

Sweden's Experience With Just Cause Dismissal

David Allen Larson†

The absolute right of an employer to fire an employee at will is disappearing in certain jurisdictions within the United States. This trend is significant since the majority of American workers are not unionized and thus lack effective bargaining power. Most employees are hired for indefinite periods of time and serve at the will of the employer.¹ Courts, however, are carving out exceptions to the employment-at-will doctrine.² If

† Associate Professor, School of Management, Millsaps College. The material for this Comment was collected while Mr. Larson was visiting as a Research Scholar at Lund University Law School in Sweden.

1. The number of employees in the United States who are members of labor unions is of central importance. Private employees rarely receive dismissal protection in individual employment contracts. Rather, just cause protection generally exists as a result of the collective bargaining process. Fewer than 25% of American workers are union members and fewer than 30% are covered by collective bargaining agreements. Summers, *Worker Participation in Sweden and the United States: Some Comparisons From An American Perspective*, 133 U. PA. L. REV. 175, 181 (1984) (citing DIRECTORY OF U.S. LABOR ORGANIZATIONS 1982-83 (C. Gifford ed. 1982) and BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. No. 2079, DIRECTORY OF NATIONAL LABOR UNIONS AND EMPLOYEE ASSOCIATIONS, 1979, at 59, 73-74 (1980)).

These percentages can be contrasted with those of the Swedish system in which approximately 90% of all blue collar workers are members of one of the 24 nationwide trade unions affiliated with the Swedish Confederation of Trade Unions (Landsorganisationen i Sverige, or LO). Additionally, approximately 80%, or 1,000,000, of the white collar workers are members of one of the 20 trade unions affiliated with the Swedish Central Organization of Salaried Employees (Tjänstemännens Centralorganisation, or TCO). The Swedish Confederation of Professional Associations (Centralorganisationen SACO/SR) also represents approximately 260,000 members, primarily in the academic professions. SWEDISH INFORMATION SERVICE, THE SWEDISH COLLECTIVE BARGAINING IN TRANSITION, No. 30, WORKING LIFE IN SWEDEN (1985).

The fact that the majority of employees in the United States are not covered by collective bargaining agreements does not necessarily mean that it will be more difficult to pass comprehensive protection legislation in this country. Unions are concerned with expanding their sphere of influence. They can build additional support by promising to obtain a form of dismissal protection through collective bargaining agreements. Comprehensive protection legislation may be perceived as a threat to union interests if dismissal protection is seen as making a union irrelevant. For a theoretical analysis of the potential conflict between labor union interests and employment security legislation as well as for an examination of this conflict in Sweden, see Falhbeck, *Interests: A Union Battle for Survival?*, 20 STAN. J. INT'L L. 295 (1984). Swedish Professor Falhbeck concludes that after failing at the bargaining table to obtain satisfactory employment security, Swedish unions supported employment security legislation. *Id.* at 301.

2. Courts in the United States have recognized exceptions to the employment-at-will doctrine. These exceptions have generally been based upon either public policy, contract theories, or tort theories. There is confusion in the United States, however, because these exceptions are not consistently applied. See *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (employee who cooperated with law enforcement investigation of fellow

the United States continues to move in the direction of requiring “just” or “objective” cause before an employee can be dismissed, significant changes may occur in the labor market. In anticipation of such changes, scholars and policy-makers must examine just cause dismissal and its consequences more closely.³ For assistance in evaluating just cause dismissal in the United States, we can look to the example of Sweden, which has had statutory just cause protection for its employees since 1974.⁴ Sweden’s experience over the last eleven years provides valuable insight into the degree of protection that is workable and, more broadly, whether this growing form of protection is a desirable development in the United States.⁵

employee was protected from dismissal); *but see* *Campbell v. Eli Lilly Co.*, 413 N.E.2d 1054 (Ind. Ct. App. 1980) (employee not protected where no express statutory duty existed to justify his act of reporting company misconduct); *Toussaint v. Blue Cross and Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980) (contents of employee handbook guaranteeing dismissal only for just cause can result in contract rights); *Agarwal v. Johnson*, 25 Cal.3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979) (victim of racial slurs, humiliation, and unexplained discharge successfully maintained cause of action for intentional infliction of emotional distress); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) (abrupt dismissal of salesman wrongful because every at-will contract contains an implied covenant of good faith and fair dealing).

3. For articles criticizing proposals or developments that have eroded the employment-at-will rule, see Power, *A Defense of the Employment At Will Rule*, 27 ST. LOUIS U.L.J. 881 (1983) (change will impose costly and unwise burdens on employees); Comment, *‘Good Cause’: California’s New ‘Exception’ to the At-Will Employment Doctrine*, 23 SANTA CLARA L. REV. 263 (1983) (California’s judicially imposed “good cause” requirement is an interference with contract, a violation of due process, and an improper usurpation of the legislative function).

Various articles reject the employment-at-will rule. *See, e.g.*, Summers, *Individual Protection Against Unjust Dismissal: Time For A Statute*, 62 VA. L. REV. 481 (1976) (United States trails the industrial world in providing good cause dismissal protection); Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment At Will*, 52 FORDHAM L. REV. 1082 (1984) (employment-at-will doctrine unsupported in legal history).

