Note

THE 1996 ARIZONA EMPLOYMENT PROTECTION ACT: A RETURN TO THE EMPLOYMENT-AT-WILL DOCTRINE

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The Arizona Employment Protection Act[1] (hereinafter "Act" or "Employment Act") went into effect on July 20, 1996. The Act strengthens Arizona's status as an employment-at-will state.[2] It expressly provides that the employment relationship is contractual in nature.[3] Unless there is a written contract stating that the employment will continue for a specific time or otherwise explicitly limiting the right of either party to terminate the employment relationship, the employment relationship is severable *at any time by either party*.[4] In addition to this statutory at-will provision, the Act restricts wrongful termination claims by limiting the nature and scope of claims and remedies available to discharged employees.[5] The Act provides that a terminated employee cannot claim wrongful termination unless the employer breached a written contract, asked the employee to violate an Arizona statute, or fired the employee in retaliation for performing a protected act.[6]

The Act is the Arizona Legislature's response to the trend away from employment-at-will that began in the mid-1980s.[7] Several Arizona Supreme Court cases from the past twelve years, including *Leikvold v. Valley View Community*

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1. S. 1386, 42nd Leg., 2d Sess. (Ariz. 1996). The Act amended ARIZ. REV. STAT. ANN. §§ 12–541 and 41–1461, and added ARIZ. REV. STAT. ANN. § 23–2501 (renumbered as ARIZ. REV. STAT. ANN. § 23–1501 (West Supp. 1996)).

2. ARIZONA CHAMBER OF COMMERCE, GUIDE TO ARIZONA AND FEDERAL EMPLOYMENT LAW I–3 (Sept. 1996).

3. ARIZ. REV. STAT. ANN. § 23–1501(1).

4. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at I–3; *see also* ARIZ. REV. STAT. ANN. § 23–1501(2).

5. Steve Bibble, *The Employment Protection Act of 1996: Restoring the Balance in Employment Relationships or Curtailing Employees' Rights?*, 33 ARIZ. ATT'Y 35, 35 (Sept. 1996).

6. ARIZ. REV. STAT. ANN. § 23–1501(3).

7. Thomas D. Arn, *The Arizona Legislation Protecting Employment At-Will*, 33 ARIZ. ATT'Y 40, 42 (Sept. 1996).

Hospital[8] and *Wagenseller v. Scottsdale Memorial Hospital*,[9] had established exceptions to the employment-at-will doctrine.[10] The legislature, intending to reverse this common law erosion of at-will employment,[11] abolished common law claims for breach of implied contract and tort claims for wrongful termination.[12] Under the Act, most causes of action are now solely statutory claims with exclusive remedies.[13] Therefore, Arizona employees will generally be restricted to statutory damages, such as back pay, reinstatement (or front pay), and attorney's fees.[14] Employees will now only have a tort claim in "those limited instances where the employer's conduct was retaliatory or in violation of a statute that otherwise provides no statutory remedy to the terminated employee."[15] In most cases, the employee may not bring a public policy tort claim seeking tort damages in addition to the damages that are allowed under the statute.[16] As a result, the Act shields employers from litigating expensive wrongful termination tort claims.[17]

The Act has been referred to as the "Arizona Employers Protection Act"[18] because it limits terminated employees' rights to sue their former employers and only provides a one-year statute of limitations for wrongful discharge lawsuits.[19] Supporters of the Act hope it restores balance, predictability, and efficiency to employment relations by setting more definitive guidelines for wrongful termination lawsuits.[20] The Act is hailed by its supporters as an attempt to provide certainty to the employment arena, thereby decreasing the likelihood of litigation.[21]

Critics of the Act claim that it not only has potentially harsh effects on employees but also violates Article 18, Section 6 of the Arizona Constitution, otherwise known as the "anti-abrogation provision."[22] This provision states that

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8. 141 Ariz. 544, 688 P.2d 170 (1984) (holding that a personnel manual may become part of an employment contract, thereby modifying an employment-at-will relationship).

9. 147 Ariz. 370, 710 P.2d 1025 (1985) (holding that an employer may not fire an at-will employee for bad cause or for a reason that is in violation of public policy).

10. Arn, *supra* note 7, at 42.

11. *Id.*

12. David F. Gomez, *The 1996 Employment Protection Act and the Abolition of Common Law Wrongful Termination in Arizona*, 33 ARIZ. ATT'Y 36, 37–39 (Sept. 1996).

13. *Arizona Restricts Wrongful Termination Torts*, 1996 DAILY LAB. REP. 78, at d21 (Apr. 23, 1996).

14. Gomez, *supra* note 12, at 37.

15. *Id.* at 36; *see also* ARIZ. REV. STAT. ANN. § 23–1501(3) (West Supp. 1996).

16. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–10.

17. *Arizona Restricts Wrongful Termination Torts*, *supra* note 13, at d21.

18. Jon Kamman, *Hiring and Firing: Experts Have the Answers*, ARIZ. BUS. GAZETTE, Oct. 17, 1996, at 2.

19. *Arizona Restricts Wrongful Termination Torts*, *supra* note 13; Michelle Crouch, *Business, Labor Disagree on Act's Impact*, ARIZ. REPUBLIC, July 19, 1996, at E2.

20. Arn, *supra* note 7, at 40.

21. *See* David Madrid, *Will New Law Get Pink Slip? Backers Say the Act Balances a Flawed System. Foes Say it Makes it Easier to Fire Workers Unjustly*, TUCSON CITIZEN, May 3, 1996, at 13C; *see also* Arn, *supra* note 7, at 44; Gomez, *supra* note 12, at 36–39.

22. ARIZ. CONST. art. XVIII, § 6; Arn, *supra* note 7, at 44.

"[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."[23] Critics argue that the Act has "closed the courthouse door to anyone seeking to recover tort damages."[24] Supporters of the Act counter that as long as claimants are not effectively prevented from obtaining redress for their injuries, the legislature may constitutionally regulate and limit their recovery, without abrogating their rights.[25]

Critics also argue that the Act violates the Equal Protection Clause[26] of the Arizona Constitution because it does not provide employees of smaller employers with the same protections afforded employees of larger employers, except in cases of sexual harassment.[27] The Act provides that with regard to sexual harassment claims only, employers with fewer than fifteen employees shall be treated as "employers" under the Arizona Civil Rights Act. With types of discrimination other than sexual harassment, an employer must have more than fifteen employees to be considered an "employer" under the Arizona Civil Rights Act. For example, if a person works at a firm with fewer than fifteen employees, he or she may be able to claim sexual harassment, but not racial or religious discrimination.[28] Thus, the Act is criticized for providing broader protections to victims of sexual harassment than are afforded to victims of other types of discrimination.[29]

Thus, lawsuits challenging the Arizona Employment Protection Act are likely.[30] Courts will not only be asked to interpret the different provisions of the Act but will also be called on to determine whether the Act itself is constitutional.[31] If the Act is upheld, wrongful termination suits will decrease; employers, and maybe even employees, will benefit from the more definitive guidelines of the employment relationship.[32]

This Note will examine the employment-at-will doctrine in Arizona and how the doctrine has been affected by the Employment Act. Part I will review the history of employment-at-will in Arizona. Part II will discuss the provisions of the Act and the dramatic changes it brings to Arizona's employment field. Part III will

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23. ARIZ. CONST. art. XVIII, § 6.

