

All Employment Contracts

More than 10 years have past since the Arizona Employment Protection Act (“AEPA”) was enacted in 1996. In that time, case law has clarified some of the AEPA’s provisions but left most others unsettled.²

One question that continues to create needless confusion is what employment contracts fall within the scope of the AEPA’s one-year statute of limitations, A.R.S. § 12-541(3). Does the term “employment contract” apply to all tort or contract claims arising out of the employment relationship?

This article demonstrates that the AEPA’s one-year statute of limitations relates only to “employment contracts” that alter or limit an employer’s right to terminate at-will.

The AEPA’S Scope

The AEPA radically altered the common law of wrongful termination. The statute:

- abolished implied oral employment

contracts altering at-will employment, making only express written contracts actionable as an exception to the at-will doctrine;

- limited the instances in which a wrongful discharge claim could be brought; and
- made the employee’s exclusive remedy any statutory remedy available for violation of state statutes or of the public policy arising out of the statute.

The legislation enacting the AEPA was Senate Bill (S.B.) 1386, which was comprised of four interrelated sections:

- (1) a preamble or “Intent” section;
- (2) the text of what is now A.R.S. § 23-1501;
- (3) an amendment to the Arizona Civil Rights Act, making the prohibition of sexual harassment applicable to small employers; and
- (4) amendment of A.R.S. § 12-541, adding a one-year statute of limitations³ for breach of “employment contract” and “wrongful termination” (what is now A.R.S. § 12-541(3), (4)).

What the Legislature did not discuss or expressly address in S.B. 1386 was whether

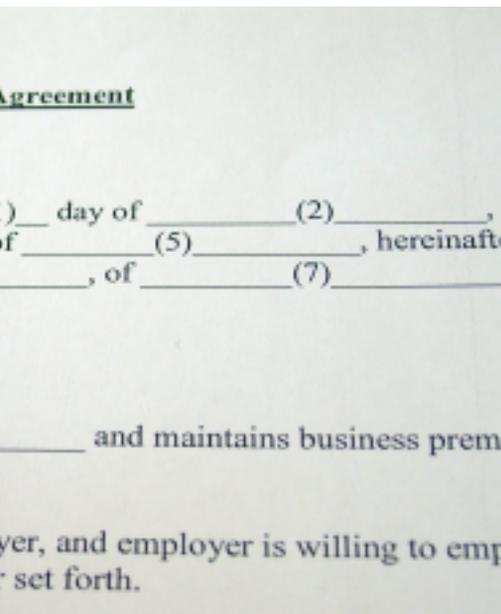
an “employment contract” unrelated to modification of the at-will relationship was included in the AEPA’s one-year statute of limitations.

Are other “employment agreements”—other than modification of at-will employment—within the scope of the AEPA’s one-year statute of limitations? What about contracts for wages, commissions, severance pay or covenants not to compete? The answer lies in the Legislature’s stated purpose in enacting the AEPA and its statute of limitations.

Why Enact the AEPA?

From the strident language of its preamble, the AEPA represents another chapter in the Legislature’s bitter feud with the courts,⁴ this time in the area of employment relations.

In the “preamble,” the Legislature sternly rebuked the Arizona Supreme Court for overstepping its bounds in “creating the public policy of the state” and stated its “Intent”⁵ to abolish any development of the common law by the courts in the area of employment relations, specifically assailing *Wagenseller v. Scottsdale*



Are Not Created

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Arizona's One-Year Statute of Limitations

BY THOMAS M. ROGERS
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Memorial Hospital,⁶ a prime example of the high court's development of the common law that significantly modified the "at-will" doctrine.⁷

The at-will doctrine holds that an employer may discharge an employee "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."⁸ Prior to the 1980s, in the absence of a contract for a term, employment was presumed to be at-will in Arizona.⁹ Beginning in the late 1960s and early 1970s, some courts began to question the soundness of the "at-will" doctrine and its adverse economic impact on workers by recognizing exceptions to the rule when termination contravened public policy or where there were implied promises of job security.¹⁰

In 1984, *Leikvold v. Valley Community Hospital*¹¹ recognized that the at-will rule could be modified by implied promises of job security as evidenced by employee manuals, disciplinary procedures, written or spoken promises or by conduct. Job security thus could become part of the employment contract and limit the employer's absolute right to discharge an

employee on an at-will basis.¹² *Loffa v. Intel Corp.*,¹³ decided in 1987, made it clear that under *Leikvold* a contract for an indefinite duration was not necessarily an at-will contract as a matter of law—that is, failure to follow the disciplinary provisions of a company's policy could be a violation of the implied employment contract.