The decision to implement just cause dismissal protection involves balancing considerations of equity and efficiency. Equitable considerations are influenced according to whether one’s perspective is that of an employer or an employee. What appears fair to an employee may be unacceptable to an employer. It can be argued that fair or morally recommended behavior is not always the most productive behavior in a competitive marketplace. Legislators, however, take numerous considerations into account, and many regulatory statutes have been enacted recognizing a trade-off between equity and efficiency. The question of whether a just cause dismissal system inevitably involves a trade-off between equity and efficiency, or instead is ultimately both more equitable and efficient than at-will employment, is beyond the scope of this discussion. Nevertheless, a just cause dismissal system does have equity and efficiency components. This Comment will identify some of those components.

4. Act Respecting the Protection of Employment (Svensk Författningssamling, 1974, No. 12) [hereinafter cited as 1974 Act], reprinted in INTERNATIONAL LABOR OFFICE: LEGISLATIVE SERIES [hereinafter cited as ILO], JULY-AUG. 1975, AT SWE.1.

5. Although a comparative examination of another country’s experience with employee protections is useful when considering such protections for the United States, one must recognize that a study of this nature involves the serious problem of reconciling cultural differences. Unfortunately, some of these differences cannot be clearly identified or completely understood. For a broader discussion of the similarities and differences between Swedish and American

This Comment will explore four questions that must be considered when deciding whether to provide just cause dismissal protection. These questions, discussed in light of Sweden's experience, address the problem of determining the maximum employment protection consistent with an efficient marketplace. First, how should policy-makers define the category of temporary workers who are not afforded the job protection granted to indefinite term workers? Second, to what extent will dismissal protection affect costs for both the judicial system and employers as a result of increased litigation and negotiation?⁶ Third, is it desirable to have a notice period during which the employee continues to be paid while allegations supporting dismissal are reviewed? Fourth, will just cause dismissal protection make it more difficult for younger, relatively inexperienced workers to enter the workforce because employees will become more reluctant to leave their jobs and employers will hesitate to expand their workforce? An examination of Swedish legislation brings these concerns into focus.

law, see Summers, *Comparisons in Labor Law: Sweden and the United States*, 7 *INDUS. REL. L.J.* 1 (1985). Professor Summers addresses three points in his analysis of the Swedish and American systems: (1) the similarity of collective bargaining statutes; (2) the difference in legal status held by unions as employee representatives; and (3) the different legal controls on the internal processes of unions. Professor Summers admits that his comparisons are limited in scope. Rather, he defines his purpose as one of providing illuminating and provocative comparisons. *Id.* at 3. See also Larson, *Protection For At-Will Employees: A Comparative Study of Sweden and the United States*, 9 *SUFFOLK TRANSNAT'L L.J.* 1 (1985) (reviews common law erosion of employment-at-will in the United States and outlines Swedish just cause dismissal protection legislation).

For an overview of unjust dismissal legislation in Canada, Great Britain, Germany, France, Italy, and Japan, see Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 *AM. J. COMP. L.* 310 (1985). Professor Estreicher states that his comparisons have raised questions of transferability and have created an agenda for future research. *Id.* at 321. Although it is critical to identify differences between Sweden and the United States, one should not overlook similarities. For instance, in the United States employers are required to pay taxes in order to support unemployment compensation funds. When employees are not dismissed "for cause," employers will be assessed at a higher rate. The concept of proving just cause in a dismissal context is thus not unfamiliar in the United States. For a thorough discussion of industrial relations in Sweden, see A. ADLERCREUTZ, *Sweden*, in *INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS*, Swed.-1 (R. Blainpain ed. 1985).

Just cause dismissal requirements eventually may be applied in international forums as these requirements are adopted by an increasing number of states. Article 38 of the Statute of the International Court of Justice provides that one of the sources of international law is "the general principles of law recognized by civilized nations." The question of whether protection from arbitrary dismissal should be recognized as a "general principle of law recognized by civilized nations" deserves further inquiry. For an exhaustive study of basic human rights and human dignity as general principles of international law, see M. MCDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980).

6. Some of the effects of just cause legislation are identified in this Comment, but other potentially positive benefits should not be ignored. This Comment will not discuss certain intangible factors such as whether this legislation has contributed to a more stable and productive work force in Sweden. This is a distinct possibility and one that should not be lightly dismissed.

Just Cause Dismissal in Sweden

The Swedish legislation granting just cause dismissal protection is the Act Respecting the Protection of Employment.⁷ It was first passed in 1974 and significantly revised in 1982.⁸ This protective legislation does not apply to managerial workers, employees who are members of the employer's family, relief workers, or household and domestic workers.⁹ Several sections of the Swedish Act are particularly important for framing this discussion. Section 7 holds that "[n]otice of termination given by the employer must be materially justified."¹⁰ Section 11 sets out notice benefit periods ranging from one to six months wherein the employee collects his or her salary for a set period of time after formal notice of dismissal.¹¹ Sections 5 and 6 define permissible temporary employment and illustrate the types of changes Sweden has made in an effort to devise a functional national labor policy.¹²

I. Defining a Category of Temporary Employment

Realistically, not all workers should be afforded indefinite term employment protection. Certain workers need to receive just cause dismissal protection only for the express term of their contract. Those workers with definite or limited term contracts are known as temporary workers. While it is possible to grant a degree of permanent employment security to indefinite term employees, it is not appropriate to offer the same protection to temporary employees when both the employer and the employee have a clear understanding of the employment period.