24. Gomez, *supra* note 12, at 36–37; *see also* Hazine v. Montgomery Elevator Co., 176 Ariz. 340, 342, 861 P.2d 625, 627 (1993) (holding that article 18, § 6 prohibits the legislature from effectively preventing claimants from obtaining redress for their injuries).

25. Arn, *supra* note 7, at 44.

26. ARIZ. CONST. art. II, § 13.

27. Arn, *supra* note 7, at 44.

28. Crouch, *supra* note 19, at E2. Marc Osborn, the spokesman for the Arizona Chamber of Commerce, supports the distinction in the law because he believes that sexual harassment is different from other kinds of discrimination. He stated that "the complexity of the cases dealing with civil-rights violations makes lowering the [employee limit] of small business inappropriate.... With sexual harassment, the distinctions are less clear." *Id.* Others argue that the provision dealing with sexual harassment was a "hollow gesture" and was only inserted to help the bill gain legislative support. *Id.* (quoting attorney Marshall Martin).

29. Arn, *supra* note 7, at 44.

30. Madrid, *supra* note 21, at 13C.

31. *Id.*; *see* Arn, *supra* note 7, at 44.

32. Arn, *supra* note 7, at 44.

consider the concerns raised by opponents of the Act.

I. HISTORY OF EMPLOYMENT-AT-WILL IN ARIZONA

For over a century, employment relationships in the United States have generally been presumed to be at-will.[33] This common law employment-at-will doctrine, followed in Arizona, provides that an employment relationship of indefinite duration may be terminated at any time by either the employer or employee for *any* reason not prohibited by law.[34] Under the common law rule, an employer has the freedom to terminate an employee for any reason, good or bad.[35] However, the parties may agree to terms other than at-will so that the parties' ability to terminate the employment relationship is modified or restricted.[36] For example, the employer may be required by contract to show "cause" or to follow a certain procedure, such as arbitration, before the employer discharges an employee.[37]

The employment-at-will doctrine, which epitomizes the laissez-faire conception of a contractual relationship,[38] is based on the assumption that employers need "complete freedom of contract to conduct business and promote industrial growth."[39] Employment-at-will gives an employer the flexibility to hire and fire employees based on need, thereby increasing the employer's competitiveness.[40] Additionally, it is believed that the doctrine provides incentive for workers to be productive; employees will work harder in order to keep their jobs.[41] Nevertheless, the employment-at-will rule has been subject to extensive academic and judicial criticism because of its potentially harsh application to employees.[42] A majority of states, including Arizona, have consequently recognized exceptions and limitations to the employment-at-will rule.[43] During the 1980s, a number of state courts across the country adopted some or all of "the three common law exceptions to the at-will rule: (1) the implied-in-fact contract exception, (2) the public policy exception and (3) the implied-in-law covenant of good faith and fair dealing."[44] These judicially created exceptions to the at-will

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33. H. WOOD, MASTER AND SERVANT § 136, at 283 (2d ed. 1886); *see* Guy D. Keenan, *Employment Limiting Employment-At-Will in Arizona:* Leikvold v. Valley View Community Hospital, 27 ARIZ. L. REV. 235 (1985).

34. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at I–1.

35. Wagenseller v. Scottsdale Mem'l Hosp., 147 Ariz. 370, 375, 710 P.2d 1025, 1030 (1985).

36. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at I–1.

37. *Id.*

38. Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85, 116–18 (1982).

39. Michael D. Moberly, *Negligent Investigation: Arizona's Fourth Exception to the Employment-at-Will Rule?*, 27 ARIZ. ST. L.J. 993, 994 (1995).

40. Arn, *supra* note 7, at 40.

41. *Id.*

42. Keenan, *supra* note 33, at 235; Moberly, *supra* note 39, at 994–95.

43. Keenan, *supra* note 33, at 235; Moberly, *supra* note 39, at 995.

44. Arn, *supra* note 7, at 40.

doctrine, along with state and federal antidiscrimination legislation,[45] have led to an increase in employment litigation during the past two decades.[46]

The Arizona Supreme Court first recognized the employment-at-will doctrine in 1932, in *Dover Copper Mining Co. v. Doenges*.[47] The Arizona courts refused to alter or restrict this common law rule until nearly fifty years later in *Leikvold v. Valley View Community Hospital*,[48] at which time the Arizona Supreme Court first recognized the implied-in-fact contract exception.[49]

A. The Implied-in-Fact Contract Exception to Employment-at-Will

In 1984, the Arizona Supreme Court clearly began to modify the employment-at-will rule.[50] In *Leikvold*, the supreme court held that "representations in a personnel manual can become terms of the employment contract and can limit an employer's ability to discharge his or her employees."[51] Thus, personnel manuals may constrain an employer's power to terminate an employment relationship that would otherwise be terminable at-will.[52] Whether or not the personnel manual modifies the employment-at-will relationship and becomes part of the employment contract is a question of fact.[53] As stated by the *Leikvold* court,

> if an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only

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45. The employment-at-will rule has been curtailed by a number of federal and state laws protecting employees from wrongful discharge, including Title VII of the Civil Rights Act of 1964 (prohibiting discrimination based upon race, color, religion, sex [including pregnancy], and national origin); the Americans With Disabilities Act (prohibiting discrimination based on disability); the National Labor Relations Act (prohibiting discrimination based upon concerted activity, such as when an employee engages in union or protected activities); the Age Discrimination in Employment Act of 1967 (prohibiting discrimination against individuals who are at least forty years of age); the Equal Pay Act (requiring equal pay for equal work within the same business establishment); the Occupational Safety and Health Act of 1970 (prohibiting retaliation against employees for exercising rights under the Act); and the Arizona Civil Rights Act (prohibiting discrimination based upon race, color, religion, sex, national origin, disability, and age). Additionally, there are local ordinances protecting employees from discrimination. For example, a Tucson ordinance protects employees from discrimination based upon sexual orientation. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–2 to III–5; Arn, *supra* note 7, at 40.

46. Arn, *supra* note 7, at 40.

47. 40 Ariz. 349, 12 P.2d 288 (1932) (holding that the general rule in regard to contracts for personal services, where no time limit is provided, is that they are terminable at the pleasure of either party, or at most upon reasonable notice); *see* Moberly, *supra* note 39, at 1000–01.

48. 141 Ariz. 544, 688 P.2d 170 (1984).

49. Arn, *supra* note 7, at 40; Moberly, *supra* note 39, at 1001.

50. Moberly, *supra* note 39, at 1001.

51. 141 Ariz. at 546, 688 P.2d at 172.

52. *Id.*

53. *Id.* at 548, 688 P.2d at 174.