In 1985, *Vermillion v. AAA Pro Moving & Storage*¹⁴ adopted the public policy doctrine and recognized the right of employees to pursue wrongful discharge tort claims where the employer terminated the employee for reasons that would violate public policy.¹⁵ The Arizona Supreme Court expanded and refined the public

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policy exception in *Wagenseller*,¹⁶ holding that “an employer may fire for good cause or for no cause [but] [h]e may not fire for bad cause—that which violates public policy.”¹⁷ Thus, terminating a nurse for her refusal to participate in a “mooning” parody was a violation of public policy against indecent exposure and hence was “bad cause.” An explicit statutory expression of public policy was not required: “Public policy” could be found in the state’s judicial decisions as well as its constitution and statutes.¹⁸

In 1986, *Wagner v. City of Globe*¹⁹ expanded the concept of public policy still further, concluding “that on balance actions which *enhance* the enforcement of our laws or *expose* unsafe conditions, or otherwise serve some singularly public purpose” inures to the benefit of the public²⁰ by the protection of the “lives, liberty and property of our people.”²¹ In 1988, *Broomfield v. Lundell*² dealt a massive blow to the at-will presumption by extending the public policy tort doctrine and tort remedies to violations of the Arizona Civil Rights Act.

The Legislature’s Stated Intent

Predictably, vocal elements within the business community opposed these limitations on their unfettered right to fire employees on an at-will basis.

For several years, prior to the passage of the AEPA, the Arizona Chamber of Commerce and other business interests had turned to the Legislature and were able to get similar legislation introduced but failed to gain its passage.²³ In 1996, by framing the AEPA as a measured legislative response to the runaway train of employment litigation,²⁴ the Legislature finally passed the AEPA after a last-minute amendment that applied the Arizona Civil Rights Act’s protection from sexual harassment to employers of fewer than 15 employees.²⁵

The AEPA’s “Intent” section succinctly stated why the Legislature enacted the AEPA. *Wagenseller* was specifically identified as the reason for the need for new legislation, expressing the view of the Legislature’s majority in 1996 that the public policy of the state could not be

decided by courts, nor any cause of action, such as wrongful discharge in violation of public policy, be recognized or established except by the Legislature.²⁶ This bold statement of intent was subsequently rejected by the Arizona Supreme Court as “patently unconstitutional,” although it upheld the constitutionality of one part of the AEPA.²⁷ Nonetheless, the “Intent” section remains a valid statement of why S.B. 1386 was passed.

The AEPA’S Necessary Implication

What was not discussed by the Legislature in the language of the legislation nor in its hearing process but necessarily implied was the definition of “employment contract.” The AEPA states that the employment relationship is severable at any time by either party at-will unless there is a “written contract” to the contrary.²⁸ Throughout the hearings before the Legislature and in the plain wording of S.B. 1386, it was a limitation of the employer’s right to terminate “at-will” that was discussed. In the AEPA, the Legislature authorized only three ways to do this:

- First, at-will employment could be limited by statute such as the Arizona Civil Rights Act or other statutes, such as those discussed in the AEPA’s language.²⁹
- Second, at-will employment could be limited by the AEPA itself, which prohibited retaliation against an employee who refused to commit an act or omission that would violate the Constitution of Arizona or the statutes of the State,³⁰ retaliation for whistleblowing relating to violations of the Constitution of Arizona or Arizona statutes,³¹ and retaliation for exercise of rights under state law.³²
- Third, the AEPA allowed for a limitation of the employer’s right to terminate “at-will” by a “written contract” signed by the employee and employer or that was set forth in the employment handbook or manual or any similar document distributed to the employee if that document expressed the intent that it was “a contract of employment.”³³

Prior to the AEPA, an oral or written agreement setting forth a specific term of employment was long recognized as an exception to the at-will rule. *Leikvold* held that whether any particular personnel manual language, course of conduct or oral representation modified the at-will relationship and became part of the employment contract was a question of fact for a jury to decide, regardless of the employer’s subjective intention that the employment contract was at-will.³⁴ The AEPA clearly sought to limit *Leikvold* contract claims that alleged that the at-will relationship had been modified by express or implied contract.

In the context of S.B. 1386, the AEPA’s statute of limitations, A.R.S. § 12-541(3), (4), used the terms “employment contract” and “contract actions” as they related to A.R.S. § 23-1501(2)’s “this written contract” or “written contract ... setting forth the employment relationship [that] shall remain in effect for a specified duration of time or [that] otherwise expressly restrict[s] the right of either party to terminate the employment relationship.”³⁵ If “this written contract” is not signed, “this written contract must be set forth in the employment handbook or manual or any similar document distributed to the employee, if that document expresses the intent that it is a contract of employment.”³⁶ The AEPA discussed and required that only a “written contract” could overcome the at-will presumption.