An effective employment protection system depends upon a workable division between indefinite term workers enjoying a degree of permanent employment protection and temporary workers who know that their employment term will soon end and may not be renewed. This allows managers to respond effectively to changes in product demand and/or

7. Svensk Författningssamling, 1982, No. 80 [hereinafter cited as 1982 Act], *reprinted in* 1983 ILO, at 175.

8. *See supra* notes 4-5. Section 1 (identifying employees excluded from coverage) was revised in 1983. Additionally, section 2 (allowing for modification of certain contracts via collective bargaining), section 21 (employee benefits during lay-offs), section 22 (order of priority for dismissals due to work shortages), and section 33 (retirement with benefits) were revised in 1984. Section 24 (laid-off employees have prior claim to work in which previously employed) was dropped in the 1984 amendments.

9. 1982 Act, *supra* note 7, § 1, *reprinted in* 1983 ILO, at 175. These exceptions are similar to those found in section 2(3) of the National Labor Relations Act of 1935, 29 U.S.C. § 152(3) (1982), which provides employees in the United States with organizing rights. Professor Falhbeck states that the managerial exception in Sweden is considerably narrower than its counterpart in the United States. It includes only those persons in very high, truly independent positions. Falhbeck, *supra* note 1, at 302 n.22.

10. 1982 Act, *supra* note 7, § 7, *reprinted in* 1983 ILO, at 177.

11. *Id.* § 11.

12. *Id.* §§ 5-6.

working seasons by either adding or refusing to renew temporary employees. Such a system permits an employer to hire a short-term employee during a holiday shopping season and later to release that employee at the end of the contract term without having to establish just cause. Sweden, thus, has recognized the need to create a temporary employment category distinct from indefinite term employment.

The temporary employment categories in Sweden are somewhat flexible. The temporary employment term is generally not expected to be lengthened, although it is possible that under specific circumstances it can become indefinite term employment.¹³ Additionally, if the employee has engaged in serious misconduct, the employer might be entitled to shorten the established employment term by summarily dismissing the employee.¹⁴ Otherwise, the temporary employee does receive just cause dismissal protection, but only for the express term of his or her contract.

It is difficult to define the situations where employment should be characterized as temporary. The original section five of the 1974 Swedish Act described temporary employment as work that could be defined by a distinct period, season, or job, or work that involved a trainee or a temporary substitute.¹⁵ The types of temporary employment were restricted to avoid abuse by employers. By characterizing employees as temporary, employers could avoid the limitations placed upon their discretion by dismissal protection legislation. Employers would gain the option of renewing only certain employees based upon arbitrary reasons. If this practice became widespread, employees would not receive the even-handed and equitable treatment that the legislation was intended to provide. Thus, the problem of defining temporary employment for a system requiring just cause dismissal involves an estimation of the extent to which employers will avoid protective legislation by categorizing workers as temporary.

Figure 1¹⁶ illustrates the extent to which jobs were categorized as temporary employment in Sweden in 1979. A 1976 Act of Parliament requested Swedish employers to report any vacancy to the public employment exchange.¹⁷ According to the National Labour Market

13. *Id.* §§ 4, 6, 36, 37, 40.

14. *Id.* § 18.

15. 1974 Act, *supra* note 4, § 5, *reprinted in* 1975 ILO, at 175. The categories of temporary employment were expanded under the 1982 amendments to the Act. 1982 Act, *supra* note 7, § 5, *reprinted in* 1983 ILO, at 176.

16. A. HENNING, TIDSBEGRÄNSAD ANSTÄLLNING, EN UNDERSÖKNING AV ANSTÄLLNINGSFÖRMERNA, I PLATSUTBUDET 1979, at 59 (1982) (Temporary Employment, An Examination of Categories of Employment in Employment Offers).

17. A. HENNING, TIDSBEGRÄNSAD ANSTÄLLNING, EN STUDIE AV ANSTÄLLNINGSFÖRMS-REGLERINGE OCH DESS FUNKTIONER 547 (1984) (Temporary Employment: A

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Board data bank, 376,047 jobs were reported in 1979.¹⁸ The vacancies were organized according to the standards of the Central Bureau of Statistics for Swedish branch-of-industry subdivisions, which are based upon the United Nations' International Standard Industrial Classification categories.¹⁹ The information reveals that almost 48% of the jobs reported were categorized as temporary employment.²⁰ The fact that approximately half of the job vacancies are categorized as positions that do not provide minimal employment protection mandated by the statute draws the effectiveness of such legislation into question.