> selectively abide by it. Having announced a policy, the employer may not treat it as illusory.[54]

On the other hand, an employer may disclaim an implied contract by a clearly displayed written disclaimer stating that the relationship is terminable at-will and that the contents of the document do not constitute the terms of a contract.[55]

The implied-in-fact contract exception is based upon the presumption that the employment-at-will rule is merely a rule of construction, and that the employer's ability to discharge an employee "can be limited by promises implied from the employer's policies, representations or practices."[56] As a rule of construction, the employment-at-will rule raises only a presumption of terminability which the employee may rebut.[57] To recover under this implied contract theory, the employee must prove "an implied-in-fact promise of employment for a specific duration, as found in the circumstances surrounding the employment relationship, including assurances of job security in company personnel manuals or memoranda."[58] The employee's continued performance is seen as consideration for the promise;[59] the employee need not show reliance in fact on the promise to have a cause of action.[60]

Under court decisions such as *Leikvold* prior to the Employment Protection Act, many employees could successfully overcome the presumption that they were hired at-will.[61] Since the question of whether an implied-in-fact contract exists is largely a question of fact, most wrongful discharge claims based on this exception were not subject to summary disposition and were often litigated before a jury.[62] In general, most wrongful discharge lawsuits result in large plaintiffs' verdicts because jurors tend to be sympathetic to the terminated employees' situations.[63] Under the implied-in-fact contract theory, contract damages were available when an employee was wrongfully discharged.[64]

B. The Public Policy Exception to Employment-at-Will

In 1985, one year following the *Leikvold* decision, the Arizona Supreme Court expressly adopted the public policy exception in *Wagenseller v. Scottsdale*

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54. *Id.*
55. Gomez, *supra* note 12, at 37.
56. Arn, *supra* note 7, at 41.
57. Keenan, *supra* note 33, at 239.
58. Wagenseller v. Scottsdale Mem'l Hosp., 147 Ariz. 370, 376, 710 P.2d 1025, 1030 (1985).
59. Wagner v. City of Globe, 150 Ariz. 82, 85, 722 P.2d 250, 253 (1986).
60. *Wagenseller*, 147 Ariz. at 383, 710 P.2d at 1038 ("The employee's reliance on an announced policy is only one of several factors that are relevant in determining whether a particular policy was intended by the parties to modify an at-will agreement.").
61. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at I–2 to I–3.
62. Arn, *supra* note 7, at 40.
63. *Id.* at 41 & n.14. One study of California wrongful discharge suits determined that the jury found for the plaintiff in 70% of the cases tried. *Id.*
64. Gomez, *supra* note 12, at 37.

Memorial Hospital.[65] Under this widely accepted theory, employers may not discharge an employee for any reason that is against the public policy of the state.[66] The *Wagenseller* court held that "in the absence of contractual provision...an employee may be fired for good cause or for no cause, but not for 'bad' cause."[67]

Catherine Wagenseller was hired as a nurse at Scottsdale Memorial Hospital in 1975.[68] She was an at-will employee because she was hired without a specific contractual term. Wagenseller attended a camping trip in 1979 with some of her colleagues, including her supervisor. During this trip, Wagenseller refused to participate in a parody of the song "Moon River," in which the members of the group allegedly mooned the audience. Wagenseller also refused to participate in the skit on two later occasions when the group performed it at the hospital.[69] Wagenseller claimed that her relationship with her supervisor deteriorated after the camping trip and that her supervisor harassed her and publicly embarrassed her. Several months later she was fired. Wagenseller claimed that she was fired for reasons that undermined public policy and that were without a legitimate cause related to job performance.[70]

The court found that there was no justification for adhering to the common law rule that permitted an employer to fire someone for "cause morally wrong."[71] The court held that the interests of society as a whole would be promoted if employers were prohibited from firing for "bad" cause.[72] The court, therefore, overruled *Dover Copper Mining Co. v. Doenges*[73] to the extent that it allowed employers to discharge an employee for *any* reason.[74]

The court then addressed the nature of "public policy."[75] It declared that public policy was not exclusively contained in statutory and constitutional law, nor were all expressions made in either a statute or the constitution expressions of public policy. The court agreed with the Eighth Circuit's statement that "the Legislature is not the only source of such policy. In common law jurisdictions the courts too have been sources of law."[76] Therefore, public policy may be found within the Arizona Constitution, state statutes, and the common law as formulated by judicial decisions.[77]

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65. 147 Ariz. 370, 710 P.2d 1025 (1985).
66. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–5.
67. 147 Ariz. at 375, 710 P.2d at 1030.
68. *Id.* at 374, 710 P.2d at 1029.
69. *Id.*
70. *Id.*
71. *Id.* at 378, 710 P.2d at 1033.
72. *Id.*
73. 40 Ariz. 349, 12 P.2d 288 (1932).
74. *Wagenseller*, 147 Ariz. at 378, 710 P.2d at 1033.
75. *Id.*
76. *Id.* (quoting Lucas v. Brown & Root, 736 F.2d 1202, 1205 (8th Cir. 1984)). For example, the courts, not the legislature, first established that businesses, such as common carriers and innkeepers, may not discriminate against certain members of society. *Id.*
77. Steven M. Guttell, *Arizona Employment Protection Act*, EMPLOYEE REL.,

The activities in which Wagenseller refused to participate arguably would have violated Arizona's indecent exposure statute, Arizona Revised Statutes Annotated Section 13–1402.[78] The court found that the legislature enacted the statute to "preserve and protect the commonly recognized sense of public privacy and decency."[79] A violation of this statute is, therefore, against the public policy of the state. The court could only uphold "this state's public policy by holding that termination for refusal to commit an act which might violate A.R.S. § 13–1402 may provide the basis of a claim for wrongful discharge."[80] Since public exposure of one's buttocks is contrary to public standards of morality, Wagenseller's termination was held to be against public policy.[81] The court concluded that "[f]iring for bad cause—one against public policy articulated by constitutional, statutory, or decisional law—is not a right inherent in the at-will contract, or in any other contract, even if expressly provided."[82]

After *Wagenseller*, discharged employees brought tort claims based not only on violations of the Arizona Constitution or Arizona statutes, but also on the public policies contained in federal statutes or local ordinances.[83] The public policy exception to employment-at-will, as expressed in *Wagenseller*, generally applies to one of four situations: (1) when an employee is terminated for refusing to participate in illegal behavior;[84] (2) when an employee is discharged for performing an important public obligation;[85] (3) when an employee is discharged for exercising important legal rights or privileges;[86] or (4) when an employee is discharged for exposing employer wrongdoing.[87]

A claim for wrongful discharge in violation of public policy is a tort claim; the tort seeks to achieve "a proper balance...among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out."[88] Since a wrongful discharge claim is a tort, an employee can recover not only economic damages such as lost wages, but also alleged damages for pain, suffering, emotional distress, embarrassment, humiliation, and punitive damages.[89] In contrast, statutes typically provide that an employee can only recover back pay and reinstatement or front pay. The recoveries under tort claims are often much larger

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ARIZ. BUS. GAZETTE, Oct. 17, 1996, at 4.

78. *Wagenseller*, 147 Ariz. at 380, 710 P.2d at 1035.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 381, 710 P.2d at 1036.

83. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–5.

84. For example, refusing to commit perjury for an employer.

85. For example, serving on jury duty.

86. For example, filing a workers' compensation claim.

87. Arn, *supra* note 7, at 41.

88. Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) (a leading case recognizing the public policy exception; the court held that the employee stated a cause of action when he was allegedly fired for supplying information to police regarding criminal violations by a coworker).

89. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–5.

than those under statutory claims.[90] Under a wrongful termination tort theory, an employee can recover an unlimited amount.[91] Therefore, many plaintiffs brought both a statutory claim and a tort claim prior to the enactment of the Employment Act.[92]

The public policy exception allowed an employee to base his or her cause of action on statutory pronouncements of public policy, even though the employee did not meet the requirements and conditions of the statute.[93] For example, if an employer's conduct did not constitute a violation of the statute because there was a restriction, definition, or exemption contained in the statute, the employee could still recover under a tort wrongful discharge theory.[94] Even if the "letter of the law" was not violated, the employee could recover if the "spirit of the law" was violated.[95] The question was not whether a particular law had been violated, but whether public policy had been undermined.[96] An explicit statutory expression of public policy was not required.[97] In order to have a wrongful discharge tort claim, however, the public policy must truly have been public, and not merely private or proprietary.[98]

The statutory claim and the wrongful discharge tort claim were seen as two distinct claims, even though the tort claim was based on a statute with its own remedial scheme.[99] Prior to the Employment Act, employees were effectively allowed to pursue greater damages than allowed under the statutory scheme.[100] The statutes containing "public policy" were being used to provide remedies never intended by the legislature.[101]

C. The Implied Covenant of Good Faith and Fair Dealing Exception to Employment-at-Will

Arizona courts have also recognized another exception to the employment-at-will rule—the implied covenant of good faith and fair dealing in employment contracts.[102] Employers have been liable in contract, and in certain

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90. *Id.*
91. *Id.*
92. *Id.* at III–5 to III–6.
93. Arn, *supra* note 7, at 41.
94. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–6.
95. *Id.*
96. Gomez, *supra* note 12, at 37. In *Wagenseller*, it was not essential that compelled exposure of one's buttocks constituted a technical violation of the statute; the compelled exposure was a significant violation of the underlying policy of the statute. 147 Ariz. 370, 380 & n.5, 710 P.2d 1025, 1035 & n.5 (1985).
97. *See Wagenseller*, 147 Ariz. 370, 710 P.2d 1025; Wagner v. City of Globe, 150 Ariz. 82, 722 P.2d 250 (1986).
98. *Wagner*, 150 Ariz. at 88, 722 P.2d at 256 (no cause of action lies if the conduct concerns a purely private matter).
99. Arn, *supra* note 7, at 41.
100. *Id.* at 41–42.
101. *Id.* at 42.
102. *See Wagenseller*, 147 Ariz. at 376, 710 P.2d at 1031.

circumstances in tort, for breach of this covenant.[103] "The covenant requires that neither party do anything that will injure the right of the other to receive the benefits of their agreement."[104]

In *Wagenseller v. Scottsdale Memorial Hospital*,[105] the terminated employee argued that discharge without good cause violated the covenant of good faith.[106] The court recognized an implied covenant of good faith and fair dealing in the employment-at-will contract, but held that the covenant did not create a duty for the employer to terminate the employee only for good cause.[107] "The covenant does not protect the employee from a 'no cause' termination because tenure was never a benefit inherent in the at-will agreement."[108] The covenant only protects the rights of the parties to the benefits of their actual agreement.[109]

The *Wagenseller* court declined to apply the exception in that case because the employment claim concerned job security, which by its very nature is not promised in an at-will relationship.[110] However, the court "approved application of the exception to preclude discharge by the employer to avoid payment of compensation or benefits earned by the employee but not yet technically owed under the agreement."[111] Therefore, the exception is recognized in Arizona, but only under limited circumstances. The exception has had little application in subsequent Arizona employment cases.[112]

D. Summary

Prior to the enactment of the Employment Protection Act, Arizona recognized all three common law exceptions to the at-will rule: (1) the implied-in-fact contract exception; (2) the public policy exception; and (3) the implied-in-law covenant of good faith and fair dealing. By applying these exceptions, the courts weakened the employment-at-will doctrine. The 1996 Arizona Employment Protection Act is an attempt by the legislature to return to the employment-at-will doctrine; the Act now limits the situations in which a terminated employee can sue his or her employer for wrongful discharge.[113]

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103. *Id.*; *see also* Zancanaro v. Cross, 85 Ariz. 394, 339 P.2d 746 (1959) (the remedy for the breach is contract damages); *cf.* Gates v. Life of Mont. Ins. Co., 638 P.2d 1063 (Mont. 1982) (breach of the covenant of good faith in an employment contract may provide the basis for a tort claim). Most courts have been reluctant to extend the tort action, commonly recognized in the insurance setting, into the employment setting. *Wagenseller*, 147 Ariz. at 385, 710 P.2d at 1040.

104. *Wagenseller*, 147 Ariz. at 383, 710 P.2d at 1038.

105. *See supra* notes 68–70 and accompanying text.

106. 147 Ariz. at 385, 710 P.2d at 1040.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Arn, *supra* note 7, at 42.

112. *Id.*

113. *Id.*; *see* L. A. Mitchell, *Ease of Firing to be Offset by Sex-Harassment Risks*, ARIZ. BUS. GAZETTE, June 20, 1996, at 3 (discussing implications of Act on employers).

II. THE EMPLOYMENT PROTECTION ACT

The Employment Act, spearheaded by the Arizona Chamber of Commerce,[114] amends Arizona Revised Statutes Annotated Sections 12–541 and 41–1461 and, perhaps most importantly, adds Section 23–1501.[115] Although the Act intends to reverse the court's erosion of at-will employment, it codifies several important aspects of *Leikvold* and *Wagenseller*.[116] This portion of the Note will discuss the most significant features of the Employment Protection Act, including: (1) the legislature's intent; (2) the statutory presumption of at-will employment; (3) the limited bases for claims against an employer for termination of employment; (4) the one-year statute of limitations for breach of contract and wrongful discharge claims; (5) the protection of employees engaging in whistleblowing activities; and (6) the treatment of sexual harassment claims under the Arizona Civil Rights Act.

A. The Legislature's Intent: The Courts May Not Make Pronouncements of Public Policy

The "Intent" section of the Act lectures the Arizona Supreme Court on what the legislature believes is the court's proper role regarding causes of action involving public policy.[117] The legislature expressed its intent that "an employer may be held liable for civil damages in the event it discharges from employment an employee for a reason that is against the public policy of this state."[118] However, the legislature expressly stated that public policy is solely determined by the legislature in the form of statutes; public policy is not determined by the courts.[119] Thus, an employee may only have a cause of action for wrongful discharge in violation of public policy when there is an explicit statutory expression of public policy.[120]

The Act states that courts are only authorized to interpret the common law and are not authorized to create, on an ad hoc basis, new causes of action.[121] If courts "make pronouncements of public policy on an ad hoc basis, they render it impossible for citizens to know in advance what actions constitute violations of the laws for which they are subject to civil damages."[122] Thus, in order not to impede the uniform application of laws to all citizens, the courts may not expand, modify, or alter the common law causes of action adopted by the Arizona Legislature.[123] It

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114. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at I–2.