The AEPA (A.R.S. § 23-1501(3)(a)) limited “contract” claims for termination of employment to those claims where “[t]he employer has terminated the employment relationship of an employee in breach of an employment contract, as set forth in paragraph 2 of this section.”³⁷ As discussed, the AEPA’s section 2 (§ 23-1501(2)) addressed only contracts “setting forth that the employment relationship shall remain in effect for a specified duration of time or otherwise expressly restricting the right of either party to terminate the employment relationship.”

The AEPA’s “Contract” Language

In S.B. 1386 and in the public discussions before the Legislature, the only reference

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to “contract” was in the context of modification of at-will employment. There was never any suggestion that the AEPA related to or encompassed other kinds of agreements, oral or written, occurring in the employment relationship, such as those related to wages, non-piracy of customers or employees, trade secrets, insurance benefits during or after employment, return of company property, indemnification, non-disparagement, commission or severance pay, or reimbursement of expenses. Because the plain meaning of “employment contract” was obvious from provisions of S.B. 1386 and because there was no discussion of the term, there was no controversy at the hearings about the definition of an “employment contract” as other than one between an employer and employee that modified at-will employment. Similarly, there was nothing to suggest that the term “employment contract” differed when S.B. 1386 amended A.R.S. § 12-541, as follows:

There shall be commenced and prosecuted within one year after the cause of action accrues, and not afterward, the following actions: ...

3. FOR BREACH OF AN ORAL OR WRITTEN EMPLOYMENT CONTRACT INCLUDING CONTRACT ACTIONS BASED ON EMPLOYEE HANDBOOKS OR POLICY MANUALS THAT DO NOT SPECIFY A TIME PERIOD IN WHICH TO BRING AN ACTION.

4. FOR DAMAGES FOR WRONGFUL TERMINATION.

Indeed, the language of A.R.S. § 12-541(3) faithfully echoes the language used in A.R.S. § 23-1501(2). The signed contract of employment or one set forth in the employment handbook or manual or any similar document distributed to the employee, as allowed under A.R.S. § 23-1501(2), was the only “employment con-

tract” for which an employee had a claim pursuant to A.R.S. § 23-1501(3)(a).

Thus, the necessary implication and meaning of the AEPA’s language and its amendment of the statute of limitations is that “employment contract” relates solely to agreements affecting a term of employment or altering or limiting the at-will presumption. The Legislature’s intent was to rein in the courts and specifically limit *Wagenseller*. No other contracts arising out of the employment relationship were affected.

It is not unusual for two or more possible limitations periods to apply to claims arising out of the same factual situation.

Arizona Decisions on the AEPA’s Scope

None of the reported cases interpreting the AEPA and its statute of limitations has reviewed the AEPA’s specific language regarding the meaning of “employment contract.” None has addressed whether other contractual relationships occurring in the employment relationship—other than those affecting the term of employment or altering or limiting the at-will presumption—are included in the AEPA’s use of the term “employment contract.” However, the cases support the proposition that the AEPA’s use of “employment contract” is limited to those that alter or limit the at-will doctrine.

In *Cronin v. Sheldon*, the Arizona Supreme Court, while narrowly upholding the AEPA’s abolishment of the so-called “Broomfield” tort claim based on the Arizona Civil Rights Act, noted that “a panoply of constitutionally protected common law tort remedies remains undisturbed as fully beyond the scope of the AEPA.”³⁸ As *Cronin* instructs, the AEPA does not preclude recovery of compensatory damages under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e as amended, or other federal claims, collateral common law tort claims related to discharge from employment, including intentional infliction of emotional distress, negligent infliction of emotional distress, interference with contractual relations, defamation, assault and battery, fraud, or other protected claims.³⁹ Nowhere does *Cronin* suggest that the statutes of limitation for these other kinds of statutory or common law causes of action, such as assault and battery, fraud, and other protected claims, were affected by the AEPA’s amendment to A.R.S. § 12-541(3), (4).

In *Taylor v. Graham County Chamber of Commerce*,⁴⁰ the court also recognized the AEPA’s limited scope, stating that the AEPA “addresses claims for termination of employment” *but not other wrongful acts or omissions*” (emphasis added). *Taylor*

noted that the AEPA related to claims for wrongful discharge⁴¹ and, like *Cronin*, held that the AEPA had changed the prior Arizona case law that allowed wrongful discharge tort claims for discrimination against employers of fewer than 15 employees.⁴² However, the *Taylor* court, like *Cronin*, did not discuss whether other wrongful employment acts or omissions arising out of a contract and unrelated to termination of employment were affected by the AEPA.