Demands for an increased number of temporary employment categories have made the situation in Sweden even more complicated. Employer groups in Sweden argued that the protective legislation first enacted in 1974 was not flexible enough to allow for adjustment to changes in market conditions. As a result, in 1982 an amended version of the Act provided several additional categories of temporary employment. Employers can now categorize as temporary those employees looking for holiday jobs²¹ (primarily expected to be students), those waiting to begin compulsory military service,²² those at obligatory retirement age (or sixty-five years old if no such retirement age exists),²³ those retained to compensate for temporary accumulations of work,²⁴ and those undergoing probationary employment (up to six months).²⁵

These additional categories give the employer more options in terms of categorizing employees as temporary. The employer's power to determine whether a temporary accumulation of work exists includes the power to decide when that accumulation has ended.²⁶ The potential for abuse is apparent. Observers can only hypothesize how many additional workers will lose employment protection under the amended legislation.

Another possible employer response to the protective legislation is to lay-off workers for lengthy periods rather than assume the cost of establishing a just cause dismissal. Sweden has addressed this problem by setting priorities among those laid-off in order to avoid prejudice at a later

Study of the Regulations Governing Categories of Temporary Employment and Their Functions).

18. *Id.* at 546.

19. *Id.* at 547.

20. *Id.*

21. 1982 Act, *supra* note 7, § 5(2), reprinted in 1983 ILO, at 176.

22. *Id.* § 5(4).

23. *Id.* § 5(5).

24. *Id.* § 5(3).

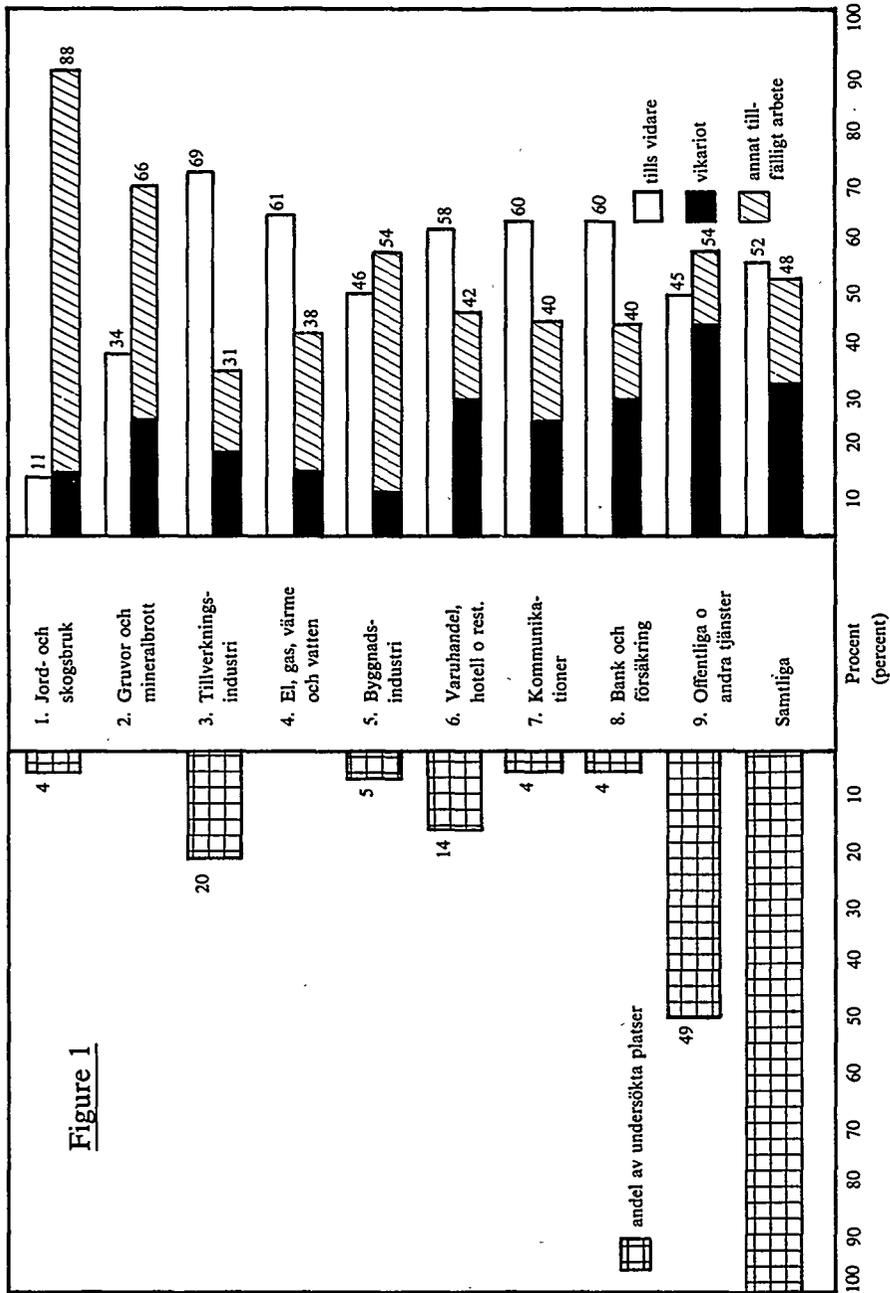
25. *Id.* § 6.