115. S. 1386, 42nd Leg., 2d Sess. (Ariz. 1996). The Act amended ARIZ. REV. STAT. ANN. §§ 12–541 and 41–1461, and added ARIZ. REV. STAT. ANN. § 23–2501 (renumbered as ARIZ. REV. STAT. ANN. § 23–1501 (West Supp. 1996)).

116. Arn, *supra* note 7, at 42.

117. S. 1386, 42nd Leg., 2d Sess. § 1; *see* Gomez, *supra* note 12, at 36.

118. S. 1386, 42nd Leg., 2d Sess. § 1(A) (Ariz. 1996). Thus, the legislature reaffirms, to some extent, the public policy exception to employment-at-will.

119. *Id.*

120. *Id.*

121. *Id.* § 1(B).

122. *Id.*

123. *Id.* § 1(D).

is the legislature's role, not the court's role, to set forth the public policy of Arizona.[124] The legislature then expressed the public policy of this state in the newly enacted Arizona Revised Statutes Annotated Section 23–1501,[125] discussed *infra* Parts II C and E. With this statutory enactment, the legislature clearly intended to show its dissatisfaction with the potentially broad public policy exception to the employment-at-will doctrine that was first established in *Wagenseller v. Scottsdale Memorial Hospital.*[126]

B. The Statutory Presumption of At-Will Employment

With respect to private and nonunion employees, the employment relationship is contractual in nature.[127] In the absence of a written contract, the employment relationship may be terminated at any time by either party.[128] The Employment Act explicitly replaces the common law presumption of at-will employment, which could often be rebutted,[129] with a statutory at-will provision:

> The employment relationship is severable at the pleasure of either the employer or the employee unless both the employee and the employer have signed a written contract to the contrary setting forth that the employment relationship shall remain in effect for a specified duration of time or otherwise expressly restricting the right of either party to terminate the employment relationship.[130]

Prior to the Act, the presumption of at-will employment could be overcome by a written contract, by an employment manual or handbook, by the employer's written or oral statements, or by the employer's course of conduct.[131] Many fired employees successfully alleged that their employer said or did something that caused the employee to expect continued employment.[132] Under the Act, an employee must have a written contract in order to bring a wrongful discharge breach of contract claim.[133] An employee may no longer maintain a claim for breach of an oral contract relating to the duration of employment.[134] However, this written contract provision only applies to private employees, and not to public

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124. *Id.* § 3.

125. ARIZ. REV. STAT. ANN. § 23–1501 (West Supp. 1996) addresses the severability of employment relationships, protection from retaliatory discharges, and the exclusivity of statutory remedies in employment.

126. *See* Wagenseller v. Scottsdale Mem'l Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985).

127. ARIZ. REV. STAT. ANN. § 23–1501(1), (2).

128. *Id.* § 23–1501(2).

129. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at I–2 to I–3.

130. ARIZ. REV. STAT. ANN. § 23–1501(2). This provision has no effect on the rights of public employees or on the rights of employees and employers as defined by a collective bargaining agreement. *Id.*

131. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at I–2.

132. *Id.*

133. *Id.* at I–3; *see* ARIZ. REV. STAT. ANN. § 23–1501(2).

134. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at I–3.

employees[135] or employees covered under a collective bargaining agreement.[136]

Thus, in order to overcome the presumption of employment-at-will, there must a be a written contract. This contract must signed by both the employer and the employee, or it "must be set forth in the employment handbook or manual or any similar document distributed to the employee, if that document expresses the intent that it is a contract of employment, or [it] must be set forth in a writing signed by the party to be charged."[137] Therefore, letters extending job offers or other letters signed by the employer may be considered part of an employment contract.[138] However, a personnel manual or an unsigned employee handbook is not considered a contract unless it affirmatively states that it is intended to be a contract.[139] This provision changes the prior law, which treated a personnel manual as a contract unless there was a clear and conspicuous disclaimer stating that it was not a contract.[140] Under the Act, partial performance by the employee does not satisfy the requirements of a written contract.[141]

The Act essentially creates a statute of frauds for the employment relationship.[142] The written contract requirement reduces the likelihood of fraud and eliminates the frequently difficult question of whether a contract actually existed.[143] The Act effectively curtails the implied-in-fact contract exception to employment-at-will.[144] It also appears to prohibit claims based on the implied covenant of good faith and fair dealing when the written contract requirement has not been met.[145] The Act should provide more certainty to the employment relationship, thereby decreasing the amount of employment litigation.[146] The employment-at-will doctrine in Arizona should now mean what it says.[147] The

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135. Public employment entails certain due process safeguards and guarantees that are not available in the private sector. Therefore, the employment-at-will doctrine has naturally had more application in the private sector. Jon E. Pettibone, *Employment-At-Will in Arizona*, 20 ARIZ. B.J. 22, 22 (1984).

136. ARIZ. REV. STAT. ANN. § 23–1501(2).

137. *Id.*

138. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at I–3.

139. The personnel manuals or handbooks may serve as a basis for breach of contract claims for breaches other than termination of the employee. The 1996 Act only deals with employment-at-will, not with other employment issues. *Id.* at I–4.

140. *Id.*

141. ARIZ. REV. STAT. ANN. § 23–1501(2). Under the implied-in-fact contract exception to employment-at-will, the employee's continued performance was deemed to be consideration for the contractual promise. *See* Wagner v. City of Globe, 150 Ariz. 82, 85, 722 P.2d 250, 253 (1986).

142. Arn, *supra* note 7, at 42.

143. *Id.*

144. *Id.*

145. *Id.* Although the Act does not specifically address the implied covenant of good faith and fair dealing, it presumably now only applies when there is a written contract. *Id.*

146. *Id.*; *see* Bibble, *supra* note 5.

147. Kamman, *supra* note 18, at 2.

presumption of employment-at-will will no longer be riddled with exceptions.[148]

C. The Limited Bases for Claims Against an Employer for Termination of Employment

The Employment Act limits the ability of employees to sue their employers by restricting the nature of wrongful termination claims that may be asserted.[149] Wrongful discharge claims are now limited to those expressly provided for in Arizona Revised Statute Annotated Section 23–1501(3). Under the Act, an employee has a claim against an employer for termination of employment only if: (1) the employer breached the employment contract; (2) the employer terminated the employee in violation of a state statute; (3) the employer terminated the employee in retaliation for protected acts specified under the statute;[150] or (4) the employee is a public employee who has a right to continued employment.[151]

If an employer breaches an employment contract that meets the requirements of Arizona Revised Statute Annotated Section 23–1501(2), the terminated employee may bring a wrongful discharge claim. The employee is limited, however, to breach of contract remedies.[152] In addition, the employee may not maintain a claim for breach of an oral contract.[153] The contract must be written as provided by Arizona Revised Statute Annotated Section 23–1501(2).[154]

If an employer violates a state statute by firing an employee, the terminated employee has a claim against the employer for termination of employment.[155] However, unlike the law prior to the adoption of the Act, state statutory remedies are now exclusive.[156] If a statute provides a remedy to an employee for an employer's violation of the statute, the employee may sue the employer under the statute and recover damages as statutorily allowed.[157] However,

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148. Mitchell, *supra* note 113, at 3.