In *Zenaty-Paulson v. McLane/Sunwest, Inc.*,⁴³ the District Court, in an unpublished decision, granted dismissal of a so-called breach of employment contract claim on the basis of the AEPA’s amend-

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ment of A.R.S. § 12-541(3), which provided a one-year limitations period for breach of employment contract. The court did not discuss the definition of “employment contract” in rendering its decision. However, the thrust of the *Zenaty-Paulson*’s breach of contract complaint was that her termination was a wrongful discharge in violation of the employment contract restricting the right of the employer to terminate the employment relationship at-will.⁴⁴ Such a claim would be limited by the AEPA’s statute of limitations, A.R.S. § 12-541(3).

Restrictions on the Employer Right To Terminate At-Will

The AEPA by necessary implication of its language and context applies only to those contracts related to a term of employment or to limitation of the employer’s right to terminate at-will. The AEPA’s amendment of A.R.S. § 12-541(3) only relates to wrongful discharge in violation of an agreed stated term of employment or a contract otherwise restricting the at-will doctrine.

Of course, many other contractual relationships arise in the context of employment other than those related to a term of employment or restricting the employer’s right to terminate at-will. These include contractual agreements related to such matters as relocation to and from the site of the job; payment of non-U.S. taxes on living costs for work out of the country; stock options, including agreements for reconveyance of stock upon termination of employment; non-competition or non-piracy of customers or employees; trade secrets and return and non-use of proprietary information; pension agreements;

insurance benefits during or after employment; return of company property; indemnification; non-disparagement and job references; commission or severance pay; wages; and reimbursement of expenses. Such other kinds of agreements are often included in employment agreements, employer policies or handbooks.

In light of the AEPA’s use of the term

“employment contract” as referring specifically to contractual provisions that relate to a term of employment or to limitations on the right of the employer to terminate at-will, agreements that do not modify the at-will relationship are simply not within the meaning or scope of “employment contract” under the AEPA.

Therefore, the AEPA’s statute of limita-

FIGURE 1. Statutes of Limitations for Employment Claims

Cause of Action	Applicable Statute of Limitations
AEPA Claim for Breach of Employment Contract that alters or modifies at-will employment	A.R.S. § 12-541(3) 1 year
AEPA Claim for Damages for wrongful termination	A.R.S. § 12-541(4) 1 year
Arizona Wage Act: Statutory claim for unpaid wages and treble damages (liability created by statute)	A.R.S. § 23-355, A.R.S. § 12-541(5) 1 year
Arizona Wage Act: Statutory claim for unpaid minimum wages	A.R.S. § 23-364(H) 2 years, 3 years (if willful)
Common law oral contract claim for unpaid wages, severance, commissions, etc.	A.R.S. § 12-543(1) 3 years
Common law written contract claim for unpaid wages, severance, commissions, etc.	A.R.S. § 12-548 6 years
All other common law oral contract claims arising out of the employment relationship unrelated to altering or modifying at-will employment	A.R.S. § 12-543(a) 3 years
All other common law written contract claims arising out of the employment relationship unrelated to altering or modifying at-will employment	A.R.S. § 12-548 6 years
Statutory claim for Trade Secrets Act violation (liability created by statute)	A.R.S. § 44-401, A.R.S. § 12-541 (5) 1 year
Common law written contract claim for breach of confidentiality agreement	A.R.S. § 12-548 6 Years

tions, A.R.S. § 12-541(3), should not affect common law contract claims unrelated to limiting at-will employment.

Different Contracts, Different Statutes of Limitation

It is not unusual for two or more possible limitations periods to apply to claims arising out of the same factual situation. “The defense of the statute of limitations is not favored by the courts, and where two constructions are possible, the longer period of limitations is preferred.”⁴⁵ (Figure 1 on p. 40 sets out some of the statutes of limitations applicable to the employment relationship.)

For instance, prior to the enactment of the AEPA, the Legislature enacted a statute to protect compensation arising out of an employment relationship, its protection separate from and in addition to common law breach of contract. The Arizona Wage Act, A.R.S. § 23-350 *et seq.*, prohibits an employer from procuring labor or services by a specific promise of compensation and then evading financial responsibility. It protects employees from an employer’s groundless refusal to pay compensation that was promised and due “in return for work performed.”⁴⁶ The Arizona Wage Act provides treble damages to deter employers from withholding or delaying payment of sums that employees have earned.⁴⁷ Because the treble damages penalty arises out of the statute, to pursue a claim for treble damages, the action must be filed within one year.⁴⁸

Effective Jan. 1, 2007, the “Raise the Minimum Wage for Working Arizonans Act,” A.R.S. § 23-362 *et seq.*, amended the Arizona Wage Act by providing, among other things, that a civil action may be brought to recover statutory unpaid minimum wages (plus twice that amount) and interest within two years after a violation last occurs or three years, if the violation was willful.⁴⁹

However, a common law claim for breach of contract for failure to pay wages pursuant to an oral agreement relating to compensation starts to run as to each month’s wages at the end of the month, and a claim for each month’s wages would

be governed by the three-year statute of limitations.⁵⁰ For common law breach of contract for failure to pay wages pursuant to a written agreement, the statute of limitations would be six years.⁵¹

Although employees could sue under the Arizona Wage Act to recover treble damages, their failure to do so within the requisite limitations periods would not eliminate their potential common law breach of contract claims for failure to pay wages under a three- or six-year statute of limitations.

