employment-Law.pdf

152. *Id.*

153. *Id.*

154. *Id. See also* WALTER, *supra* note 136 at 11.

for validity, the stringent requirement imposed on the employer to consider possible alternatives to termination implies a validity check on its own.

IV. EU CORPORATE GOVERNANCE MODEL

The European Union has no regulation mandating a specific model of corporate governance. The Communication from the Commission to the European Parliament titled, *Action Plan: European Company Law and Corporate Governance* ("Communication"), however, defines corporate governance as "the relationships between a company's management, its board, its shareholders and its other stakeholders."[155] It should be noted that the Communication makes only limited reference to employees as stakeholders; however, it does note that corporate governance should take employee participation into account.[156] In the absence of an EU-wide requirement for minimum employee participation, Member States have adopted different models to ensure that employees have a voice in corporate decision making.[157] For example, the United Kingdom is traditionally assimilated to the United States in favoring a shareholder-value model,[158] while most of continental Europe has gravitated towards a stakeholder-pluralist model.[159] Interestingly, in the stakeholder-pluralist context, the executive's duty itself is not much different than in the shareholder-value model.[160] For example, in Germany the duty is called *Gesellschaftswohl*, which literally means "the best interests of the business."[161] The difference lies in the definition, where the interest of the business means the interest of the enterprise as a whole, including its employees.[162] In fact, Germany represents the strongest model of the stakeholder-pluralist system, since it

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155. *Communication from the Commission to the European Parliament, the Council, the European economic and Social Committee and the Committee of the Regions,* at 2, COM (2012) 740 final (Dec. 12, 2012), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0740&from=EN.

156. *Id.* at 3.

157. *See* Hopt, *supra* note 49, at 6–7.

158. *Id.*

159. *Id.*

160. *See* Hodge, *supra* note 51, at 104–05.

161. *Id.*

162. *Id.*

mandates an equal number of equal-membership nominations from shareholders and from labor on the supervisory board.[163] Other countries such as France and the Netherlands employ different variations of codetermination, though they do so to a lesser degree than Germany.[164]

Somewhat parallel to the governance system is the corporation's board structure. The United States, as a country with a shareholder-value corporate governance system, uses a one-tier board structure, where there is no separation between management and supervision.[165] However, it is common practice for boards to delegate powers to managers below, as well as to create subcommittees within the board to deal with specific issues, such as compensation committees.[166]

In the European Union, those who elect to form a "European Company," rather than one incorporated at a national level, can choose between a one- or two-tier board structure.[167] Some European countries allow for a choice at the national level as well.[168] In a two-tier structure, there is a strict division of power between the management board and the supervisory board.[169] This division allows the inclusion of stakeholders in the governance system, by making them a part of a supervisory board.[170] Countries where employee representation is mandated require employee-side directors on the supervisory board.[171]

A. Employee participation in EU Corporate Governance

Directive 2002/14/EC on the Cross-Community Establishment of Procedures for Information and Consultation of Employees[172] provides an additional avenue on a community-scale

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163. *See* Hopt, *supra* note 49, at 55.
164. *Id.*
165. Paul L. Davies & Klaus J. Hopt, *Boards in Europe - Accountability and Convergence* 10, (Eur. Corp. Governance Inst., Working Paper No. 205/2013 2013).
166. *Id.*
167. *Id.* at 14.
168. *Id.*
169. *Id.* at 10.
170. *Id.* at 33.
171. *See* Hodge, *supra* note 51, at 116.
172. Directive 2009/38, on the Establishment of a European Works Council or a Procedure in Community-scale Undertakings and Community-scale Groups of Undertakings for the Purposes of Informing and Consulting Employees, 2009 O.J. (L 122) 28.

for employee participation. This directive specifies employer obligations for consultation with employees.[173] However, in contrast to national level codetermination regulations that include labor in corporate-wide decision making, this directive only allows the involvement of labor in labor-related decisions.[174] In addition, employee rights are stipulated in other corporate EU regulations. For example, the EU Takeover Directive mandates certain requirements for disclosure to employees, and also requires that the offer document stipulates the acquirer's intentions with regard to the target's workforce.[175]

V: SIDE-BY-SIDE COMPARISON AND WHAT DOES IT MEAN

A. Analysis of the Comparison

As demonstrated above, European employment law differs greatly from that in the United States. For instance, while U.S. employees enjoy only a single layer of protection – only if their termination falls under the narrow scope of the WARN Act – employees in Germany potentially enjoy two layers of protection, an individual level and a collective level – should their termination fall under the much broader legal definition of a layoff or collective dismissal. The additional requirements imposed on European employers in the case of layoffs, compared to those provided by the WARN Act in the United States, have much further reach and cover much smaller businesses, including when there are a smaller number of terminations within the same period of time.

