Viewpoint

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Employment at Will vs. Good Cause

Which better promotes job creation?

Dr. John Stapleford and John C. Sigler, Esq.

As Delaware goes forth with an eye toward job creation and a revived economy, few legislative actions could be as harmful as irrevocably changing the employer/employee relationship by replacing our existing Employment at Will standard with the labor union endorsed "Good Cause" requirement. If passed, this law could stifle job creation and cause many Delaware employers to relocate in other states. Just as importantly, many companies who are currently considering relocation to Delaware, which is what we need at this pivotal moment in our economic stagnation, are waiting to see the outcome of this legislation (HB 18). We can be assured that their attorneys will advise against coming here should it be signed into law. The following article will help define the debate and offer better solutions for job creation.

Shaun Fink
Executive Vice President, CRI

Understanding the Common Law Doctrine of "Employment-at-Will"

by John C. Sigler, Esq.

The so-called "Employment-at-Will Doctrine" is perhaps one of the most mis-understood, and therefore much maligned, employment law concepts existing today among both the general public and many employers. Developed under old English Common Law and brought to this country during our infancy, the "doctrine" states, in its purest form, that an employer may terminate the employment of an employee "for a good cause, a bad cause, or no cause at all". It is this purest form of "employment-at-will" which frequently troubles lawmakers, employees and the general public and which frequently leads unsophisticated employers into troubled waters.

Simply put, there are generally two types of employment relationships; "employment by contract" and "employment-at-will". In a pure employment by contract scenario, each party to the agreement – both the employer and the employee – have duties and responsibilities owed to the other and each accepts liability for breaching those duties. In other words, those duties and liabilities flow equally in both directions.

In such an arrangement, if the employer breaches the agreement by terminating the employment of the employee without "just cause", then the employer owes to the employee damages in the amount of the value of the contract. For example, if the term of the contract is for two years and the termination occurs at the end of one year, then the employer owes in damages to the employee that amount which the employee would have earned during the second year.

Likewise, if the employee breaches the contract by quitting early, the employee is liable to the employer for the cost of finding his replacement, and if the replacement costs more than the employee would have earned during that second year, the employee owes the difference between what the employee would have been paid and what the employer must now pay his replacement. Obviously, both sides also have a duty to mitigate damages.

By comparison, in a theoretically pure "employment-at-will" setting, both the employer and the employee may terminate the relationship without penalty. The only duty that the employer owes to the employee is the duty to pay for the employee's services, but the employee owes no duty to the employer except to follow the employer's instructions at work. In the employment-at will setting, the employee can leave at any time without the employer having legal recourse against the employee.

Now, having described the "pure employment-at-will" setting, please know that there really is no such thing in its pure form. As our society has progressed, the so-called "Employment-at-Will Doctrine" has been eroded to the point where the only thing that remains is what Delaware now has and that which HB 18 would take away, if passed by both Houses of the General Assembly and signed by the Governor.

Through a combination of state and federal anti-discrimination statutes, Delaware employers may not fire a person because of their race, color, genetic information, sex, religion, age, national origin, military or veteran status, sexual orientation, disability or marital status, or because of their relationship with a person within a protected class. And they may not retaliate against a person because of their exercise of protected employment law-related rights.

Additionally, in some cases such as those covered by our Workers Compensation Laws, Family and Medical Leave Laws, and laws designed to protect military service members and their families, not only may an employer not terminate employees who exercise their rights under those laws, but employers must either hold a position open for an absent employee, or return that employee to an equivalent position should they elect to return to work for that employer.

In addition to all of the civil rights laws that serve to erode the classical "Employment-at-Will Doctrine", Delaware also recognizes the "Doctrine of Good Faith and Fair Dealing" in certain employment law settings. This is a Common Law doctrine arising in Equity which further limits the employer's ability to rely upon the "Employment-at-Will Doctrine" as a defense to shoddy treatment of employees.

So, in reality, there is no such thing as a pure "employment-at-will" setting. In reality an employer is effectively barred from firing someone "for a good cause, a bad cause or no cause at all". In reality, the "Employment-at-Will Doctrine" has been eroded to the point that its existence approaches the level of being a myth – but not yet.

So "why not HB 18" you ask?