149. Madrid, *supra* note 21, at 13C.

150. The Act specifies that an employer may not terminate an employee in retaliation for any of the following: (1) refusal to commit an act or omission that would violate the Arizona Constitution or an Arizona statute; (2) reasonable disclosure by the employee of employer's violation of the Arizona Constitution or an Arizona statute; (3) exercise of workers' compensation rights; (4) service on a jury; (5) exercise of voting rights; (6) exercise of choice regarding labor organization membership; (7) service in national guard or armed forces; (8) exercise of right to be free from the extortion of fees or gratuities as a condition of employment; and (9) exercise of right to be free from coercion to purchase goods or supplies from any particular person as a condition of employment. ARIZ. REV. STAT. ANN. § 23–1501(3)(c) (West Supp. 1996).

151. *Id.* § 23–1501(3).

152. *Id.*

153. *Id.*; *see* ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at I–3.

154. ARIZ. REV. STAT. ANN. § 23–1501(3).

155. *Id.* § 23–1501(3)(b).

156. *Id.*

157. *Id.* For example, under the Arizona Civil Rights Act, a plaintiff is entitled to (1) back pay from the time of the discrimination to the time of trial; (2) reinstatement (or front pay if reinstatement is not feasible); and (3) attorney's fees. *Id.* § 41–1481(G), (J) (West Supp. 1996); *see also* ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–10

the employee may not also sue the employer for a violation of the public policy that arises out of the statute.[158] Under the new Act, the discharged employee may not bring a public policy tort claim to recover damages in excess of those provided under the statute.[159]

The Act lists sources of public policy, including the Arizona Civil Rights Act, the Occupational Safety and Health Act, the Hours of Employment Law, and the Agricultural Employment Relations Act.[160] Significantly, the Employment Act only allows public policy claims based on the Arizona Constitution or Arizona statutes.[161] Claims may not be based on federal or local law or generalized pronouncements by the courts.[162]

If a statute does *not* provide a remedy to the terminated employee, "the employee shall have the right to bring a tort claim for wrongful termination in violation of the public policy set forth in the statute."[163] In the absence of a statutory remedy, the employee can seek unlimited tort damages, including damages for emotional distress and punitive damages.[164] Thus, under some circumstances, the Act codifies the tort of wrongful termination in violation of public policy, as established in *Wagenseller v. Scottsdale Memorial Hospital.*[165] However, the tort is now more defined; claims may only be based on public policy as formulated by the Arizona Legislature.[166] A fired employee may not bring a state tort claim if the employer allegedly violated a federal statute or local law.[167]

Therefore, under the Act, an employee may still bring a wrongful termination claim in violation of public policy. However, the claim may only be based on an Arizona statute that does not also provide a remedy to the fired employee.[168] An example of when this tort claim might be successful is when an employer fires an employee for filing a workers' compensation claim.[169] Although the workers' compensation statute[170] gives the employee the right to file a claim, it does not provide a remedy for an employee who has been fired for doing so. As long as the employee satisfies all of the statute's requirements, including the statute's jurisdictional and administrative prerequisites, the employee will have a

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(discussing remedies available under the Arizona Civil Rights Act).

158. ARIZ. REV. STAT. ANN. § 23–1501(3)(b); *see* ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–5.

159. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–6.

160. ARIZ. REV. STAT. ANN. § 23–1501(3)(b).

161. Guttell, *supra* note 77, at 4.

162. *Id.*

163. ARIZ. REV. STAT. ANN. § 23–1501(3)(b).

164. Guttell, *supra* note 77, at 4.

165. Arn, *supra* note 7, at 42.

166. *Id.*

167. Guttell, *supra* note 77, at 4.

168. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–5.

169. *Id.* at III–6.

170. *See* ARIZ. REV. STAT. ANN. §§ 23–901 to 23–1091 (West 1995 & Supp. 1996).

wrongful discharge tort claim.[171]

Nevertheless, in an attempt to curtail employment-related lawsuits, the Employment Act eliminates many tort claims for wrongful discharge in breach of public policy.[172] The limitations imposed by the legislature must now be met; it is no longer sufficient that the employer violated the "spirit of the law."[173] Under the Act, the employer must violate the "letter of the law."[174]

Although the Act eliminates many of the tort claims for wrongful discharge in breach of public policy, an employee still has many related causes of action.[175] Some of the collateral torts that are not affected by the Act are claims for interference with contractual relations, intentional infliction of emotional distress, defamation, assault and battery, fraud, and negligent hiring or supervision.[176]

One of the primary objectives of the Act is to help employers and employees evaluate wrongful termination cases more accurately.[177] Prior to the Act, employees had great incentive to pursue wrongful discharge tort claims because of the amount of damages potentially involved.[178] The Arizona courts were among the most liberal courts in the country with regard to the damages employees could recover under wrongful discharge claims.[179] Even when the facts of the case did not warrant a lawsuit, some plaintiffs aggressively pursued their cases in hopes of recovering punitive damages from an unpredictable jury.[180] The potential for a large jury verdict prevented many early and reasonable settlements.[181] The litigation arising out of the employment-at-will exceptions substituted "the opinions of jurors and judges for management discretion when assessing the severity of employee misconduct or the quality of an individual's work performance."[182]

By restricting when an employee may bring a tort action, the Act will hopefully enable the parties to reach early and reasonable settlements.[183] The wrongful termination cases should now generally be litigated under the employment statutes that were specifically enacted to deal with the employment

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171. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–6.
172. *Id.*
173. *Id.*; *see* Arn, *supra* note 7, at 42.
174. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–6.
175. *Id.* at III–9.
176. *Id.*
177. *Id.* at III–10.
178. *Arizona Restricts Wrongful Termination Torts*, *supra* note 13.
179. *Id.*; *see also* Pettibone, *supra* note 135, at 24 ("Verdicts can be huge. Six-figure verdicts are not uncommon.").
180. *Arizona Restricts Wrongful Termination Torts*, *supra* note 13.
181. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–11.
182. Pettibone, *supra* note 135, at 24 (Pettibone notes that jurors may not be able to understand that employers may only want to keep the most qualified employees, and not those who are only doing an adequate job. "The subtle distinction between good cause and bad faith standards easily may become obfuscated in the jury room. The more difficult cases involve discharge of high level personnel, not in bad faith or even related to the employee's conduct or performance, but in the exercise of business judgment.").
183. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–11.

arena, rather than under general tort principles.[184] Because employees will now usually be limited to statutory damages, the amount of economic loss can be more easily predicted by both the employer and employee.[185] The restrictions on tort actions should allow "cases to be litigated in a manner proportionate to the employees' true economic loss."[186] Additionally, employers should benefit economically by the disallowance of wrongful discharge in violation of public policy claims that are based on federal laws, state court decisions, or municipal ordinances.[187]