The benefit under the WARN Act is sixty-days advance notice for mass layoffs, whereas under German law workers are entitled to four to twenty-eight weeks' notice, depending on their length of employment with the company. Workers are also entitled to a social plan that ensures the most vulnerable workers are not laid off first, as well as an appeals process during which terminations are put on hold, and to detailed information throughout the process about how and why a layoff is occurring.[176] WARN Act benefits apply only to employers with one

173. *Id.*
174. *See* Hopt, *supra* note 49, at 59.
175. *Id.* at 58.
176. *See generally* Directive 98/59, *supra* note 124; KSchG, *supra* note 145.

hundred or more full-time employees when at least fifty are being terminated at once, while the threshold is much lower in Germany, where a termination of only five workers is subject to protections for a layoff and employers of only twenty workers are already subject to notice requirements.[177] Moreover, the WARN Act includes six significant exceptions,[178] making the reach of the Act extremely narrow.

Workers in the United States and in Germany are also treated differently by the respective models of corporate governance in the two countries. The distinguishing feature between the U.S.-shareholder model and the European-stakeholder model is that in the latter, the well-being of employees is considered to be part of the well-being of the company. As a consequence, corporate decision making in the stakeholder model must take into account the costs to workers, and workers have a voice in the decision making process. In other words, employee protections in Europe are not limited to those guaranteed by employment laws. Parallel to these protections, in many European countries corporate governance itself ensures employees' participation in the decisions that affect them. Making employees a part of the decision-making process introduces a consultative mechanism before major corporate decisions can be made. By contrast, the shareholder model used in the United States does not provide opportunities for employee participation in corporate decisions. Nor does that system provide any other alternatives through which employee interests can be taken into account.[179]

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177. KSchG, *supra* note 145.

178. Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C.A. § 2101 (2000).

179. In rare cases, individual corporations may have mechanisms in place to give employees a voice in corporate governance, but their ultimate responsibility is owed to shareholders. This is confusing at best and presents a conflict of interest at worst. In a recent case at the Volkswagen plant in Chatanooga, Tennessee, German management attempted to set up a work council, but workers voted against unionization. Lydia Depillis, *Auto Union Loses Historic Election at Volkswagen Plant in Tennessee,* WASH. POST, Feb. 14, 2014, http://www.washingtonpost.com/blogs/wonkblog/wp/2014/02/14/united-auto-workers-lose-historic-election-at-chattanooga-volkswagen-plant/. Commentators speculate that one reason the European model has not gained steam in the United States is that workers are "spooked" by the idea of "too much coziness with management." *Id.*

B. Is there a Conflict of Shareholder and Labor Interests?

Generally, shareholders and labor have one overlapping interest, which is a prosperous company.[180] The point at which the interests of these two groups collide is when shareholders, who aim to maximize profits in part by minimizing costs, view labor as a cost.[181] The shareholder-value system arguably has resulted in stagnant wages in the United States,[182] where the minimum wage in real terms has been on decline since 1997.[183] This conflict becomes especially apparent in the context of mergers, acquisitions, and restructurings, given that they inevitably lead to asset disposals, and therefore downsizing.[184] In fact, one of the criticisms of the codetermination system which requires labor representation is that it results in the creation of two "camps" within the board,[185] thereby hindering the general

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180. Shareholders want to maximize both stock price and dividends, and employees want both higher wages and increased job security. Presumably, a prosperous company is more likely to provide all of these. United Auto Workers President Bob King said in response to the Volkswagen case in Tennessee, *see supra* note 179:

> Our philosophy is, we want to work in partnership with companies to succeed. Nobody has more at stake in the long-term success of the company than the workers on the shop floor . . . . We're concerned about competitiveness. We work together with companies to have the highest quality, the highest productivity, the best health and safety, the best ergonomics, and we are showing that companies that succeed by this cooperation can have higher wages and benefits because of the joint success.

Id.

181. Simon Deakin, *Corporate Governance and Financial Crisis in the Long Run*, (Cambridge University Centre for Business Research, Working Paper No. 417, 2010).

182. *Id.*

183. NELP, THE "TRAINING WAGE" LOOPHOLE. A SUB-MINIMUM WAGE FOR TEENAGERS WOULD NOT HELP MOST EMPLOYERS, WOULD PROVIDE AN UNFAIR SUBSIDY FOR FAST FOOD AND RETAIL CHAINS, AND WOULD CREATE BAD INCENTIVES (2012), http://nelp.3cdn.net/f10db6a2fc770a8957_76m6bed9h.pdf.