26. A. HENNING, *supra* note 17, at 542.

Figure 1: Explanation and Translation

Employment Categories According to Industry, 1979. Right half illustrates types of employment (permanent employment, deputyship and other temporary employment) and share of market by percentage distribution within different industries (based upon those vacancies reported). Left half illustrates industry share of the market by percentage.

1) agriculture	7) transportation & communications	 permanent
2) mining	8) finance, insurance, real estate	 substitute (deputy)
3) manufacturing	9) services (police, fire, hospital & education)	 other temporary employment
4) utilities		Samtliga - Totals
5) construction		
6) hotel & restaurant retail/wholesale		



time when workers are recalled.²⁷ Additionally, an outer time limit should be established defining a time period after which a lay-off becomes a dismissal requiring proof of just cause.²⁸

An important aspect of Figure 1 is that temporary jobs are further divided into subcategories according to the nature of the job. A large percentage of temporary jobs are "deputyships," filled by substitutes who take the position of permanent employees while they are taking advantage of Sweden's liberal leave of absence policies. The Swedish government, accounting for 49% of the work force, as shown in Figure 1, has a liberal policy for leaves of absence. In contrast, the United States government is not nearly as large a force in the employment market, and leaves of absence are not as readily granted. Accordingly, the number of deputyships in the United States filled by temporary employees would be lower, all other things being equal. Although there may be fewer temporary workers in the United States, the provision of any temporary employment categories offers employers the opportunity to misuse those categories in order to avoid the goals of protective legislation. Therefore, the problem of defining temporary employment must be addressed in drafting just cause dismissal protection legislation for the United States.

II. The Costs of Litigating Just Cause Dismissal

Requiring an employer to establish just cause before terminating an employee may result in costly negotiation, litigation, or both. It is difficult to predict the quantity of litigation that a new just cause protection statute would generate. A number of employment protection questions will be resolved at the union-employer negotiating level. Thus any effort to report those negotiation costs is likely to be hampered by incomplete records. Some developments, however, can be reported. In 1978, the *Arbetsdomstolens Domar*, the case reporter for Sweden's Labour Court, initiated a convenient statute index that enables one to determine the number of times a particular statute has been cited before the Labour Court in a given year. The Labour Court is the final tribunal for labor issues.

27. 1982 Act, *supra* note 7, § 22, reprinted in 1983 ILO, at 180.

28. In Sweden there has not been a need to establish an outer time limit after which a lay-off is treated as a dismissal. Section 21 of the Act requires employers to pay full wages to employees laid-off more than two weeks in succession or for a total period exceeding thirty days in any calendar year. 1982 Act, *supra* note 7, § 21, reprinted in 1983 ILO, at 179-180. There is, therefore, no incentive to disguise a dismissal by calling it a lay-off. An outer time limit would be necessary in the United States.

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Figure 2²⁹

Year		No. of cases citing Act	Total no. cases	%
1978		31	169	18.3
1979		20	165	12.1
1980		23	175	13.1
1981		28	174	16.1
1982	1974 Act	45	165	27.3
	1982 Act	2	165	1.2
	Total	47	165	28.5
1983	1974 Act	20	190	10.5
	1982 Act	15	190	7.9
	Total	35	190	18.4
1984	1974 Act	9	147	6.1
	1982 Act	28	147	19.1
	Total	37	147	25.2

Figure 2 shows the percentage of the cases decided and published by the Labour Court each year that involved Swedish dismissal protection legislation. The Labour Court also keeps unpublished office records that indicate the nature and subject matter of cases coming before the court. Records of the unpublished decisions of the Labour Court indicate a somewhat greater percentage of the court's energy and time is being devoted to employment protection legislation issues than indicated by the published records.

Figure 3³⁰

Year	No. of cases concerning Act	Total no. cases	%
1978	76	282	27.0
1979	95	342	27.8
1980	85	342	24.9
1981	96	300	32.0
1982	118	323	36.5
1983	115	337	34.1

Figure 3 confirms that substantial judicial resources are being devoted to employment protection issues. Such a development is not unexpected, and it is likely that similar legislation in the United States would generate

29. Compilation by the author of material gathered from the Författningsregister (Statute Index) of each volume of the *Arbetsdomstolens Domar*.

30. Internal office records of the Swedish Labour Court, provided and interpreted by Claus Eklundh, one of the Presidents of the Labour Court.

significant litigation. Greater amounts of litigation would increase employment costs.

III. Notice Periods

Swedish employers, as noted above, have not sat by idly as this legislation has developed and evolved. The Employers' Confederation in Sweden has consistently argued for a relaxation of the employment security statutes. It asserted that employers would hire 15 to 20% more new workers in 1977 if this protective legislation did not exist.³¹ Reluctance to hire new employees results from the costs involved in dismissing an employee. Any employee can challenge notice of dismissal by arguing either that the proper procedure was not followed or that sufficient facts do not exist to justify dismissal.³²

One of the costs incurred in Sweden would probably not be involved, at least at the outset, in the United States. In Sweden, section 11 of the Act Respecting the Protection of Employment requires that dismissed employees be paid their salary for established periods after the issuance of notice of dismissal.³³ The benefit periods are a function of both length of service and age.³⁴ These notice period benefit requirements are not likely to be a part of any legislation in the United States at this early stage in the evolution of employee protections.