Conclusion

The AEPA’s amendment of A.R.S. § 12-541(3) relates only to an “employment contract” that specifies duration of employment or otherwise expressly restricts the employer’s right to terminate at-will. The AEPA addressed claims for “termination of employment” but not other wrongful employment acts or omissions.⁵² This is clearly demonstrated by the AEPA’s legislative history, the full text of S.B. 1386, the plain meaning of the term “employment contract” as used in S.B. 1386, and the absence of any discussion whatsoever before the Legislature that the AEPA intended to address the payment of wages or amounts agreed to be paid after termination of the employment relationship, or any of the other kinds of employment contracts. Accordingly, the AEPA’s statute of limitations cannot be applied to other contractual agreements occurring in the employment relationship.

The AEPA’s one-year statute of limitations applies only to “employment contracts” that alter or limit at-will employment. 

endnotes

1. Section 3 of CHAPTER 140, S.B. 1386 (1996), Proposed Ariz. Rev. Stat. § 23-2501, later renumbered after enactment to § 23-1501.
2. See, e.g., *Cronin v. Sheldon*, 991 P.2d 231 (Ariz. 1999), in which the Arizona Supreme Court upheld the constitutionality of the AEPA’s abolition of the so-called “Broomfield” public policy wrongful discharge tort claim based on the employer’s alleged violation of the Arizona Civil Rights Act (A.R.S. § 41-1461 *et seq.*) under the anti-abrogation and non-limitation provisions of the Arizona Constitution (art. 18, § 6, art. 2, § 31). However, the Court left open the possibility that the AEPA’s abolition of the Broomfield tort claim was unconstitutional under art. 2, § 13’s denial of equal privileges, and similarly left as open questions of the constitutionality of the AEPA’s other provisions. See also, *Galati v. America West Airlines, Inc.*, 69 P.3d 1011 (Ariz. Ct. App. 2003) (“whether a common law tort for wrongful termination still exists after the [AEPA] is an open and much debated question in Arizona law”), and David F. Gomez, *The Employment Protection Act after Cronin v. Sheldon*, ARIZ. ATT’Y, Mar. 2000, at 28.
3. Section 2 of Chap. 140, S.B. 1386 (1996), amended A.R.S. § 12-541 by adding new paragraphs (3) and (4).
4. Jenny Clevenger, Comment & Legislative Review, *Arizona’s Employment Protection Act: Drawing a Line in the Sand Between the Court and the Legislature*, 29 ARIZ. ST. L.J. 605, 610 and n. 39 (Summer 1997).
5. Chapter 140, S.B. 1386 (1996) Section 1. Intent.
 - A. The Arizona Supreme Court in the case of *Wagenseller v. Scottsdale Memorial Hospital*, 147 Ariz. 370, 710, P.2d 1025 (1985) (en banc) held that an employer may be held liable for civil damages if such employer discharges from employment an employee for a reason that is against the public policy of this state. The Court also held that it had the independent authority to determine what actions of the employer violated the public policy of this state. The legislature affirms that an employer may be held liable for civil damages in the event it discharges from employment an employee for a reason that is against the public policy of this state. However, public policy is expressly determined by the legislature in the form of statutory provisions. While courts interpret the common law in accordance with Arizonan Revised Statutes section 1-201, they are not authorized to establish a cause of action in connection with specific acts or omissions that constitute a violation of the public policy of this state.
 - B. Citizens have a right to prior notice of those specific actions that constitute viola-

tions of the law for which they are subject to civil damages. It is the intent of the legislature to confirm that the employment relationship is contractual. Laws affecting employees and employers shall be uniformly and consistently applied to all citizens. The court impedes the uniform application of laws to citizens of the state when it purports to create, on an *ad hoc* basis, rights to recover civil damages in response to varying factual situations before the court. Courts are not vested with the authority to create public policy of the state. When courts make pronouncements of public policy on an *ad hoc* basis, they render it impossible for citizens to know in advance what actions constitute violations of the laws for which they are subject to civil damages.