184. *See* Deakin, *supra* note 181, at 12.

185. Contradicting this view, however, is the praise frequently granted the German system of codetermination for its role in preventing labor strikes and in facilitating consensus between workers and management when layoffs are economically unavoidable. *See Contra* William Boston, *VW Labor Representatives to Push for Works Council at Tennessee Plant,* WALL ST. J. MARKET WATCH, February 16, 2014, http://www.marketwatch.com/story/vw-labor-

corporate governance function of the board.[186] Furthermore, shareholder interests run in conflict with the codetermination system itself, where shareholders' voting power has less weight.[187]

Nonetheless, it can be argued that the clash of labor and shareholder interests is only true if those interests are considered in the short term. Experts widely share the view that one important factor leading to the financial crisis was so-called "short-termism,"[188] defined as the "excessive focus of corporate managers, [...] on short-term results, [...] and a repudiation of concern for long-term value creation and the fundamental value of firms."[189] There are many reasons for the rise of short-termism, and they are not simple.[190] The major push, however, is from the desire to boost the price of shares here and now, which is deemed to serve the interests of shareholders.[191]

Another related factor is the practice of earnings management, defined as the manager's judgment in financial reporting and in structuring transactions to alter financial reports to either mislead some stakeholders about the underlying economic performance of the company or to influence contractual outcomes that depend on reported accounting practices.[192] Such a definition usually refers to the accrual of earnings to management, where companies engage in accounting manipulations to decrease the amount of debt or the volume of sales, which in turn affects share prices.[193] Roychowdhury, a researcher on both managers' incentives and accounting and reporting choices, also refers to "operational" earnings management or "real activities manipulation," where managers engage in sales manipulation and overproduction, while decreasing discretionary expenditures, to be able to meet market expectations for earn-

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representatives-to-push-for-works-council-at-tennessee-plant-2014-02-16-74492237

186. *See* Davies, *supra* note 165, at 37.

187. *See* Hopt, *supra* note 49, at 56.

188. Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 267–68 (2012).

189. *Id.*

190. *Id.* S*ee also* Partnoy, *supra* note 10, at 154.

191. Dallas, *supra* note 169, at 271.

192. Healy, P.M. & J.M. Wahlen, *A Review of The Earnings Management Literature and Its Implications for Standard Setting*, 13 ACCOUNTING HORIZONS, no. 4, 1999, at 365.

193. *See* Dallas, *supra* note 188, at 278.

ings, which again affects share prices.[194] Based on comprehensive company data available through Compustat,[195] it appears that manipulating real activities is in fact a commonly used tactic in meeting earning targets.[196] These short-term gains not only hurt labor in an immediate sense,[197] they also hurt the company in the long run.[198] Moreover, such a system has broader implications for society. As discussed above, there are clear linkages between corporate decision making and the financial crisis. In addition, a system which inherently tries to save on labor[199] inevitably results in a society with high income inequality.[200]

VI. PROPOSALS

The previous sections showed that broad employment-protection systems, such as those that exist in Europe, coupled with the representation of labor interests in decision making, provide mechanisms that increase corporate accountability and better protect workers than the current U.S. system. This section, in addition, proposes a narrower, fault-based model that could help change U.S. executives' prioritization of short-term interests and remedy a legal structure that is reluctant to regulate business decisions and its effect on stakeholders other than corporate executives and shareholders. Some argue that broad-based employee protections lead to increased unemploy-

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194. Sugata Roychowdhury, *Earnings Management through Real Activities Manipulation*, 42 J. ACCT'G & ECON. 335, 341 (2006).

195. Compustat is a global database of companies' financial and market information, which is a division of Standard and Poor's Capital, Inc.

196. *Id.*

197. *Id.* For example, decreasing discretionary expenses–such as research and development, administrative, and general costs–can often mean labor cuts.

198. *Id.* For example, offering discounts to boost sales and generate higher earnings in a given reporting period may actually result in decreased margins, whereas production costs relative to sales are very high.

199. *See* Lawrence Mishel, *Declining Value of The Federal Minimum Wage is a Major Factor Driving Inequality*, *in* ECON. POLICY INST., THE STATE OF WORKING AMERICA ch. 4 (12th ed. Supp. 2013), http://s1.epi.org/files/2013/minimum-wage.pdf.