The existence of notice period benefits has a consequence that should not be overlooked. These benefits serve to mitigate otherwise expected increases in periods of unemployment. Swedish economist Bertil Holmlund analyzed the effects of the 1974 legislation using a series of economic models and simulations to determine changes in labor market behavior.³⁵ Holmlund concluded that the notice benefit period was an important factor in preventing an increase in unemployment duration because it allowed workers to search for new jobs while still technically on the old job.³⁶ Dismissed employees could receive their salary for up to six months after notice of dismissal.³⁷ This provides ample time to search for new employment. Thus Sweden's system allows dismissed

31. SWEDISH EMPLOYERS' CONFEDERATION, DOC. NO. 1092, A WELL-FUNCTIONING LABOUR MARKET 5-6 (1981).

32. 1982 Act, *supra* note 7, §§ 34-35, reprinted in 1983 ILO, at 183.

33. *Id.* § 11.

34. *Id.*

35. Holmlund, *Determinants and Characteristics of Unemployment in Sweden: The Role of Labor Market Policy*, in *STUDIES IN LABOUR MARKET BEHAVIOR: SWEDEN AND THE UNITED STATES* 114-19 (G. Eliasson, B. Holmlund & F. Stafford eds. 1981).

36. *Id.* at 116.

37. 1982 Act, *supra* note 7, §§ 11-12, reprinted in 1983 ILO, at 177-78.

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workers to look for new jobs before they ever reach the point of actual unemployment. Without a similar system disguising the newly unemployed for up to six months, longer periods of unemployment can be expected in the United States.

A question closely related to the concern with unemployment duration addresses the effect of dismissal protection on the duration of employment vacancies, or job openings. Holmlund concluded that vacancy duration will be longer as a result of employment protection legislation.³⁸ Employers will be much more careful in terms of hiring new workers, recognizing that dismissal may be difficult at a later date. An employment protection system that encourages employers to become more careful in hiring new workers but lacks the mitigating effect of a notice period requirement will tend to increase the duration of unemployment periods.

IV. Labor Mobility and Younger Workers

Before implementing a just cause standard, the changes in employee behavior that may result should be taken into account. Will an employee, secure in the knowledge that she cannot be dismissed without just cause, be more reluctant to change jobs? If a just cause dismissal system does inhibit labor mobility, there will be a corresponding cost to the economic sector as a result of inefficient allocation of labor skills and resources. Yet factors such as seniority rules may already contribute to a reduction in labor mobility. To the extent that this is true, any additional effect on labor mobility resulting from dismissal protection may be negligible.

Significant burdens resulting from a reduction in labor mobility may fall upon younger workers. If a just cause system decreases labor mobility, there may be fewer established jobs periodically opening for younger workers. In addition, from a management perspective, a just cause dismissal system may cause employers to hesitate before expanding their business and increasing the size of their work force. Every time a new employee is added, an employer incurs the risk that a time-consuming and expensive dismissal situation may later arise. To the degree that this concern manifests itself in a reluctance to expand and aggressively pursue perceived increases in demand, individual employers may suffer in competitive markets.

A look at recent employment statistics for eighteen- and nineteen-year-olds in Sweden suggests that this age group is currently struggling.

38. Holmlund, *supra* note 35, at 112.

Figure 4—May 1985³⁹

(Population figures in thousands)

Age	Emp.	Unemp.	No. in labor force	No. not in labor force	Total Pop.	Unemp. %
18	46.8	25	49.3	72.9	122.2	5.0
19	80.4	34	83.7	38.7	122.5	4.0

Although conditions appear satisfactory at first glance, closer inspection identifies hidden unemployment. In 1985, the Swedish government financed an unemployment program for eighteen- and nineteen-year-olds known as the *Umdomslag* program. Those eighteen- and nineteen-year-olds who are participating in the program are reported by the Central Bureau of Statistics as employed.⁴⁰ Their entire wages, however, are provided by the Swedish government, and the youths typically work only four hours per day. They earn a normal wage based upon existing union contracts for the hours they work. The participants in this program are individuals who presumably are not able to secure a more permanent form of employment on the open market. The number of individuals subsidized by this program may more accurately indicate the employment situation for eighteen- and nineteen-year-olds.

According to the Central Bureau of Statistics, 29,800 eighteen- and nineteen-year-olds were participating in the *Umdomslag* program in May 1985.⁴¹ Based upon the information in Figure 4, representing May 1985, there were 49,300 eighteen-year-olds and 83,800 nineteen-year-olds in the labor force. Of these 133,000 workers, 127,200 were employed. When the number of employed workers in the *Umdomslag* program is considered independently, however, it is clear that 23% of those working were really only part-time, government-subsidized workers. Thus out of an eighteen- and nineteen-year-old work force of 133,000, over 22% were in this single program.