C. The Constitution of Arizona vests the legislature with the authority to create laws and the public policy of the state. Article V, section 1, Constitution of Arizona. In contrast, the courts are established to adjudicate cases by applying the laws enacted by the legislature to facts of those cases. Article VI, Constitution of Arizona. When the legislature adopted the common law to provide the Court with laws of reference, it did not intend to vest the courts with the authority to establish new causes of action or to independently set for the public policy of the state. Section 1-201, Arizona Revised Statutes.

D. It is the intent of the legislature to establish that the courts cannot create new causes of action. Courts can apply common law causes of action to cases they adjudicate provided they do not expand, modify or in any manner whatsoever alter the common law causes of action that were adopted by the legislature pursuant to Arizona Revised Statutes Section 1-201.

E. In *Wagenseller v. Scottsdale Memorial Hospital*, 147 Ariz. 370, 710 P.2d 1025 (1985 (en banc)), the court was confronted with an egregious factual allegation where the employer was alleged to have terminated an employee for failing to publicly indecently expose herself during a staff performance of the song "Moon River." While as a policy matter, the court reached the correct conclusion, it lacked the authority to make such a holding under the Constitution of Arizona. It is the role of the legislature, the elected representatives of the citizens, and not the court, to establish the public policy of the State. The court in *Wagenseller* reached the correct holding because the alleged acts would violate the state's public indecency statute, Arizona Revised Statutes section 13-1402.

However, the court had no authority to create a cause of action. It is the intent of the legislature that the public policy of the state is that the termination of an employee in retaliation for refusing to violate the public indecency or other laws of the state constitutes a violation of the Employment Protection Act subjecting the employer to civil damages.

F. It is the intent of the legislature that the Employment Protection Act will not in any way limit the other protections for employers contained in the laws of the Constitution of the United States, the Constitution of Arizona, the federal statutes or the Arizona Revised Statutes.

G. As stated above, the employment relationship is contractual in nature. In the absence of a written contract, the employment relationship is severable at any time by either the employee or the employer. However, if the termination of the employment relationship violates the public policy of the state as expressly defined in the Arizona Constitution and Arizona Revised Statutes, the employee may bring an action for damages against the employer. If a statute provides an expressed remedy for a cause of action, that remedy is the exclusive remedy for the violation of the statute or the public policy arising out of the statute.

6. 710 P.2d 1025 (Ariz. 1985) (en banc).
7. For a fuller discussion, see R. KELLEY HOCKER, *THE HISTORY, EROSION AND RESURGENCE OF THE EMPLOYMENT-AT-WILL DOCTRINE*, 1 ARIZ. EMP. L. HANDBOOK, Article 1.2 (Thomas M. Rogers, ed. 1995).
8. *Payne v. Western & Atlantic R.R.*, 81 Tenn. 507, 519-20 (1884).
9. *Builders' Supply Corp. v. Shipley*, 341 P.2d 940 (Ariz. 1959); *Larsen v. Motor Supply Co.*, 573 P.2d 907 (Ariz. 1977). *But see Old Dominion Copper Mining & Smelting Co. v. Andrews*, 56 P. 969 (Ariz. 1899).
10. See *Leikvold v. Valley View Cmty. Hosp.*, 688 P.2d 170, 174 (Ariz. 1984).
11. 688 P.2d 170 (Ariz. 1984). Thus, an implied employment contract, like an express employment contract for employment for a term, could modify the at-will expectation that an employer could discharge an employee for any or no reason.
12. *Leikvold*, 688 P.2d at 174. The court identified two types of implied contract terms: implied-in-fact and implied-in-law. Implied-in-fact terms are inferred from the statements or conduct of the parties. The crux of the holding was that implied promises of job security as evidenced by employee disciplinary procedures, written or spoken promises, or by conduct, could become part of the employment contract and limit the employer's absolute right to discharge what would otherwise be an at-will

employee.

