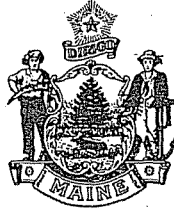


# MAINE STATE LEGISLATURE

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# 124th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2009

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Legislative Document

No. 1185

S.P. 433

In Senate, March 25, 2009

### An Act To Require Cause for Employment Termination

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Reference to the Committee on Labor suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN  
Secretary of the Senate

Presented by Senator CRAVEN of Androscoggin.  
Cosponsored by Representative CLARK of Millinocket and  
Senator: JACKSON of Aroostook, Representatives: BERRY of Bowdoinham, BRYANT of  
Windham, BUTTERFIELD of Bangor, RUSSELL of Portland, STUCKEY of Portland,  
WAGNER of Lewiston, WEBSTER of Freeport.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 26 MRSA c. 37** is enacted to read:

3 **CHAPTER 37.**

4 **MAINE EMPLOYMENT TERMINATION ACT**

5 **§3151. Definitions**

6 As used in this chapter, unless the context otherwise indicates, the following terms  
7 have the following meanings.

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

11 **2. Employer.** "Employer" means a person that has employed 5 or more employees  
12 for each working day in each of 20 or more calendar weeks in the 2-year period next  
13 preceding a termination or an employer's filing of a complaint pursuant to section 3155,  
14 subsection 3, excluding a parent, spouse, child or other member of the employer's  
15 immediate family or of the immediate family of an individual having a controlling  
16 interest in the employer.

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

21 **4. Good cause.** "Good cause" means:

22 A. A reasonable basis related to an individual employee for termination of the  
23 employee's employment in view of relevant factors and circumstances, which may  
24 include the employee's duties, responsibilities, conduct on the job or otherwise, job  
25 performance and employment record; or

26 B. The exercise of business judgment in good faith by the employer, including  
27 setting its economic or institutional goals and determining methods to achieve those  
28 goals, organizing or reorganizing operations, discontinuing, consolidating or  
29 divesting operations or positions or parts of operations or positions, determining the  
30 size of its workforce and the nature of the positions filled by its workforce and  
31 determining and changing standards of performance for positions.

32 **5. Pay.** "Pay," as a noun, means hourly wages or periodic salary, including tips,  
33 regularly paid and nondiscretionary commissions and bonuses and regularly paid  
34 overtime, but not fringe benefits.

35 **6. Person.** "Person" means an individual, corporation, business trust, estate, trust,  
36 partnership, association, joint venture or any other legal or commercial entity, excluding  
37 government or a governmental subdivision, agency or instrumentality.

1           **7. Termination. "Termination" means:**

2           A. A dismissal, including that resulting from the elimination of a position, of an  
3           employee by an employer;

4           B. A layoff or suspension of an employee by an employer for more than 2  
5           consecutive months; or

6           C. A quitting of employment or a retirement by an employee induced by an act or  
7           omission of the employer, after notice to the employer of the act or omission without  
8           appropriate relief by the employer, so intolerable that under the circumstances a  
9           reasonable individual would quit or retire.

10           **§3152. Short title; scope**

11           1. Short title; effective date. This chapter may be known and cited as "the Maine  
12           Employment Termination Act." This chapter applies only to a termination that occurs  
13           after the effective date of this section.

14           2. Exemptions. This chapter does not apply to a termination at the expiration of an  
15           express oral or written agreement of employment for a specified duration that was valid,  
16           subsisting and in effect on the effective date of this section.

17           3. Common-law rights displaced. Except as provided in subsection 5, this chapter  
18           displaces and extinguishes all common-law rights and claims of a terminated employee  
19           against the employer, its officers, directors and employees that are based on the  
20           termination or on acts taken or statements made that are reasonably necessary to initiate  
21           or effect the termination if the employee's termination requires good cause under section  
22           3153, subsection 1, is subject to an agreement for severance pay under section 3154,  
23           subsection 1, paragraph B or is permitted by the expiration of an agreement for a  
24           specified duration under 3154, subsection 1, paragraph C.