The combination of reported unemployment percentages for eighteen- and nineteen-year-olds in Figure 4 results in a 4.5% unemployment rate

39. STATISTISKA CENTRALBYRÅN, ARBETSKRAFTSUNDERSÖKNINGEN MAJ 1985, at 4 (National Central Bureau of Statistics, Labour Force Sample Survey, May 1985). The months of April and May, *see infra* note 42, were selected because they were the most recent months available. This is obviously not an attempt to make an exhaustive study of labor statistics in this area. Rather, it is an effort to expose a point of concern that requires further study. The uncomfortably high unemployment figures suggest that legislators must pay close attention to any adverse effects that just cause dismissal legislation may have upon younger workers.

40. NATIONAL CENTRAL BUREAU OF STATISTICS, THE SWEDISH LABOUR FORCE SURVEYS, A SHORT PRESENTATION 5-6 (1983).

41. STATISTISKA CENTRALBYRÅN, PRESSMEDDELANDE ARBETSMARKNADSLÄGET NO. 197, at 6 (1985) (National Central Bureau of Statistics, Press Release, Labor Market Studies).

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for that age group. Yet the addition of those workers participating in the *Umdomslag* program increases that statistic to almost 27% of those in the work force. The results are similar for April 1985.

Figure 5—April 1985⁴²

(Population figures in thousands)

Age	Emp.	Unemp.	No. in labor force	No. not in labor force	Total Pop.	Unemp. %
18	64.5	11	65.6	64.8	130.4	1.6
19	85.0	31	88.1	29.0	117.1	3.5

The Central Bureau of Statistics reports that 33,000 workers in the eighteen- and nineteen-year-old age group were in the *Umdomslag* program in April 1985.⁴³ A computation similar to that completed with reference to Figure 4 reveals that approximately 22% of those employed in April 1985 were in the *Umdomslag* program. If this government program were cancelled, 33,000 workers in the eighteen- and nineteen-year-old age group would be added to a total labor force having a reported unemployment of approximately 2.5%. The addition of 33,000 new unemployed workers would raise the unemployment figures for this age group to approximately 25%.

In Sweden, younger workers appear to have problems obtaining permanent employment. These difficulties are not entirely reflected in official statistics. This conclusion is clear without even considering how many eighteen- and nineteen-year-olds are involved in other government subsidized employment programs.

Actual unemployment is not accurately reflected in Swedish statistics. An individual can be considered unemployed only if she: (a) looked for work during the previous sixty days; (b) was waiting for re-employment at a previous place of work; (c) was waiting to commence new employment starting within thirty days; or (d) would have looked for work had she not been temporarily ill.⁴⁴ It is quite possible that there are a number of individuals who became so discouraged in the job search that they did not seek employment in accordance with these conditions and have become part of the invisible unemployed which, if included in the statistics, would provide an even bleaker employment picture.⁴⁵

42. STATISTISKA CENTRALBYRÅN, ARBETSKRAFTSUNDERSÖKNINGEN APRIL 1985, at 4 (National Central Bureau of Statistics, Labor Force Sample Survey).

43. STATISTISKA CENTRALBYRÅN, *supra* note 41, at 6.

44. NATIONAL CENTRAL BUREAU OF STATISTICS, *supra* note 40, at 5-6.

45. The United States Bureau of the Census defines unemployed persons as:

Any labor policy involves choices. A choice to protect existing jobs and to provide for the security of current workers may make it more difficult for young and inexperienced employees to be placed in permanent positions. This choice is not limited to a simple preference for protecting older workers over younger workers. There are long-term structural effects involving the composition of the workforce. Consequently, decisionmakers must carefully consider whether such a policy is in the nation's best interests.

V. Significance for the United States

If the United States is to adopt a just cause standard for the dismissal of employees, the standard must be carefully defined. In Sweden, where the employer/employee negotiation system is centralized and efficient, the Swedish Act allows modification of numerous significant sections through collective bargaining agreements.⁴⁶ Such flexible legislation is unlikely to be effective in the United States where we do not have a similar history of centralized bargaining. We cannot count upon the affected parties to "fine-tune" the legislation.⁴⁷

[A]ll civilians who had no employment during the reference week, who made specific efforts to find a job within the previous four weeks (such as applying directly to an employer, or to a public employment service, or checking with friends) and who were available for work during that week. Persons on a lay-off from a job or waiting to report to a new job within thirty days are also classified as unemployed. All other persons, 16 years and older, are "not in the labor force."

UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1985, at 388 (105th ed. 1984). There is also an invisible unemployed sector in the United States.

46. *But see* SWEDISH INFORMATION SERVICE, *supra* note 1, which asserts that a large public employment sector combined with a slowing of economic growth has led to a conflict of interest between public and private employees. This has resulted in an erosion of the ability of the private sector to control a current wage spiral.

