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Submitted by the Council to the Members of
The American Law Institute
for Discussion at the Eighty-Sixth Annual Meeting on May 18, 19, and 20, 2009

Restatement of the Law Third
Employment Law

Tentative Draft No. 2
(April 3, 2009)

SUBJECTS COVERED

CHAPTER 1  Existence of Employment Relationship (revised)
CHAPTER 2  Employment Contracts: Termination (revised)
CHAPTER 4  The Tort of Wrongful Discipline in Violation of Public Policy (revised)

As of the date of publication, this Draft has not been considered by the members of The American Law Institute and does not represent the position of the Institute on any of the issues with which it deals. The action, if any, taken by the members with respect to this Draft may be ascertained by consulting the Annual Proceedings of the Institute, which are published following each Annual Meeting.
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Pierre N. Leval, U.S. Court of Appeals, Second Circuit, New York, NY
David F. Levi, Duke University School of Law, Durham, NC

*Director Emeritus
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Diane P. Wood, U.S. Court of Appeals, Seventh Circuit, Chicago, IL

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Chief Reporter
Professor Samuel Estreicher
New York University School of Law
40 Washington Sq. S.
New York, NY 10012-1005
Fax: (212) 995-4341
Email: samuel.estreicher@nyu.edu

Reporters
Professor Matthew T. Bodie
St. Louis University School of Law
3700 Lindell Blvd.
St. Louis, MO 63108-3412
Fax: (314) 977-3333
Email: mbodie@slu.edu

Professor Michael C. Harper
Boston University School of Law
765 Commonwealth Ave.
Boston, MA 02215-1401
Fax: (617) 353-3077
Email: mconradh@bu.edu

Professor Andrew P. Morriss
University of Illinois College of Law
504 E. Pennsylvania Ave.
Champaign, IL 61820-6909
Fax: (217) 244-1478
Email: morriss@law.uiuc.edu

Dean Stewart J. Schwab
Cornell Law School
263 Myron Taylor Hall
Ithaca, NY 14853-4901
Fax: (607) 255-7193
Email: sjs15@cornell.edu

Director
Professor Lance Liebman
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Fax: (215) 243-1636
Email: director@ALI.org
Restatement of the Law Third
Employment Law

CHIEF REPORTER
SAMUEL ESTREICHER, New York University School of Law, New York, NY

REPORTERS
MATTHEW T. BODIE, Saint Louis University School of Law, St. Louis, MO [from 2008]
MICHAEL C. HARPER, Boston University School of Law, Boston, MA
CHRISTINE JOLLS, Yale Law School, New Haven, CT [to 2006]
ANDREW P. MORRIS, University of Illinois College of Law, Champaign, IL [from 2008]
STEWART J. SCHWAB, Cornell Law School, Ithaca, NY

ADVISERS
FRED W. ALVAREZ, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA
ALICE W. BALLARD, Law Office of Alice W. Ballard, Philadelphia, PA
MARSHA S. BERZON, U.S. Court of Appeals, Ninth Circuit, San Francisco, CA
JOAN M. CANNY, Morgan, Lewis & Bockius, Miami, FL [from 2008]
DENNY CHIN, U.S. District Court, Southern District of New York, New York, NY
FRANK CUMMINGS, Buchanan Ingersoll & Rooney, Washington, DC
MIKE DELIKAT, Orrick, Herrington & Sutcliffe, New York, NY [from 2008]
DEBORAH A. DEMOTT, Duke University School of Law, Durham, NC [from 2004]
CHRISTINE M. DURHAM, Utah Supreme Court, Salt Lake City, UT
CYNTHIA L. ESTLUND, New York University School of Law, New York, NY [from 2004]
LAURENCE GOLDBERG, Bredhoff & Kaiser, Washington, DC [from 2007]
WILLIS J. GOLDSMITH, Jones Day, New York, NY [from 2004]
MARVIN L. GRAY, JR., Davis Wright Tremaine, Seattle, WA
HOWARD C. HAY, Paul, Hastings, Janofsky & Walker, Costa Mesa, CA
JONATHAN P. HIATT, General Counsel, AFL-CIO, Washington, DC
WILLIAM F. HIGHERBERGER, Superior Court of California, County of Los Angeles, Los Angeles, CA [from 2008]
P AUL V. H OLTZMAN, Krokidis & Bluestein, Boston, MA
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RODERICK L. IRELAND, Massachusetts Supreme Judicial Court, Boston, MA
HERMA HILL KAY, University of California at Berkeley School of Law, Berkeley, CA
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MARK A. ROTSTEIN, University of Louisville, Louis D. Brandeis School of Law, Louisville, KY

