

SHORT TITLE: Arbitration and labor; creating Oklahoma Employment Termination Act; making act applicable to termination of employment; displacing and extinguishing certain common law rights of terminated employee with certain exceptions; prohibiting certain terminations by employer; providing procedures for arbitration of termination; codification; effective date.

STATE OF OKLAHOMA

2nd Session of the 44th Legislature (1994)

SENATE BILL NO. 609

By: Horner

AS INTRODUCED

An Act relating to arbitration and labor; amending 15 O.S. 1991, Sections 802 and 818, which relate to arbitration; providing short title; defining terms; making act applicable to termination of employment occurring after certain date; exempting certain terminations; displacing and extinguishing certain common law rights of terminated employee with certain exceptions; prohibiting certain terminations by employer; providing for oral and written agreements between employer and employee and requiring certain conditions in order to waive rights, provide additional rights, become subject to act, or settle or resolve claims in certain manner; providing for filing complaint and demand for arbitration with Commissioner of Labor; providing for filing procedures, time periods and filing fee; making arbitration proceedings subject to and exempt from certain statutes; requiring Commissioner adopt additional procedural rules and rules for appointing arbitrators; providing for certain forms of discovery; providing for representation and certain standards of proof; authorizing certain awards and prohibiting certain awards; providing for judicial review; stating conditions under which court may vacate or modify award; providing for awarding attorney fees and

costs; requiring act or summary be posted and providing administrative penalty; prohibiting certain retaliatory actions; providing for certain civil action and penalties; making act inapplicable to certain terminations; modifying application of Uniform Arbitration Act to employer and employee relations; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 571 of Title 40, unless there is created a duplication in numbering, reads as follows:

Sections 1 through 12 of this act shall be known and may be cited as the "Oklahoma Employment Termination Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 572 of Title 40, unless there is created a duplication in numbering, reads as follows:

As used in this act:

1. "Employee" means an individual who works for hire, including an individual employed in a supervisory, managerial, or confidential position, but not an independent contractor;

2. "Employer" means a person that has employed five (5) or more employees, excluding a parent, spouse, child, or other member of the employer's immediate family or of the immediate family of an individual having a controlling interest in the employer, for each working day in each of twenty (20) or more calendar weeks in the two-year period next preceding a termination or an employer's filing of a complaint pursuant to subsection C of Section 6 of this act;

3. "Fringe benefit" means vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, pension benefit plan, or other benefit of economic value, to the extent the leave, plan, or benefit is paid for by the employer;

4. "Good cause" means:

- a. a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise, job performance, and employment record, or
- b. the exercise of business judgment in good faith by the employer, including setting its economic or institutional goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force and the nature of the positions filled by its work force, and determining and changing standards of performance for positions;

5. "Good faith" means honesty in fact;

6. "Pay", as a noun, means hourly wages or periodic salary, including but not limited to tips, regularly paid and nondiscretionary commissions and bonuses, and regularly paid overtime, but not fringe benefits;

7. "Person" means an individual, corporation, business trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity and includes the state and any subdivision, agency or instrumentality thereof; and

8. "Termination" means:

- a. a dismissal, including that resulting from the elimination of a position, of an employee by an employer,
- b. a layoff or suspension of an employee by an employer for more than two (2) consecutive months, or
- c. a quitting of employment or a retirement by an employee induced by an act or omission of the employer, after notice to the employer of the act or omission without appropriate relief by the employer, so intolerable that under the circumstances a reasonable individual would quit or retire.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 573 of Title 40, unless there is created a duplication in numbering, reads as follows:

A. This act applies only to a termination that occurs after the effective date of this act.

B. This act does not apply to a termination at the expiration of an express oral or written agreement of employment for a specified duration, which was valid, subsisting, and in effect on the effective date of this act.

C. Except as provided in subsection E of this section, this act displaces and extinguishes all common law rights of a terminated employee against the employer, its officers, directors, and employees, which are based on the termination or on acts taken or statements made that are reasonably necessary to initiate or effect the termination if the employee's termination requires good cause under subsection A of Section 4 of this act, is subject to an agreement for severance pay under subsection C of Section 5 of this act, or is permitted by the expiration of an agreement for a specified duration under subsection D of Section 5 of this act.

D. An employee whose termination is not subject to subsection A of Section 4 of this act or subsection D of Section 5 of this act

and who is not a party to an agreement under subsection C of Section 5 of this act retains all common law rights and claims.

E. 1. This act does not displace or extinguish rights or claims of a terminated employee against an employer arising under:

- a. state or federal statutes or administrative rules or regulations having the force of law,
- b. collective bargaining agreement between an employer and a labor organization, or
- c. an express oral or written agreement relating to employment that does not violate this act.