D. The One-Year Statute of Limitations for Breach of Employment Contract and Wrongful Discharge Claims

The Employment Protection Act reduces the amount of time in which an employee may bring a claim for breach of an employment contract or wrongful termination to one year.[188] Previously, an employee had two years to bring a wrongful termination claim and either three or six years to bring a breach of contract claim, depending on whether the contract was oral or written.[189] Under the Act, the fired employee must file his or her suit within one year to satisfy the statute of limitations.[190]

E. The Protection of Employees Engaging in Whistleblowing Activities

Perhaps one of the most important provisions of the Employment Act for Arizona employees is Arizona Revised Statute Annotated Section 23–1501(3)(c)(ii),[191] which protects private employees who engage in whistleblowing activities. For the first time, the Arizona Legislature provides protection to whistleblowers who disclose, in a reasonable manner, an employer's violation of

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184. *Id.* at III–10.
185. *Id.*
186. Madrid, *supra* note 21, at 13C.
187. *Arizona Restricts Wrongful Termination Torts*, *supra* note 13.
188. ARIZ. REV. STAT. ANN. § 12–541 (West Supp. 1996).
189. Gomez, *supra* note 12, at 39.
190. Madrid, *supra* note 21, at 13C.
191. ARIZ. REV. STAT. ANN. § 23–1501(3)(c)(ii) (West Supp. 1996) states that an employee has a claim against his or her employer if the employer terminated the employment relationship in retaliation for:

> The disclosure by the employee in a reasonable manner that the employee has information or a reasonable belief that the employer, or an employee of the employer, has violated, is violating or will violate the Constitution of Arizona or the statutes of this state to either the employer or a representative of the employer who the employee reasonably believes is in a managerial or supervisory position and has the authority to investigate the information provided by the employee and to take action to prevent further violations of the constitution [sic] of Arizona or statutes of this state or an employee of a public body or political subdivision of this state or any agency of a public body or political subdivision.

Id.

the Arizona Constitution or an Arizona statute.[192] The Act clarifies that whistleblowing is a protected act.[193] Prior to the Act, only public employees had statutory whistleblowing protection.[194] Although courts had recognized a common law right of private employees to be free from retaliation for disclosing illegal activity, private employees were not protected under a state statute.[195]

While the Act protects whistleblowing, it limits the protection to disclosures based on state, not federal, law.[196] Additionally, the Act limits the protection by requiring certain conditions to exist.[197] The employee will only be protected if he or she makes the disclosure in a reasonable manner to the appropriate authorities.[198] For the Act's whistleblower protection to apply, the employee must disclose the illegal activity to either a manager or supervisor of the employer or to a public agency.[199] The statute does not protect an employee who demonstrates or protests against the employer or who reports the employer's wrongdoing to the media or to a coworker.[200]

F. The Treatment of Sexual Harassment Claims Under the Arizona Civil Rights Act

The Employment Act also amends the Arizona Civil Rights Act[201] to cover sexual harassment claims from employees working at small businesses.[202] Prior to the Employment Act, only employers with fifteen or more employees were subject to the Arizona Civil Rights Act.[203] Now, with regard to sexual harassment claims, "employer" means "a person who has one or more employees in the current or preceding calendar year."[204] The Act thereby ensures that employees who are

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192. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–9.

193. Guttell, *supra* note 77, at 4. The protection afforded by the Act is broader than that afforded by many court decisions from across the country, which do not provide protection for internal whistleblowing. *Id.*

194. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–9.

195. *Id.*; Guttell, *supra* note 77, at 4.

196. Gomez, *supra* note 12, at 38. Although the Act limits the whistleblowing tort claim to state law, there are many federal statutes that provide whistleblowing protection to employees. ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–9.

197. ARIZ. REV. STAT. ANN. § 23–1501(3)(c)(ii) (West Supp. 1996); *see* ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–9 (discussing whistleblower protections).

198. ARIZ. REV. STAT. ANN. § 23–1501(3)(c)(i).

199. *Id.*

200. *See* ARIZONA CHAMBER OF COMMERCE, *supra* note 2, at III–10.

201. *See* ARIZ. REV. STAT. ANN. §§ 41–1461 to 41–1465; 41–1481 to 41–1485 (West 1992 & Supp. 1996)

202. *Id.* § 41–1461(2); Mitchell, *supra* note 113, at 3.

203. Mitchell, *supra* note 113, at 3

204. ARIZ. REV. STAT. ANN. § 41–1461(2) states:

> "Employer" means a person who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person, *except that to the extent that any person is alleged to have committed any acts of sexual harassment, employer means, for purposes of administrative and civil*

sexually harassed have a legal remedy, regardless of the size of their employer.[205]

This provision exposes more small businesses to sexual harassment suits.[206] For the first time, the Arizona Civil Rights Division will protect employees who are sexually harassed at small companies.[207] Significantly, however, the Act does not alter the definition of "employer" for other types of discrimination, such as racial or religious discrimination.[208] These forms of discrimination may still be legally practiced at companies with fewer than fifteen employees. As a result, small business employees who experience discrimination other than sexual harassment have no cause of action under Arizona law.[209]

Unlike most of the Act's provisions, which favor employers rather than employees, the sexual harassment provision is a benefit for employees.[210] More employees will now be covered under the Arizona Civil Rights Act.[211] However, with the exception of sexual harassment claims, the Act makes it more difficult for terminated employees to sue their employers.[212]

III. POTENTIAL PROBLEMS OF THE EMPLOYMENT PROTECTION ACT

Although most employers support the Employment Act, there has been significant criticism that the Act does not provide enough protection for employees.[213] Employees will generally not have as much protection as they did under the common law exceptions to employment-at-will.[214] Critics argue that the Act unjustly eliminates the improvements made in the employment relationship over the past few decades and that employees may no longer have any means of recourse against unfair employers.[215]

Not only is the Act criticized for treating employees harshly and unfairly, it is also criticized for allegedly violating the Arizona Constitution.[216] Opponents of the Act hope it will be declared unconstitutional for either violating the Anti-abrogation Provision, Article 18, Section 6, or the Equal Protection Clause, Article 2, Section 13, of the Arizona Constitution.[217] These constitutional concerns will

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actions regarding such allegations of sexual harassment, a person who has one or more employees in the current or preceding calendar year....

Id. (emphasis added).