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KAZUO SUGENO, Faculty of Law, University of Tokyo, Tokyo, Japan [from 2003]
KENNETH P. THOMPSON, Thompson Wigdor & Gilly, New York, NY [from 2008]
P AUL H. TOBIAS, Tobias, Kraus & Torchia, Cincinnati, OH
JAY W. WAKS, Kaye Scholer, New York, NY [from 2004]

LIAISONS

For the American Bar Association
  STEWART S. MANELA, Washington, DC
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For the National Employment Lawyers Association
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Employment Law
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Foreword

For 25 years I have taught employment law. As coauthor of one of the first casebooks, I played a role as U.S. law schools separated the law of the employment relationship between labor law (concerned with unions and collective representation) and employment law (the evolving legal doctrines governing the 90-plus percent of private-sector workers who are not union members).

Early in my ALI directorship, Professor Sam Estreicher of New York University raised with me the possibility of a Restatement of employment law. As Sam and I talked, I gradually saw the arguments for such a project. Important federal and state statutes regulate employment law, but large areas have not been codified and are governed by state judge-made law. Those state rules vary widely. The subject is as appropriate for a statement of national common-law principles as contracts, torts, agency, restitution, and other common-law areas that have benefited from Restatement work in the Institute’s first decades and since. Indeed, I believe that judges, practitioners, and law teachers who read this Tentative Draft, now ready for Annual Meeting action, will find great value in its coherent and progressive black-letter statements of law and the supporting explanation and documentation. Consistent with the ALI’s tradition, these three Chapters were improved by the Reporters’ appropriate responses to the constructive criticism received on earlier drafts.

The full project will include a number of additional Chapters, but the three ready for the 2009 Annual Meeting are at the center. Chapter 1, largely the work of Professor Michael Harper of Boston University, restates the definition of the employment relationship. What is the difference between an employee and an independent contractor and between an employee and an owner? In Chapter 2, Professor Estreicher provides the law of the employment contract, which is especially the law of employment termination. The Chapter includes sophisticated treatment of oral contracts, unilateral employer statements such as are common in handbooks, and contracts of indefinite term, all starting from the long-established American concept (endorsed in every state except Montana) of employment at will. Dean Stewart Schwab of Cornell University, primary author of the final Chapter in this draft, has taken on the tort of wrongful dismissal or discipline, in place (but with widely varying limits and descriptive language) in more than 40 states. The tort material is Chapter 4 because Chapter 3, not yet drafted, will cover compensation and benefits.

All three of these Chapters were discussed at the 2008 Annual Meeting, but as the discussion and debate proceeded I concluded that there was not adequate time to allow all points to be made and discussed. I am happy about that decision because the black letter, the Comments, and the Reporters’ Notes here presented are improved over last year’s draft. With this project I am not just being nice when I thank the Advisers, the ALI members who have been active in the Consultative Group, and other professors, judges, and practicing employment lawyers, some but not all ALI members, who have commented, criticized, and made suggestions. Restating the law of employment has turned out to be an intellectually challenging endeavor, but as to these three Chapters the Reporters have met the challenges and have made what I believe will be a major contribution.
We have miles to go and have engaged additional talent, Professors Matthew Bodie of St. Louis University and Andrew Morriss of the University of Illinois, to assist as the project goes forward. For now, my appreciation for the work accomplished and the commitment demonstrated by Michael, Stewart, and especially Sam, is immense.

LANCE LIEBMAN
Director
The American Law Institute

March 27, 2009
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THE TORT OF WRONGFUL DISCIPLINE IN VIOLATION OF PUBLIC POLICY

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REPORTERS’ MEMORANDUM

TENTATIVE DRAFT NO. 2

RESTATEMENT OF THE LAW THIRD,
EMPLOYMENT LAW
CHAPTERS 1, 2, and 4

Tentative Draft No. 1 was presented to the membership at its Annual Meeting on May 21, 2008. A number of motions were made to table or to amend the draft; all were unsuccessful. Because of time constraints, however, the draft was not voted on. Taking into account comments made during the Annual Meeting, the Reporters submitted revised Chapters to the Advisers and the Members Consultative Group for additional comments through an electronic forum maintained by the Institute. In light of those comments, on October 17, 2008, the Reporters presented Council Draft No. 3 for consideration by the Council; it was unanimously approved. The present draft is being submitted for a vote by the membership at its Annual Meeting in May 2009.