2. The rights and claims arising under paragraph 1 of this subsection may not be asserted under this act, except as otherwise provided in this act. The existence or adjudication of those rights or claims does not limit the employee's rights or claims under this act, except as stated in subsection D of Section 8 of this act.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 574 of Title 40, unless there is created a duplication in numbering, reads as follows:

A. Unless otherwise provided in an agreement for severance pay under subsection C of Section 5 of this act, or for a specified duration under subsection D of Section 5 of this act, an employer may not terminate the employment of an employee without good cause.

B. Subsection A of this section applies only to an employee who has been employed by the same employer for a total period of one (1) year or more and has worked for the employer for at least five hundred twenty (520) hours during the twenty-six (26) weeks next preceding the termination. A layoff or other break in service is not counted in determining whether an employee's period of employment totals one (1) year, but the employee is considered to be employed during paid vacations and other authorized leaves. If an employee is rehired after a break in service exceeding one (1) year, not counting absences due to labor disputes or authorized leaves,

the employee is considered to be newly hired. The twenty-six-week period for purposes of this subsection does not include any week during which the employee was absent because of layoffs of one (1) year or less, paid vacations, authorized leaves, or labor disputes.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 575 of Title 40, unless there is created a duplication in numbering, reads as follows:

A. A right of an employee under this act may not be waived by agreement except as provided in this section.

B. By express written agreement, an employer and an employee may provide that the employee's failure to meet specified business-related standards of performance or the employee's commission or omission of specified business-related acts will constitute good cause for termination in proceedings under this act. Those standards or prohibitions are effective only if they have been consistently enforced and they have not been applied to a particular employee in a disparate manner without justification. If the agreement authorizes changes by the employer in the standards or prohibitions, the changes must be clearly communicated to the employee.

C. By express written agreement, an employer and an employee may mutually waive the requirement of good cause for termination, if the employer agrees that upon the termination of the employee for any reason other than the willful misconduct of the employee, the employer will provide severance pay in an amount equal to at least one (1) month's pay for each period of the employee's employment totaling one (1) year, up to a maximum total payment equal to thirty-six (36) months' pay at the employee's rate of pay in effect immediately before the termination. The employer shall make the payment in a lump sum or a series of monthly installment, none of which may be less than one (1) month's pay plus interest on the principal balance. The lump-sum payments must be made or the

monthly payments must begin within thirty (30) days after the employee's termination. An agreement under this subsection constitutes a waiver by the employer and the employee of the right to civil trial, including jury trial, concerning disputes over the nature of the termination and the employee's entitlement to severance pay, and constitutes a stipulation by the parties that those disputes will be subject to the procedures and remedies of this act.

D. The requirement of good cause for termination does not apply to the termination of an employee at the expiration of an express oral or written agreement of employment for a specified duration related to the completion of a specified task, project, undertaking, or assignment. If the employment continues after the expiration of the agreement, Section 4 of this act applies to its termination unless the parties enter into a new express oral or written agreement under this subsection. The period of employment under an agreement described in this subsection counts towards the minimum periods of employment required by subsection B of Section 4 of this act.

E. An employer may provide substantive and procedural rights in addition to those provided by this act, either to one or more specific employees by express oral or written agreement, or to employees generally by a written personnel policy or statement, and may provide that those rights are enforceable under the procedures of this act.

F. An employing person and an employee not otherwise subject to this act may become subject to its provisions to the extent provided by express written agreement, in which case the employing person is deemed to be an employer.

G. An agreement between an employer and an employee subject to this act imposes a duty of good faith in its formation, performance, and enforcement.



H. By express written agreement, an employer and an employee may settle at any time a claim arising under this act.

I. By express written agreement before or after a dispute or claim arises under this act, an employer and an employee may agree to private arbitration or other alternative dispute resolution procedure for resolving the dispute or claim.

J. By express written agreement after a dispute or claim arises under this act, an employer and an employee may agree to judicial resolution of the dispute or claim.

K. The substantive provisions of this act apply under any agreement authorized by subsections I and J of this section.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 576 of Title 40, unless there is created a duplication in numbering, reads as follows:

A. An employee whose employment is terminated may file a complaint and demand for arbitration under this act with the Commissioner of Labor not later than one hundred eighty (180) days after the effective date of the termination, the date of the breach of an agreement for severance pay under subsection C of Section 5 of this act, or the date the employee learns or should have learned of the facts forming the basis of the claim, whichever is latest. The time for filing is suspended while the employee is pursuing the employer's internal remedies and has not been notified in writing by the employer that the internal procedures have been concluded. Resort to an employer's internal procedures is not a condition for filing a complaint under this act.