200. As of 2008, the United States has one the highest income inequality levels within OECD countries: the top 1 percent earns 20 percent of the nation's income. ORG. ECON. CO-OPERATION & DEV., AN OVERVIEW OF GROWING INCOME INEQUALITIES IN OECD COUNTRIES 38 (2011), http://search.oecd.org/els/soc/49499779.pdf.

ment.[201] While these views lack an empirical basis, they are very strongly held, which is why this Note also proposes a narrower alternative that should be more palatable in U.S.-corporate culture. This alternative is in line with the fault-based common law principle of the U.S.-legal system, where wrongdoers in nearly every noneconomic case are held liable for the wrong committed and which the hurt party is entitled to redress. For example, under common law, an individual owes duty to not harm or endanger another.[202] Should an individual's acts reflect something other than those of a reasonable person and result in harm to another, the perpetrator is deemed negligent and held liable to the person who has suffered harm.[203] However, U.S. law generally does not recognize purely economic harm, and thus a harmed party can be compensated for economic loss only if it is adjacent to a physical injury.[204] One of the few exceptions is a minority rule established by New Jersey, which states that purely economic loss is recognized if it was especially foreseeable that the loss would occur from negligent conduct.[205]

In most cases, compensation for loss of employment is excluded as a tort claim, since it is seen as a purely economic loss. However, similar to the exception provided by the minority rule, there are exceptions that allow for compensation in cases

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201. For discussion of the criticism and an empirical analysis of twenty three OECD countries showing otherwise, see PRABIRJIT SARKAR, *Does Employment Protection Law Lead to Unemployment? A Panel Data Analysis of OECD Countries, 1990–2008*, 37 CAMBRIDGE J. ECON., no. 1 (2013). In fact, as this Note demonstrates, Germany has strong employee protection laws and saw a dramatic decrease in its unemployment numbers, while the United States, which has weaker protections, has been seeing a dramatic increase in unemployment. Steven Rattner, *The Secrets of Germany's Success What Europe's Manufacturing Powerhouse Can Teach America*, FOREIGN AFFAIRS, Aug. 2011; *A Model of Success,* ECONOMIST (Nov. 9, 2013), http://www.economist.com/blogs/schumpeter/2012/04/germanys-mittelstand#.

202. BARRY A. LINDAHL & J. D. LEE, MODERN TORT LAW: LIABILITY AND LITIGATION § 3:1 (2d ed. 2002).

203. *Id.*

204. Gennady A. Gorel, *The Economic Loss Doctrine: Arguing for the Intermediate Rule and Taming the Tort-Eating Monster*, 37 RUTGERS L.J. 517, 520 (2006).

205. Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 AM. J. COMP. L. 111, 117–18 & 124 (1998). Similar exceptions now exist in other states, such as Florida, for example. *See* Curd v. Mosaic Fertilizer, LLC, 39 So. 3d 1216, 1218–19 (Fla. 2010).

of wrongful termination for public-policy reasons.[206] The public-policy reason is usually limited to cases where the employee was fired due to his or her failure to follow orders which themselves were illegal.[207] In such cases courts usually order the employee's reinstatement.[208] A less popular exception is the "Implied Obligation of Good Faith and Fair Dealing," under which an employer cannot terminate someone in bad faith.[209] This exception applies when an employer discharges an employee solely to avoid payment for services already performed.[210] Similar protections are granted by anti-retaliation statutes for discriminatory terminations as well as for whistle blowers.[211] The underlying principle behind all these exceptions is one of fairness and justice.[212] In other words, both courts and the legislature have refused to approve terminations that are in violation of public policy.[213]

Based on the principles of a fault-based system and on the public-policy exception pursuant to the principles of fairness and justice, one possible remedy to the problems in the U.S. system would be to extend the public-policy exception, so that it would apply in cases where employees are terminated due to the criminal or reckless behavior of an executive. In other words, if a company cannot afford to pay its employees as a result of fraud, those who are responsible should compensate employees who are terminated. Another similar, but not exact, model is seen in the unemployment-insurance system, where the amount paid by a company to the unemployment-insurance system increases based on the number of workers the company terminated and who then draw from the unemployment-

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206. Christopher L. Pennington, *The Public Policy Exception to the Employment-at-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583, 1593 (1994).

207. *Id.*

208. *Id.*

209. *Id.* at 1592 (explaining that bad faith exception applies to cases where employers terminate workers to avoid paying bonuses or other compensation).

210. *See* DeMott, *supra* note 10, at 503.

211. Eric Duryea, *Wrongful Discharge in Violation of Public Policy* 1, http://www.law.virginia.edu/pells/employment+law+4.nsf/Studentarticles/4551DAEE81B6F1798525674F000EE0E8/$File/discharge.pdf.