47. Professor Reinhold Falhbeck concludes that the structure of Swedish industrial relations greatly contributes to a willingness to intervene in the labor market. Falhbeck, *supra* note 1, at 327. For an article illustrating similarities and differences between American and Swedish unions, see Summers, *supra* note 1. Although the focus of that article is somewhat different from the issue before us, the article does provide information that is of value to our discussion. Professor Summers notes the striking difference in the percentage of workers that are unionized. He further observes that employers in the United States are much more hostile towards unions than their Swedish counterparts. Whereas in Sweden there is a broad social consensus that collective bargaining is the appropriate method for managing the labor market, the situation in the United States is not as unequivocal. *Id.* at 184. This conclusion does not encourage one to leave it up to unions and employers in the United States to "fine-tune" any legislation in a calm and cooperative manner. The centralized Swedish system results in national industry agreements and national employer associations. The American system, however, is noted for its decentralization. This is a function, in part, of the principle of free choice found in section seven of the National Labor Relations Act, which encourages small bargaining units in order to maximize freedom of choice. *Id.* at 189.

Just Cause Dismissal in Sweden

It will be difficult to structure an exception for temporary workers. The demands of employers who require the flexibility that temporary workers provide must be balanced against the demands of workers who will not want to see their newly awarded protections evaded by employers classifying jobs as temporary. It is unlikely that American employers will be any less eager than Swedish employers have been to categorize job vacancies as temporary and thus avoid protective legislation.⁴⁸

There is also a question of the effect that the legislation will have on young workers. If the Swedish experience is a guide, future employment prospects for younger workers may suffer. The United States will not be as ready as Sweden to create a government subsidized work program for its struggling younger workers. In fact, in light of a legislative climate that has resulted in sweeping legislation such as the Balanced Budget and Emergency Deficit Control Act of 1985,⁴⁹ this type of program is highly unlikely.

Just cause protection may lead to increases in periods of unemployment. In an era of reduced government spending, it is not probable that state and federal government funds will be readily available to ease the hardship that will follow. As a future solution to shortening the length of unemployment, one can at least examine the possibility of adopting a notice period benefit system. This, however, is not foreseeable in the United States where we do not yet have even simple just cause dismissal protection.

Finally, policy-makers must be conscious of the likelihood that this new legislation will generate a significant amount of litigation. Swedish protection legislation has been cited frequently by their Labour Court. In addition, policy-makers must not overlook the fact that the number of cases concerning the rights of at-will employees being litigated in the United States has been growing dramatically. Although there were only

48. In fact, employers in the United States have been observed to be more hostile towards employees than their Swedish counterparts. Professor Summers believes that employers in the United States systematically and intentionally violate the law. For an example of this behavior, he cites *NLRB v. J.P. Stevens & Co.*, 563 F.2d 8, 25 (2d Cir. 1977) (compliance fine was appropriate in instance of over 30 individual violations of the National Labor Relations Act by employer). Although most employers in the United States obey the law, employers generally fight unionization aggressively by launching anti-union publicity campaigns, scheduling employee meetings, communicating with employees' spouses, and organizing community pressure. In Sweden, on the other hand, it would be highly unusual for an employer to oppose unionization. Summers, *supra* note 1, at 182-83. Swedish employers do, however, have the added incentive of avoiding the cost of notice period benefits, as well as, the cost of establishing just cause.

49. Pub.L. No. 99-177, 99 Stat. 1037 (1985). The law establishes a series of deficit reduction goals. For instance, it sets a \$144 billion deficit target for fiscal year 1987, which begins October 1, 1986.

eight cases reported in 1973, there were over ninety in 1983.⁵⁰ Furthermore, the number of cases doubled from 1981 to 1982.⁵¹ If the United States continues to address at-will issues on a case-by-case basis, one can expect the numbers to explode as word of successful litigation circulates among potential plaintiffs. Although new legislation might result in an initial increase in litigation, over the long term it may preclude a flood of civil complaints. Legislation will provide a framework by which plaintiffs can evaluate their chances of success and deter the frivolous complaints that are encouraged in the uncertain early stages of common law development.⁵²

Conclusion

Just cause dismissal protection is gradually being developed by common law courts in different parts of the United States. Before state legislatures or Congress act and pass comprehensive legislation, policy-makers must be aware of the possible consequences. First, one can anticipate difficulties in developing a workable definition for temporary workers. Second, one can expect unemployment problems for younger workers and possible restrictions of labor mobility. Finally, at least initially, such protection may lead to increases in negotiation and litigation costs.

Sweden's history of centralized social welfare and employer-employee cooperation does not parallel that of the United States. Any just cause dismissal statute must be drafted with these differences in mind. The effects of such legislation in Sweden make it clear that great care must be taken in devising a workable employment security statute if it is to achieve its goal of protecting employees from arbitrary dismissal.

50. Marinan, *Employment-At-Will: Pandora's Box May Have An Attractive Cover*, 7 *HAMLINE L. REV.* 155, 156 (1984) (citing Survey, Research and Special Project Division, Bureau of National Affairs, Survey App. (1983)).

51. *Id.*

52. The cost to the judicial system may be substantial as protection legislation is initially interpreted. That cost may then decline over time. The expense to the employer, however, should be distinguished. The cost of coming forward and proving just cause in every dismissal situation may very well follow the same pattern as the cost to the judicial system. The expense of establishing and maintaining an acceptable dismissal process, which may not have already been in place, represents a new cost to the employer.