The reality of HB 18 and laws like it in other jurisdictions is that HB 18 effectively negates the "Employment-at-Will Doctrine" in its remaining entirety and creates a property right in continued employment that does not currently exist outside of government employment. HB 18 and other similar measures effectively create a one-sided contractual relationship wherein all of the advantages and benefits lie on one side of the equation (the employee's) without the counterbalancing duties and responsibilities that normally create fairness and equality in a typical contractual relationship.

In short, HB 18 creates a new cause of action under Delaware law where employers will be forced to prove "good cause" as defined in the statute (bill) for terminating employment. Although defined in the bill, it remains to be seen whether "good cause" will have the same meaning in the courts as the well known term already used by employment law practitioners known as "just cause".

In essence, HB 18 has the very real potential of making almost every case in which Unemployment Compensation Benefits would otherwise be awarded under current Delaware law into a case of "Wrongful Termination". It also presents the specter of every Delaware employer covered by the Act being forced to bear the costs of defending each and every one of these cases; or, more likely, having to settle each case to avoid the costs of litigation and the potential risk of an adverse judgment - the costs of settlement invariably being less expensive than the costs of litigation, even if the employer were to prevail at trial. And anyone who has ever practiced law will tell you, this situation then paves the way for an

entirely new form of "extortion by threat of litigation."

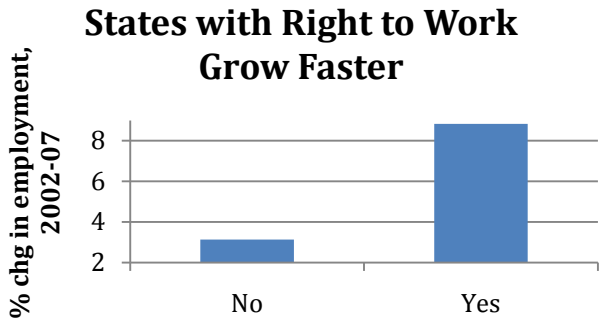
The ironic thing about HB 18 is that this is union-inspired legislation which will never benefit union workers, because union workers are already protected by the terms of their own labor contracts.

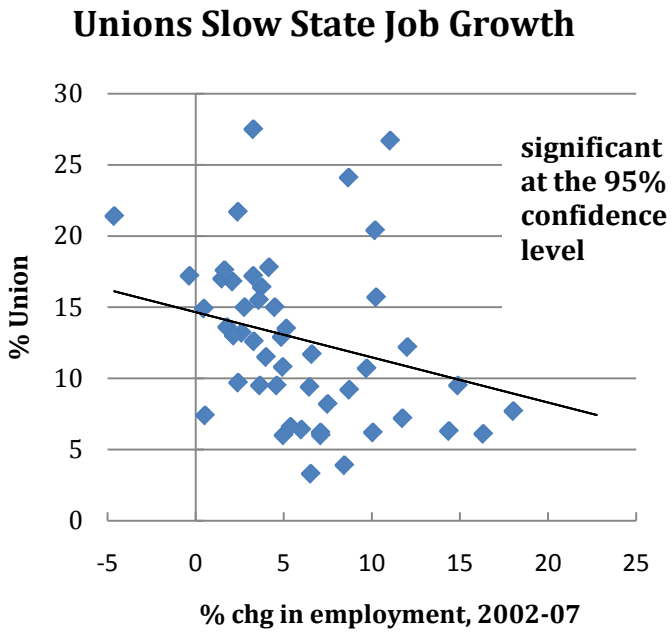
A more prudent course

by Dr. John Stapleford

Research shows that issues such as "right to work laws", workers compensation rates and the elimination of the prevailing wage statute are critical to the issue of encouraging private sector job growth within the State of Delaware. And although to some observers, HB 18 may not appear to be a radical departure from the current status of employment law in Delaware, the data proves out that Delaware's current economic situation would make this a less than optimal time to be introducing such changes within that body of law without a more thorough analysis of the potential impact of such proposed changes on Delaware's overall ability to grow private sector jobs and businesses within the current economic atmosphere.