205. *Id.*; Mitchell, *supra* note 113, at 3.
206. Mitchell, *supra* note 113, at 3.
207. Guttell, *supra* note 77, at 4.
208. Crouch, *supra* note 19, at E2.
209. *Id.*
210. Guttell, *supra* note 77, at 4.
211. *Id.*
212. Mitchell, *supra* note 113, at 3.
213. *See* Crouch, *supra* note 19; Gomez, *supra* note 12.
214. *See generally* Gomez, *supra* note 12.
215. *See* Crouch, *supra* note 19.
216. Gomez, *supra* note 12, at 36–37; *see* Arn, *supra* note 7, at 44.
217. Arn, *supra* note 7, at 44.

certainly be addressed in upcoming court battles applying the new Act.[218]

A. The Anti-abrogation Provision

Article 18, Section 6 of the Arizona Constitution provides that "[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."[219] The Act arguably violates this anti-abrogation provision by abolishing common law rights and remedies and by imposing statutory limits on damages.[220] As discussed previously, terminated employees may not bring a contract claim unless there is a written contract; nor may they bring a tort claim for wrongful termination in violation of public policy unless the administrative and jurisdictional requirements of the underlying statute are met. Additionally, terminated employees may not recover tort damages when the employment statute provides a remedy.[221] One critic of the Act has recognized that:

> [P]ublic policy tort claims based on an employer's violation of the Arizona Civil Rights Act, or any statute that provides a remedy, are abolished and the only 'alternative' is a statutory discrimination claim, not a tort claim for damages. The Act has effectively closed the courthouse door to anyone seeking to recover tort damages for such a claim.[222]

However, proponents of the Act make a strong argument that the Act does not abrogate rights and remedies but merely regulates wrongful termination claims.[223] As long as claimants are not prevented from obtaining redress for their injuries, the legislature may regulate damage recovery.[224] In requiring a written contract before a terminated employee can bring a breach of contract action, the legislature is reasonably regulating the employment arena, rather than abrogating the terminated employee's rights.[225] The written contract requirement in the employment context can be analogized to the Statute of Frauds when applied to oral contracts incapable of being performed within one year; in both cases, the employees' rights are not likely to be abrogated.[226]

The Act does limit a claimant to statutory damages when the claimant was wrongfully terminated in violation of public policy and the underlying statute provides a remedy to the employee.[227] In this situation, the employee may no longer

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218. *Id.*; *see* Guttell, *supra* note 77, at 4.
219. ARIZ. CONST. art. XVIII, § 6.
220. Gomez, *supra* note 12, at 36.
221. Arn, *supra* note 7, at 44.
222. Gomez, *supra* note 12, at 36–37.
223. *See id.*
224. Arn, *supra* note 7, at 44; *see* Hazine v. Montgomery Elevator Co., 176 Ariz. 340, 342, 861 P.2d 625, 627 (1993).
225. Arn, *supra* note 7, at 44.
226. *Id.*
227. ARIZ. REV. STAT. ANN. § 23–1501(3)(b) (West Supp. 1996).

recover tort damages available at common law.[228] However, since these statutes are based on the legislature's determination of public policy, the legislature should be able to change, as necessary to deal with changing times, the public policy expressed within the statutes.[229] Thus, the legislature should be able to limit or condition recovery without violating the Anti-abrogation Provision of the Arizona Constitution.[230] Nevertheless, the Act will likely be challenged for restricting recovery.[231]

B. The Equal Protection Provision

The Act is also claimed to violate the Equal Protection Clause of the Arizona Constitution, which provides: "[n]o law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."[232] Critics contend that victims of sexual harassment are afforded more protection than victims of other types of discrimination.[233] Regardless of the size of the employer, all employees who have been sexually harassed may bring a claim under the Arizona Civil Rights Act.[234] However, with other types of discrimination, including race, gender, religion, national origin, disability, age, and sex discrimination, only employees who are employed at a business with fifteen or more employees may bring a cause of action.[235] Under the Act, in situations other than sexual harassment, employees at small businesses will no longer be able to bring a wrongful discharge tort claim for violations of public policy because they do not meet the requirements of the Arizona Civil Rights Act.[236] These employees of small businesses are left without a state-law remedy if they are fired based on their age, religion, or sex.[237] Because of the disparate treatment afforded different types of discrimination victims, the courts might scrutinize the Act to determine whether it violates the Equal Protection Clause.[238]

There is another equal protection argument based on the increased protection afforded employees working for an employer with fifteen or more employees as compared to the protection afforded employees working for an employer with less than fifteen employees.[239] This constitutional argument, however, will likely fail because there is no suspect class and the distinction is

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228. Arn, *supra* note 7, at 42.
229. *Id.*
230. *Id.*
231. Guttell, *supra* note 77, at 4.
232. ARIZ. CONST. art. II, § 13.
233. Gomez, *supra* note 12, at 36; *see also supra* notes 201–12 and accompanying text.
234. *See* Arn, *supra* note 7, at 40.
235. *See* ARIZ. REV. STAT. ANN, § 41–1461(2) (West Supp. 1996); Arn, *supra* note 7, at 40.
236. *See* ARIZ. REV. STAT. ANN. § 41–1461(2); Arn, *supra* note 7, at 40.
237. Gomez, *supra* note 12, at 36.
238. Arn, *supra* note 7, at 44.
239. *Id.*

rationally related to a legitimate state interest, such as the protection of small businesses.[240] Nevertheless, these constitutional considerations will certainly be contested in court when wrongful termination cases are litigated under the new Act.

IV. CONCLUSION

Assuming the Employment Act survives constitutional attack, it could potentially save employers a significant amount of time and money in litigation costs. Employers have much more protection under the Act than at common law; employees, on the other hand, will have to be more proactive in protecting themselves.[241] If the employee wants to avoid being fired at-will, the employee must have a provision in his or her employment contract allowing firing only for good cause.[242] The employee may potentially alter the employment-at-will relationship,[243] but the contract must be in writing and signed by the employer.[244]

Although the Act is expected to decrease litigation arising out of the employment context, plaintiffs' lawyers will likely find other avenues in which to pursue their claims.[245] When state statutes do not provide remedies, claimants will still be able to bring wrongful discharge tort actions; these claims may be based on statutes that were never intended to cover the employment field.[246] Actions based on collateral torts, such as intentional infliction of emotional distress, will also continue.[247] Additionally, fired employees may bring more claims against supervisors, in the hope that employers will pay any judgments against one of their supervisors.[248] Employment litigation will thus continue under the Act, but the Act should restrict many wrongful termination claims. The Act brings dramatic changes to Arizona's employment field by returning to the employment-at-will doctrine and by limiting the nature and scope of claims and remedies available to discharged employees.

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240. *Id.* In 1995, this constitutional argument was raised in an Oklahoma case. The Oklahoma antidiscrimination act was challenged for violating the Equal Protections provisions of the Federal and Oklahoma Constitutions because it did not provide a sexual harassment remedy to employees of employers with less than fifteen employees. Brown v. Ford, 905 P.2d 223 (Okla. 1995). The Oklahoma Supreme Court held that the act did not implicate any suspect classification or fundamental right. *Id.* at 227. The act was held constitutional because it served a rational state interest in sparing small businesses potentially huge litigation costs. *Id.*

241. Madrid, *supra* note 21, at 13C.

242. *Id.*

243. Unfortunately, many employees do not have the bargaining power necessary to change their employment contracts.

244. Madrid, *supra* note 21, at 13C.

245. *See* Guttell, *supra* note 77, at 4.

246. *Id.*

247. *Id.*

248. *Id.* The Act only restricts claims against the business entity, not against the business' employees.