B. Except when an employee quits, an employer, within ten (10) business days after a termination, shall mail or deliver to the terminated employee a written statement of the reasons for the termination and a copy of this act or a summary approved by the Commissioner.

C. An employer may file a complaint and demand for arbitration under this act with the Commissioner to determine whether there is good cause for the termination of a named employee. At least fifteen (15) business days before filing, the employer shall mail or deliver to the employee a written statement of the employer's intention to file and the factors alleged to constitute good cause for termination.

D. The Commissioner shall promptly mail or deliver to the respondent a copy of the complaint and demand for arbitration. Within twenty-one (21) days after receipt of a complaint, the respondent must file an answer with the Commissioner and mail a copy of the answer to the complainant. The answer of a respondent employer must include a copy of the statement of the reasons for the termination furnished the employee.

E. When a complaint is filed, a complainant employee or employer shall pay a filing fee to the Commissioner in an amount not exceeding the maximum filing fee for a civil action in the district courts of this state. The Commissioner may waive or defer payment of the filing fee upon a showing of the complainant employee's indigency.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 577 of Title 40, unless there is created a duplication in numbering, reads as follows:

A. Except as otherwise provided in this act, the Uniform Arbitration Act, Section 801 et seq. of Title 15 of the Oklahoma Statutes, applies to proceedings under this act as if the parties had agreed to arbitrate under that statute. The Commissioner of Labor shall adopt additional procedural rules to regulate arbitration under this act. Article II of the Administrative Procedures Act, Section 309 et seq. of Title 75 of the Oklahoma Statutes, does not apply to arbitration proceedings under this act.

B. The Commissioner shall adopt rules specifying the qualifications, method of selection, and appointment of arbitrators. An arbitrator serving under this act exercises the authority of the state.

C. Subject to rules adopted by the Commissioner, all forms of discovery consistent with Section 3224 et seq. of Title 12 of the Oklahoma Statutes and Section 807 of Title 15 of the Oklahoma Statutes are available in the discretion of the arbitrator, who shall ensure there is not undue delay, expense, or inconvenience. Upon request, the employer shall provide the complainant or respondent employee a complete copy of the employee's personnel file.

D. A party may be represented in arbitration by an attorney or other person authorized under the laws of this state to represent an individual in arbitration.

E. A complainant employee has the burden of proving that a termination was without good cause or that an employer breached an agreement for severance pay under subsection C of Section 5 of this act. A complainant employer has the burden of proving that there is good cause for termination. In all arbitrations, the employer shall present its case first unless the employee alleges that a quitting or retirement was a termination within the meaning of subparagraph c of paragraph 8 of Section 2 of this act.

F. If an employee establishes that a termination was motivated, in part, by impermissible grounds, the employer, to avoid liability, must establish by a preponderance of the evidence that it would have terminated the employment even in the absence of the impermissible grounds.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 578 of Title 40, unless there is created a duplication in numbering, reads as follows:

A. Within thirty (30) days after the close of an arbitration hearing or at any later time agreeable to the parties, the arbitrator shall mail or deliver to the parties a written award sustaining or dismissing the complaint, in whole or in part, and specifying the appropriate remedies, if any.

B. An arbitrator may make one or more of the following awards for a termination in violation of this act:

1. Reinstatement to the position of employment the employee held when employment was terminated or, if that is impractical, to a comparable position;

2. Full or partial backpay and reimbursement for lost fringe benefits, with interest determined pursuant to the provisions of Section 727 of Title 12 of the Oklahoma Statutes, reduced by interim earnings from employment elsewhere, benefits received, and amounts that could have been received with reasonable diligence;

3. If reinstatement is not awarded, a lump-sum severance payment at the employee's rate of pay in effect before the termination, for a period not exceeding thirty-six (36) months after the date of the award, together with the value of fringe benefits lost during that period, reduced by likely earnings and benefits from employment elsewhere, and taking into account such equitable considerations as the employee's length of service with the employer and the reasons for the termination; and

4. Reasonable attorney's fees and costs.

C. An arbitrator may make either or both of the following awards for a violation of an agreement for severance pay under subsection C of Section 5 of this act:

1. Enforcement of the severance pay and other applicable provisions of the agreement, with interest determined pursuant to the provisions of Section 727 of Title 12 of the Oklahoma Statutes; and

2. Reasonable attorney's fees and costs.

D. An arbitrator may not make any award except as provided in subsections B and C of this section. The arbitrator may not award damages for pain and suffering, emotional distress, defamation, fraud, or other injury; punitive damages; compensatory damages; or any other monetary award. In making a monetary award under this section, the arbitrator shall reduce the award by the amount of any monetary award to the employee in another forum for the same conduct of the employer. In making any award, the arbitrator is subject to the rules of issue, fact, and judgment preclusion applicable in district court.