13. 738 P.2d 1146 (Ariz. Ct. App. 1987).
14. 704 P.2d 1360, 1361 (Ariz. Ct. App. 1985). Vermillion claimed that he was ordered to conceal the employer's theft of a customer's property. When Vermillion told the customer that his employer had stolen the property, he was fired.
15. *Vermillion*, 704 P.2d at 1361-62.
16. 710 P.2d 1025.
17. *Id.* at 1033.
18. *Id.* at 1032-33.
19. 722 P.2d 250 (Ariz. 1986). Wagner was terminated for "whistle-blowing" when he called the chief of police's attention to the fact that prisoners were being illegally detained.
20. *Id.* at 257 (emphasis added).
21. *Id.* at 258.
22. 767 P.2d 697 (Ariz. Ct. App. 1988).
23. 29 ARIZ. ST. L.J. at 609 and n. 30.
24. *Id.* at 608 and n. 25 (citing Steve Biddle, *The Employment Protection Act of 1996: Restoring the Balance in Employment Relationships or Curtailing Employees' Rights?* ARIZ. ATT'Y, Sept. 1996, at 35; see also David Seldon, *Testimony in Support of Employment Protection Act*, S.B. 1386, Before the Arizona House Committee on Commerce (Mar. 12, 1996) (unpublished submission to committee, House of Representatives). "The bill achieved the proper and fair balance between the interest of employees and employers. Employees will be protected from unlawful conduct by employers. ... Employers will be protected from some of the most costly common law lawsuits that now face Arizona employers." *Id.* at 4.).
25. 29 ARIZ. ST. L.J. at 613 and n. 52. Opponents of the Act had successfully opposed its enactment in committee by pointing out that an employee of a business with fewer than 15 employees would be prohibited from pursuing a wrongful termination claim on the basis of a state civil rights violation because the state law did not apply to employers of fewer than 15 employees. Referring to the AEPAs as the "Freedom to Sexually Harass Law," the opponents "repeatedly proposed a hypothetical to legislators asking them to imagine that their 19-year-old daughter was fired for refusing to expose herself on the job and was left without a remedy because the small business she worked for fell outside the reach of the Arizona Civil Right Act. See tapes of March 12 Commerce Committee Hearing, supra, n. 24. Note the marked similarity between the fact pattern of this hypothetical and the facts of *Wagenseller*. In response to this criticism, Representative Pat Conner introduced a floor amendment which changed the definition of "employer" to include persons employing one or more employees where the alleged violation involved sexual harassment. Proposed House Amendment S.B. 1386, 42d Leg., 2d Reg. Sess., Representative Pat Connor Floor Amendment #2 (Mar. 28, 1996) (on file

with the Chief Clerk of the House of Representatives). The amendment was adopted and became law: A.R.S. § 41-1461(2).

26. Chap. 140, S.B. 1386, Section 1(A-E).
27. In *Cronin v. Sheldon*, 991 P.2d at 238, the Arizona Supreme Court characterized the AEPA's preamble as "patently unconstitutional." The preamble nevertheless remains "an indication of the Legislature's intent in enacting the substantive law." *Johnson v. Hispanic Broadcasters of Tucson, Inc.*, 2 P.3d 687, 689 n. 2 (Ariz. Ct. App. 2000).
28. The Preface to the AEPA, Chap. 140, S.B. 1386 (1996), Section 1 (Intent) discusses that "[i]t is the intent of the Legislature to confirm that the employment relationship is contractual ... " [Section B] and that "[a]s stated above, the employment relationship is contractual in nature. ... In the absence of a written contract, the employment relationship is severable at any time by either the employee or the employer." [Section G]. Having stated that the employment relationship is contractual in nature, the AEPA never defined the term "employment contract." The AEPA's language in proposed Section 23-2501 [later renumbered after enactment to 23-1501] discusses "[s]everability of employment relationships" and states:

The public policy of this state is that:

1. The employment relationship is contractual in nature.
2. *The employment relationship is severable at the pleasure of either the employee or the employer unless both the employee and the employer have signed a written contract to the contrary setting forth that the employment relationship shall remain in effect for a specific duration of time or otherwise expressly restricting the right of either party to terminate the employment relationship . . .*
3. An employee has a *claim against an employer for termination of employment* only if one or more of the following circumstances have occurred:
 - (a) The employer has *terminated the employment relationship of an employee in breach of an employment contract, as set forth in paragraph 2 of this section*, in which case the remedies for the breach are limited to the remedies for a breach of contract.

(Emphasis added.) Remaining Sections 3b) and c) deal with the classic wrongful termination tort remedies provided by *Wagenseller* and seek to limit the holding of *Wagenseller*, limiting its tort remedies for wrongful termination in