Introduction to Chapter 1:
Existence of Employment Relationship (MCH)

Chapter 1 deals with the threshold question of the overall coverage of this Restatement: When is a principal’s relationship with an agent an employment relationship for purposes of the various employment laws providing protections or benefits or imposing obligations on employees? The Chapter is divided into four Sections: (1) defining the general conditions for the existence of an employment relationship (§ 1.01); (2) developing the distinction between volunteers and employees (§ 1.02); (3) assessing the extent to which ownership or control of the employer is inconsistent with employee status (§ 1.03); and (4) analyzing when individuals can be employed by two or more employers at roughly the same time (§ 1.04). The only notable change from Tentative Draft No. 1 is some tightening up of the language in § 1.01.

The principles developed in Chapter 1 provide background or default rules from which departures may be crafted by legislatures and other decisionmakers.

Areas of particular note include:

(1) The common-law test of employment is an elaboration of the basic distinction between independent contractors and employees. The proposed test for distinguishing an individual employee from an independent contractor is whether the employer “precludes the individual from rendering the services as part of an independent business.” The individual renders service as an independent business “when the individual in his or her own interest exercises entrepreneurial control over the manner and means by which the services are performed.” (Examples of such entrepreneurial control are given in § 1.01(3).) The employer’s ability to control the details of how the work is done is often a sufficient indicator of employee status. There will be circumstances,
however, where, even in the absence of such control, the employer’s control of other aspects of the work environment—such as the timing of assignments, the extent to which equipment is specially tailored for use for that employer only, the ability to hire assistants, and the ability to work for other clients—effectively prevents the individual from operating an independent business while performing work for the principal. In those situations, the relationship is still one of employment.

(2) Individuals who through ownership of all or a substantial part of a business are able to control all or part of that business to serve their independent interests are not employees for the purpose of protective employment laws. This is a corollary of the general common-law principle that those who retain discretion to make business decisions in their own interests are not employees. This is most clear for sole owners of a business who make entrepreneurial decisions completely independently. In some cases, even where ownership is divided, some individuals through their ownership interest exercise a degree of control over their remuneration and activities that approximates the control of a sole owner; such individuals are also not employees. High-level executives generally have delegated authority to make entrepreneurial decisions, but that authority is to be exercised in behalf of the business they serve, not primarily to enhance the remuneration or other independent interests of the executives. Neither labels nor part ownership is determinative of nonemployee status.

Introduction to Chapter 2
Employment Contracts: Termination (SE)

Chapter 2 addresses the basic contractual law dealing with termination of the employment relationship. (Chapter 3 will deal with contractual issues concerning compensation, benefits, and other working conditions.) The presumptive or default rule is the employment-at-will doctrine. The remainder of the Chapter discusses the core contractual exceptions to at-will employment. These exceptions, other than the implied covenant of good faith and fair dealing, reflect obligations that are assumed by the parties rather than imposed by law. The exceptions include (i) agreements between an employer and employee providing for a definite term of employment or an indefinite term of employment while limiting termination of employment (§ 2.03); (ii) promises by employers limiting termination of employment that reasonably induce detrimental reliance by the employee (§ 2.02, Comment c); (iii) unilateral employer policy statements limiting termination of employment (§ 2.04); and applications of the implied covenant of good faith and fair dealing limiting termination of employment (§ 2.06). We also include a discussion of the modification or rescission of unilateral employer commitments (§ 2.05).

This Chapter occasioned the most commentary during the Annual Meeting with a number of speakers questioning whether employment at will states the default rule followed by most jurisdictions in the United States. In response to these questions, we have included an Appendix to the Reporters’ Notes for Chapter 2 that sets forth the status of the default rule in 49 states and the District of Columbia. Montana is the only state which has passed a statute that alters
Reporters’ Memorandum

the default rule from employment at will to “good cause” for termination of employment of all nonprobationary employees.

No attempt is made to restate all of the conceivable contractual principles that might apply to the interpretation of employment agreements. Cross-references are provided to the Restatement Second of Contracts, and the opening Introductory Note states that this Chapter is part of the general law of contracts, as articulated in that Restatement. In addition, a residual category (§ 2.02(e)) includes “any other ground recognized in the general law of contracts [that] limits termination of employment.”