E. If an arbitrator dismisses an employee's complaint and finds it frivolous, unreasonable, or without foundation, the arbitrator may award reasonable attorney's fees and costs to the prevailing employer.

F. An arbitrator may sustain an employer's complaint and make an award declaring that there is good cause for the termination of a named employee. If the arbitrator dismisses the employer's complaint, the arbitrator may award reasonable attorney's fees and costs to the prevailing employee.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 579 of Title 40, unless there is created a duplication in numbering, reads as follows:

A. Either party to an arbitration may seek vacation, modification, or enforcement of the arbitrator's award in the district court for the county in which the termination occurred or in which the employee resides.

B. An application for vacation or modification must be filed within ninety (90) days after delivery of a copy of the award to the applicant. An application for enforcement may be filed at any time after the issuance of the arbitrator's award.

C. The court may vacate or modify an arbitrator's award only if the court finds that:

1. The award was procured by corruption, fraud, or other improper means;

2. There was evident partiality by the arbitrator or misconduct prejudicing the rights of a party;

3. The arbitrator exceeded the powers of an arbitrator;

4. The arbitrator committed a prejudicial error of law; or

5. Another ground exists for vacating the award under the Uniform Arbitration Act, Section 801 et seq. of Title 15 of the Oklahoma Statutes.

D. In an application for vacation, modification, or enforcement of the arbitrator's award, the court may award a prevailing employee reasonable attorney's fees and costs. In an application by an employee for vacation of the arbitrator's award, the court may award a prevailing employer reasonable attorney's fees and costs if the court finds the employee's application is frivolous, unreasonable, or without foundation.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 580 of Title 40, unless there is created a duplication in numbering, reads as follows:

An employer shall post a copy of this act or a summary approved by the Commissioner of Labor in a prominent place in the work area. An employer who violates this section is subject to an administrative penalty not to exceed Five Hundred Dollars (\$500.00). The Commissioner is authorized to impose and collect any administrative penalty arising under this section.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 581 of Title 40, unless there is created a duplication in numbering, reads as follows:

An employer or other employing person may not directly or indirectly take adverse action in retaliation against an individual for filing a complaint, giving testimony, or otherwise lawfully participating in proceedings under this act, whether or not the

individual is an employee having rights under this act. An employer or other employing person who violates this section is liable to the individual subjected to the adverse action in retaliation for damage caused by the action, punitive damages when appropriate, and reasonable attorney's fees. A separate civil action may be brought to enforce this liability. An employer is also subject to applicable procedures and remedies provided by Sections 6 through 9 of this act.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 582 of Title 40, unless there is created a duplication in numbering, reads as follows:

This act does not apply to the termination of an employee within six (6) months after the effective date of this act based upon the employee's refusal to enter into an agreement meeting the minimum standards of subsection C of Section 5 of this act, which the employer, in the exercise of good faith business judgment, may impose as a condition of continued employment.

SECTION 13. AMENDATORY 15 O.S. 1991, Section 802, is amended to read as follows:

Section 802. A. ~~This act~~ 1. The Uniform Arbitration Act, Section 801 et seq. of this title, shall apply to a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. Such agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract. ~~This act~~

2. The Uniform Arbitration Act shall apply to employer and employee relations only as provided for in the Oklahoma Employment Termination Act, Sections 1 through 12 of this act.

3. The Uniform Arbitration Act shall not apply to collective bargaining agreements or contracts with reference to insurance except for those contracts between insurance companies.

B. The term "court" as used in ~~this act~~ the Uniform Arbitration Act means any court of competent jurisdiction of this state. The making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under ~~this act~~ the Uniform Arbitration Act and to enter judgment on an award thereunder.

SECTION 14. AMENDATORY 15 O.S. 1991, Section 818, is amended to read as follows:

Section 818. ~~This act~~ The Uniform Arbitration Act, Section 801 et seq. of this title, shall apply only to agreements made subsequent to the effective date of this act. ~~This act does not apply to employer and employee relations.~~ ~~This act~~ The Uniform Arbitration Act shall not apply to contracts between insuror and insured, except where both the insured and insuror are insurance companies.

SECTION 15. This act shall become effective January 1, 1995.

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