25           4. Common-law rights protected. An employee whose termination is not subject to  
26           section 3153, subsection 1 or section 3154, subsection 1, paragraph C and who is not a  
27           party to an agreement under section 3154, subsection 1, paragraph B retains all common-  
28           law rights and claims.

29           5. Rights and claims maintained. This chapter does not displace or extinguish  
30           rights or claims of a terminated employee against an employer arising under state or  
31           federal statutes or administrative rules or regulations having the force of law, a collective  
32           bargaining agreement between an employer and a labor organization or an express oral or  
33           written agreement relating to employment that does not violate this chapter. Those rights  
34           and claims may not be asserted under this chapter, except as otherwise provided in this  
35           chapter. The existence or adjudication of those rights or claims does not limit the  
36           employee's rights or claims under this chapter, except as stated in section 3157,  
37           subsection 4.

38           **§3153. Prohibited terminations**

39           1. Termination; severance pay. Except as provided in subsection 2 and unless  
40           otherwise provided in an agreement for severance pay under section 3154, subsection 1,

1 paragraph B or for a specified duration under section 3154, subsection 1, paragraph C, an  
2 employer may not terminate the employment of an employee without good cause.

3 **2. Application.** Subsection 1 applies only to an employee who has been employed  
4 by the same employer for a total period of one year or more and has worked for the  
5 employer for at least 520 hours during the 26 weeks next preceding the termination. A  
6 layoff or other break in service is not counted in determining whether an employee's  
7 period of employment totals one year, but the employee is considered to be employed  
8 during paid vacations and other authorized leaves. If an employee is rehired after a break  
9 in service exceeding one year, not counting absences due to labor disputes or authorized  
10 leaves, the employee is considered to be newly hired. The 26-week period for purposes  
11 of this subsection does not include any week during which the employee was absent  
12 because of layoffs of one year or less, paid vacations, authorized leaves or labor disputes.

### 13 **§3154. Agreements between employer and employee**

14 **1. Rights of employee.** A right of an employee under this chapter may not be  
15 waived by agreement except as provided in this section.

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

24 B. By express written agreement, an employer and an employee may mutually waive  
25 the requirement of good cause for termination, if the employer agrees that, upon the  
26 termination of the employee for any reason other than willful misconduct of the  
27 employee, the employer will provide severance pay in an amount equal to at least one  
28 month's pay for each period of employment totaling one year, up to a maximum total  
29 payment equal to 30 months' pay at the employee's rate of pay in effect immediately  
30 before the termination. The employer shall make the payment in a lump sum or in a  
31 series of monthly installments, none of which may be less than one month's pay plus  
32 interest on the principal balance. The lump sum payment must be made or payment  
33 of the monthly installments must begin within 30 days after the employee's  
34 termination. An agreement under this subsection constitutes a waiver by the  
35 employer and the employee of the right to civil trial, including jury trial, concerning  
36 disputes over the nature of the termination and the employee's entitlement to  
37 severance pay and constitutes a stipulation by the parties that those disputes are  
38 subject to the procedures and remedies of this chapter.

39 C. The requirement of good cause for termination does not apply to the termination  
40 of an employee at the expiration of an express oral or written agreement of  
41 employment for a specified duration related to the completion of a specified task,  
42 project, undertaking or assignment. If the employment continues after the expiration  
43 of the agreement, section 3153 applies to its termination unless the parties enter into a  
44 new express oral or written agreement under this subsection. The period of

1 employment under an agreement described in this subsection counts toward the  
2 minimum periods of employment required by section 3153, subsection 2.

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

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

11 F. An agreement between an employer and an employee subject to this chapter  
12 imposes a duty of good faith in its formation, performance and enforcement.

13 G. By express written agreement, an employer and an employee may settle at any  
14 time a dispute or claim arising under this chapter.