212. *See* Pennington, *supra* note 206, at 1619.

213. *Id.*

insurance system.[214] This note proposes an additional step into this system, one where employees would be compensated, in addition to unemployment insurance, if they are terminated due to the fault of the employer. Not only would such a system serve as an additional deterrent for fraudulent activity,[215] it also would recognize an additional constituency that could serve as a watchdog and bring cases of fraud to the attention of the judiciary.[216]

A. Causality[217]

If such a fault-based system is adopted, undoubtedly issues of causality will arise. Employers will contest that some external factors, rather than a specific fraudulent or reckless decision, are responsible for their companies' lack of funds and the necessity to cut costs by terminating employees. The legal system at large, and corporate law in particular, have dealt with issues of causality, which can also be applied here. One conceivable model is the one applied in cases of securities fraud and compensation of shareholder losses. As the Supreme Court noted in *Dura Pharmaceuticals*, causality can be demonstrated by showing an actual loss resulting from a misleading statement.[218] Cases following *Dura* now include event studies to show attribution of a particular part of a loss (i.e. fluctuation in market price) to a specific fraudulent statement.[219] Similarly, in the case of claims by terminated employees, causality can be demonstrated by showing actual loss, such as the loss of employment resulting from a lack of funds that were due to losses in the market, resulting from fraudulent activity. Here too,

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214. Timothy J. Moroney & Tyson Shower, *Review of Selected 1995 California Legislation*, 27 PAC. L.J. 893, 897 (1996).

215. Specifically, the risk of of incurring additional costs to the company of compensating terminated employees would encourage executives to consider the fate of workers in their business decisions and would deter them from making risky decisions that are likely to result in layoffs.

216. Under this proposed system, former employees would have a cause of action to challenge their termination or demand compensation when they can prove causality between fraudulent activity and their termination.

217. For background discussion and examples of cases where corporate fraud was temporally or causally linked to layoffs, see the Part I, *infra*.

218. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 338 (2005).

219. Ann Morales Olazabal, *Loss Causation in Fraud-on-the-Market Cases Post-Dura Pharmaceuticals*, 3 BERKELEY BUS. L.J. 337, 346–47 (2006).

market-event studies can be employed to account for other factors that might have contributed to a lack of funds and the necessity of terminating employees.

A much more difficult claim to withstand would be when employers claim that termination was a business necessity in order to maximize shareholder value. In contrast to the recommendation for the adoption of broad-based legislative protections for employees, this tort-based recommendation does not cover instances where termination is part of a business decision. Instead, this recommendation creates an additional claim by employees, parallel to that of shareholders in cases of securities and other fraud.

CONCLUSION

As a remedy to excessive corporate risk taking that results in a fragile economy and increasing income inequality, this Note suggests changes in U.S. employment laws. Employee protections during layoffs and labor representation in corporate decision making leads to more responsible decisions that take into account both short and long-term interests. The existing U.S.-corporate legal system relies on regulating the process and is reluctant to regulate the quality of corporate decisions. The problem we observe, however, is that these processes have been automatized and lack the necessary checks and balances. Employee participation and notification requirements would serve as an additional step, which unlike other steps are harder to skip or automatize. Consequently, such requirements can play a critical role in slowing down decision making and preventing excessive risk taking, steps that might have prevented the financial crisis altogether.

Additionally, this Note proposes an alternate system of employee protection for the United States that would be fault-based, rather than broad-based. This system would rely on tort law, the principle of which is that the wrongdoer compensates the harmed party. In dealing with pure economic loss doctrine, which prevents compensation in cases where the harm is solely economic, this Note proposes to extend the public policy exception. This alternative model is much narrower in coverage and only deals with cases of fraud. Nevertheless, it could be a step forward in protecting employees who have been harmed due to intentional wrongdoing by company executives. By increasing the costs of fraudulent activity, this model would serve as an additional deterrent to excessive risk taking. Furthermore, by creating an additional watchdog body in employees, this proposed system would increase the likelihood of fraud detection.

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* Diploma in Education and Linguistics, Khujand State University (2003); M.A., International Affairs, The New School (2007); J.D. Brooklyn Law School (2015). In memory of my dear father, Muhiddinjon Djabarov, who ingrained the values of justice and fairness in me and my work. He taught me that workers' rights are the backbone of civil rights, and that organized workers are the vehicle for fairness in a society. This I now recognize not only with the sense of my consciousness, but also because I have seen the reality. I am thankful to Robin S. Brooks for many hours spent discussing, debating, and reading my drafts. The time Robin devoted created the space where these ideas came to live. All errors or omissions are my own.