- violation of public policy to violations of a state law or the State Constitution only.
29. See proposed Section 23-2501 [later renumbered after enactment to 23-1501] (3)(b)]. These included: (i) the civil rights act prescribed in title 41, chapter 9 [Section 41-1401 et seq.]; (ii) the occupational safety and health act prescribed in chapter 2, article 10 of this title [Section 23-401 et seq.]; (iii) the statutes governing the hours of employment prescribed in Chapter 2 of this title [Section 23-201 et seq.]; and (iv) the agricultural employment relations act prescribed in chapter 8, article 5 of this title [Section 23-1381 et seq.]
30. A.R.S. § 23-1501(3)(c)(i).
31. *Id.* § 23-1501(3)(c)(ii).
32. *Id.* § 23-1501(3)(c)(iii). The exercise of rights under the workers' compensation statutes prescribed in chapter 6 of this title [Section 23-901 et seq.]; (iv) Service on a Jury as protected by § 21-236; (v) The exercise of voting rights as protected by § 16-1012; (vi) The exercise of free choice with respect to non-membership in a labor organization as protected by § 23-1302; (vii) Service in the national guard or armed forces as protected by §§ 26-167 and 26-168; (viii) The exercise of the right to be free from the extortion of fees or gratuities as a condition of employment as protected by § 23-202; (ix) The exercise of the right to be free from coercion to purchase goods or supplies from any particular person as a condition of employment as protected by § 23-203; and (x) The exercise of a victim's leaves right as provided in §§ 8-420 and 13-4439.
33. *Id.* § 23-1501(2).
34. *Leikvold*, 688 P.2d at 174.
35. A.R.S. § 23-1501(2): "The employment relationship is severable at the pleasure of either the employee or the employer unless both the employee and the employer have signed a written contract to the contrary setting forth that the employment relationship shall remain in effect for a specified duration of time or otherwise expressly restricting the right of either party to terminate the employment relationship. Both the employee and the employer must sign this written contract, or this written contract must be set forth in the employment handbook or manual or any similar document distributed to the employee, if that document expresses the intent that it is a contract of employment, or this written contract must be set forth in a writing signed by the party to be charged."
36. *Id.* (emphasis added).
37. A.R.S. § 23-1501(3)(a).
38. 991 P.2d 231, 235 at ¶ 17.
39. *Cronin*, 991 P.2d at 241, ¶¶ 50-51.
40. 33 P.3d 518, ¶ 2 (Ariz. Ct. App. 2001).
41. "The AEPA 'limit[s] plaintiffs to three avenues of relief for claims asserted against employers on the theory of wrongful discharge, one of which is when 'the discharge violated a statute of this state.'" *Taylor*, 33 P.3d at 522, citing *Cronin v. Sheldon*, 991 P.2d 231, ¶ 17.
42. *Id.* at ¶ 22.
43. *Zenaty-Paulson*, 2000 WL 33300666 at

- *13; *cf. Kelly v. City of Mesa*, 873 F. Supp. 320, 327 (D. Ariz. 1994) (finding that wrongful termination tort claims in Arizona are barred by the two-year tort statute of limitations set forth in A.R.S. § 12-542, citing *Felton v. Unisource Corp.*, 940 F.2d 503 (9th Cir. 1991).
44. *Zenaty-Paulson* also asserted a claim for breach of the covenant of good faith and fair dealing, which the court found to be a duplicate of a breach of an employment contract claim. *Zenaty-Paulson*, 2000 WL 33300666, *18-19. The court, however, stated in its decision that "[a]side from actions based on the employment contract, there is no other claim for breach of covenant in the employment context." *Id.* at *19. The court's language was overreaching and misinterpreted the specific language of the AEPA. Perhaps the court's language should be explained only in the context of the court's conclusion that all of the plaintiff's contract claims related only to wrongful discharge in violation of an employment contract restricting the right of the employer to terminate the employment relationship at will. The court was not presented with and did not rule on whether such contract claims as the failure to pay compensation, breach of an agreement relating to job references or nondisparagement, and similar agreements would be barred.
45. *Woodward v. Chirco Constr. Co., Inc.*, 687 P.2d 1275, 1279 (Ariz. Ct. App. 1984) (citations omitted).
46. *Schade v. Dietbrich*, 760 P.2d 1050, 1061 (Ariz. 1988) (en banc), quoting *Nieto-Santos v. Fletcher Farms*, 743 F.2d 638, 642 (9th Cir. 1984) (wage statute is inapplicable, therefore, to damages for breach of a contract to employ).
47. *Schade*, 760 P.2d at 1061, citing *Apache East, Inc. v. Wiegand*, 580 P.2d 769, 773 (Ariz. Ct. App. 1978).
48. A.R.S. § 12-541(5).
49. The Raise the Minimum Wage for Working Arizonans Act also created a cause of action for retaliatory discharge if an employee is terminated for asserting or assisting others to assert a minimum-wage claim or informing others about their minimum-wage rights. The statute of limitations for bringing such a claim is also "two years after a violation last occurs, or three years in the case of a willful violation." A.R.S. § 23-364(B), (H).
50. *Southwest Mines Dev. Co. v. Martignene*, 64 P.2d 1031, 1032 (Ariz. 1937), (interpreting a predecessor statute to A.R.S. § 12-543).
51. A.R.S. § 12-548.
52. *Taylor v. Graham County Chamber of Commerce*, 33 P.3d 518 (Ariz. Ct. App. 2001).