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

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

20 J. The substantive provisions of this chapter apply under an agreement authorized by  
21 paragraphs H and I.

22 **§3155. Procedure and limitations**

23 **1. Employee complaint and demand for arbitration.** An employee whose  
24 employment is terminated may file a complaint and demand for arbitration under this  
25 chapter with the Maine Labor Relations Board not later than 180 days after the effective  
26 date of the termination, the date of the breach of an agreement for severance pay under  
27 section 3154, subsection 1, paragraph B or the date the employee learns or should have  
28 learned of the facts forming the basis of the claim, whichever is latest. The time for filing  
29 is suspended while the employee is pursuing the employer's internal remedies and has not  
30 been notified in writing by the employer that the internal procedures have been  
31 concluded. Resort to an employer's internal procedures is not a condition for filing a  
32 complaint under this chapter.

33 **2. Reason for termination.** Except when an employee quits, an employer, within  
34 10 business days after a termination, shall mail or deliver to the terminated employee a  
35 written statement of the reasons for the termination and a copy of this chapter or a  
36 summary approved by the Maine Labor Relations Board.

37 **3. Employer complaint and demand for arbitration.** An employer may file a  
38 complaint and demand for arbitration under this chapter with the Maine Labor Relations  
39 Board to determine whether there is good cause for the termination of a named employee.  
40 At least 15 business days before filing, the employer shall mail or deliver to the employee

1 a written statement of the employer's intention to file and the factors alleged to constitute  
2 good cause for a termination.

3 4. Procedure. The Maine Labor Relations Board shall promptly mail or deliver to  
4 the respondent a copy of the complaint and demand for arbitration. Within 21 days after  
5 receipt of a complaint, the respondent must file an answer with the Maine Labor  
6 Relations Board and mail a copy of the answer to the complainant. The answer of a  
7 respondent employer must include a copy of the statement of the reasons for the  
8 termination furnished to the employee.

9 5. Fees. When a complaint is filed, a complainant employee or employer shall pay a  
10 filing fee established by the Maine Labor Relations Board in an amount not exceeding the  
11 maximum filing fee for a civil action in the Superior Courts of this State. The Maine  
12 Labor Relations Board may waive or defer payment of the filing fee upon a showing of  
13 the complainant employee's indigency.

14 **§3156. Arbitration; selection and powers of arbitrator; hearings; burden of proof**

15 1. Arbitration. The Maine Labor Relations Board shall adopt procedural rules to  
16 regulate arbitration under this chapter.

17 2. Selection of arbitrators. The Maine Labor Relations Board shall adopt rules  
18 specifying the qualifications, method of selection and appointment of arbitrators. An  
19 arbitrator serving under this chapter exercises the authority of the State.

20 3. Discovery. Subject to rules adopted by the Maine Labor Relations Board, all  
21 forms of discovery provided by applicable law, rule or regulation are available in the  
22 discretion of the arbitrator, who shall ensure there is no undue delay, expense or  
23 inconvenience. Upon request, the employer shall provide the complainant or respondent  
24 employee a complete copy of the employee's personnel file.

25 4. Representation. A party may be represented in arbitration by an attorney or other  
26 person authorized by law to represent an individual in arbitration.

27 5. Burden of proof. A complainant employee has the burden of proving that a  
28 termination was without good cause or that an employer breached an agreement for  
29 severance pay under section 3154, subsection 1, paragraph B. A complainant employer  
30 has the burden of proving that there is good cause for a termination. In all arbitrations,  
31 the employer shall present its case first unless the employee alleges that a quitting or  
32 retirement was a termination within the meaning of section 3151, subsection 8, paragraph  
33 C.

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

1           **§3157. Awards**

2           **1. Notice.** Within 30 days after the close of an arbitration hearing or at a later time  
3 agreeable to the parties, the arbitrator shall mail or deliver to the parties a written notice  
4 of award sustaining or dismissing the complaint, in whole or in part, and specifying  
5 appropriate remedies, if any.