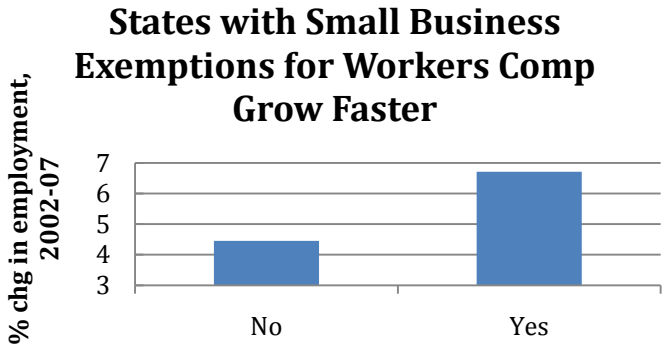
The employment growth data from the most recent expansion (2002-07) demonstrate that states with "right to work" laws have higher job growth than states without such laws. Moreover, the higher the proportion of workers in a state who are members of a union, the lower the employment growth rate. The descriptive data does not identify the causes of the slower growth. It could be that firms tend not to locate to states that allow "closed shops" or are highly unionized. Or it could be that strong union rules and regulations deter innovation and start-ups.

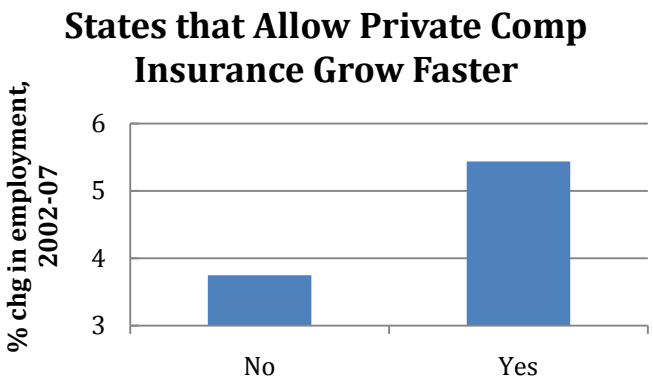


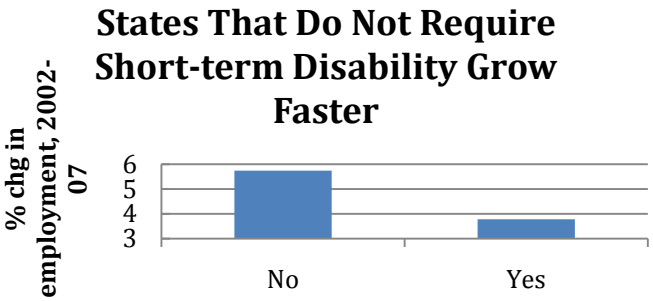


The research literature is clear that over time higher workmen compensation rates and more complex regulations discourage job growth. The BEA data for 2002-07 evidences that state job growth can be encouraged by workmen comp exemptions for some small businesses and some agricultural workers, in states where private comp insurance is allowed and in states that do not require short-term disability insurance.

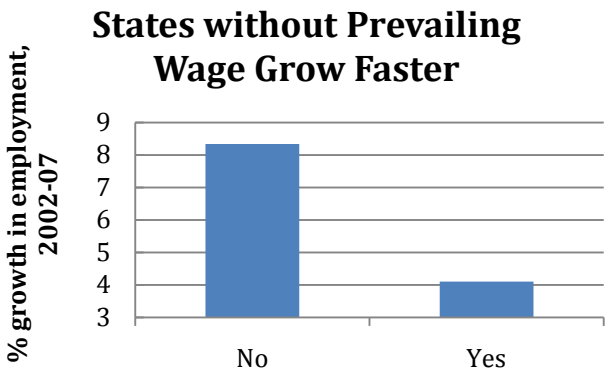
Alternatively, jobs grow as rapidly in states that have their own occupational safety and health agency covering all industries. Job growth is suppressed, however, in states where such agencies apply only to public sector employees.







Finally, employment grows faster in states that do not have prevailing wage laws. Not surprisingly, states where the work force is more unionized are far more likely to have prevailing wage laws.



HB 18 aside, are there changes that could be made in Delaware's to enhance job growth? The answer, of course, is "yes." Delaware could become a "right to work" state. Delaware could exempt some small businesses from workmen's comp and not require short-term disability insurance. Finally, Delaware could eliminate its prevailing wage law. All of these changes would make Delaware a more wide-open economy and more attractive to business investment and growth.

Dr. John Stapleford holds a Ph.D. in urban and regional economics from the University of Delaware, a M.A. in government and planning from Southern Illinois University and a B.S. in chemistry from Denison University. John was formerly the Director of the Bureau of Economic Research at the University of Delaware and was the co founder and served as the acting Director of the Delaware Small Business Development Center. Dr. Stapleford is a member of the Board of Directors of the Caesar Rodney Institute and the Director of the Center for Economic Policy and Analysis.

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