6           **2. Awards for wrongful termination.** An arbitrator may make one or more of the  
7 following awards for a termination in violation of this chapter:

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

10           **B.** Full or partial back pay and reimbursement for lost fringe benefits, with interest,  
11 reduced by interim earnings from employment elsewhere, benefits received and  
12 amounts that could have been received with reasonable diligence;

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

19           **D.** Reasonable attorney's fees and costs.

20           **3. Awards for violation of severance agreement.** An arbitrator may make either or  
21 both of the following awards for a violation of an agreement for severance pay under  
22 section 3154, subsection 1, paragraph B:

23           **A.** Enforcement of the severance pay and other applicable provisions of the  
24 agreement, with interest; and

25           **B.** Reasonable attorney's fees and costs.

26           **4. Conditions on awards.** An arbitrator may not make an award except as provided  
27 in subsections 2 and 3. The arbitrator may not award damages for pain and suffering,  
28 emotional distress, defamation, fraud or other injury under the common law; punitive  
29 damages; compensatory damages; or any other monetary award. In making a monetary  
30 award under this section, the arbitrator shall reduce the award by the amount of any  
31 monetary award to the employee in another forum for the same conduct of the employer.  
32 In making an award, the arbitrator is subject to the rules applicable in courts of record in  
33 this State.

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

37           **6. Sustain or dismiss employer complaint.** An arbitrator may sustain an  
38 employer's complaint and make an award declaring that there is good cause for the  
39 termination of a named employee. If the arbitrator dismisses the employer's complaint,  
40 the arbitrator may award reasonable attorney's fees and costs to the prevailing employee.



1           **§3158. Judicial review and enforcement**

2           1. Judicial review. Either party to an arbitration may seek vacation, modification or  
3 enforcement of the arbitrator's award in the Superior Court for the county in which the  
4 termination occurred or in which the employee resides.

5           2. Timeliness. An application for vacation or modification must be filed within 90  
6 days after issuance of the arbitrator's award. An application for enforcement may be filed  
7 at any time after issuance of the arbitrator's award.

8           3. Court findings. The court may vacate or modify an arbitrator's award only if the  
9 court finds that:

- 10           A. The award was procured by corruption, fraud or other improper means;  
11           B. There was evident partiality by the arbitrator or misconduct prejudicing the rights  
12 of a party;  
13           C. The arbitrator exceeded the powers of an arbitrator;  
14           D. The arbitrator committed a prejudicial error of law; or  
15           E. Another ground exists for vacating the award under the arbitration laws of this  
16 State.

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

22           **§3159. Posting**

23           An employer shall post a copy of this chapter or a summary approved by the Maine  
24 Labor Relations Board in a prominent place in the work area. An employer who violates  
25 this section is subject to the penalties set forth in section 704.

26           **§3160. Retaliation prohibited and civil action created**

27           An employer or other employing person may not directly or indirectly take adverse  
28 action in retaliation against an individual for filing a complaint, giving testimony or  
29 otherwise lawfully participating in proceedings under this chapter, whether or not the  
30 individual is an employee having rights under this chapter. An employer or other  
31 employing person who violates this section is liable to the individual subjected to the  
32 adverse action in retaliation for damage caused by the action, punitive damages when  
33 appropriate and reasonable attorney's fees. A separate civil action may be brought to  
34 enforce this liability. The employer is also subject to applicable procedures and remedies  
35 provided by sections 3155 to 3158.

1. **§3161. Savings and transitional provisions**

2. This chapter does not apply to the termination of an employee within 6 months after  
3. the effective date of this chapter based upon the employee's refusal to enter into an  
4. agreement meeting the minimum standards of section 3154, subsection 1, paragraph B,  
5. which the employer, in the exercise of good faith business judgment, may impose as a  
6. condition of continued employment.

7. **SUMMARY**

8. This bill enacts the Maine Employment Termination Act.