Areas of particular note include:

(1) We moved away from an earlier draft that used terminology of “bilateral agreement,” as opposed to unilateral employer commitments. Section 2.02 uses the language of “agreement” to indicate bargained-for agreements recognized under the law of contracts; “promise” to indicate binding commitments as a matter of promissory estoppel; and “statement” to indicate binding employer commitments that are neither agreements nor promises enforceable under the doctrine of promissory estoppel (usually because of the absence of employee reliance).

(2) Section 2.02(a), as in earlier drafts, refers not only to express contracts for a definite term but also contracts for an indefinite term. Such agreements can be entered into with one or more employees. The distinguishing characteristic is that such agreements are bargained for or supported by consideration: there is either an express exchange of promises between employer and employee, an offer by the employer that contemplates acceptance by performance on the employee’s part, or some other promissory statement or conduct manifesting a promise by the employer to which the employee assents by words or conduct. Some courts use the language of “implied in fact” agreements, but this usage is not consistent across jurisdictions and has led to some confusion. Most of the results in those cases would also be reached under the formulation in this Section. Agreements under § 2.02(a) can be modified only in the usual manner provided in the law of contracts.

(3) “Cause” for termination of an agreement is defined in Comments i-j to § 2.03, which provide a default rule in the event the parties have not negotiated a special understanding. Reflecting judicial practice and the likely expectations of the parties, the Section defines “cause” in an indefinite-term agreement to include not only employee malfeasance or other material breach but also changes in the business conditions of the employer; by contrast, “cause” in a definite-term agreement encompasses only material breach by the employee. In either case, an objective standard of cause is contemplated; reasonable, good-faith but erroneous belief does not constitute cause.

(4) Section 2.04 uses the phrase “binding employer policy statement” to denote terms that employers set unilaterally for large workforces, often by means of handbooks, policy manuals, and the like. The terms in these statements are not typically bargained-for with employees; in some settings, the statements are intended solely for the attention of supervisors to direct their exercise of discretion. Some jurisdictions require a showing of reliance by employees, but most do not. A good number of states use the language of “unilateral contract”; slightly fewer
jurisdictions, following the lead of the Michigan Supreme Court, use language of “estoppel” or “reasonable expectation.” The approach of this Section is closer to the latter, treating such unilateral employer statements as binding on the employer until reasonable advance notice of change or rescission is given to affected employees. Section 2.05 states that, absent any vested or accrued employee right that may have been created by the statement or by an agreement or promise, employers may by clear notice prospectively change the terms they have set in these unilateral statements. More than half of the reported decisions on the subject adopt the rule of presumptive, prospective-only modifiability advanced here; others, purporting to apply traditional contract-law principles, do not allow modification absent bargained-for exchange with employees for consideration. Some of the courts adopting the no-modification rule, however, have not been clear about the nature of the previous understanding sought to be changed—whether they regard the previous understanding as a bargained-for agreement or a promise enforceable by virtue of promissory estoppel, rather than an obligation flowing from a unilateral employer promulgation. Conceivably, a clarification of the distinction between agreements and unilateral employer policy statements might lead these courts to a rule of modifiability mirroring the position of this Chapter. In any event, clarity as to the background rule is needed. Appendix B provides a state-by-state account of the enforceability and modifiability of employee handbooks and personnel manuals.

(5) Section 2.06 states that the implied covenant of good faith and fair dealing is contained in every employment contract, including at-will contracts. The covenant plays a special role in preventing employers from using their power to terminate the relationship as a means of preventing employees from qualifying for vested or accrued compensation or benefits despite substantial performance by employees of their obligations under the contract. Another application of the covenant is to prevent employers from terminating the employment relationship when the employee has simply performed his or her duties. The covenant or duty is nonwaivable by the parties, although the terms of their agreement will inform the duties and reasonable expectations of both sides.

Introduction to Chapter 4
The Tort of Wrongful Discipline in Violation of Public Policy (SJS)

Chapter 4 deals with a central tort in employment law—employer discipline in violation of public policy. Arising in the last several decades of the 20th century, this tort is now recognized by 43 states and is stable enough for a Restatement to be useful. (Many other torts also concern the employment relationship, including defamation, intentional infliction of emotional distress, and tortious interference with contractual relations. They will be treated in Chapters 5-6.) In previous drafts, this tort had been called “retaliatory discharge” or “retaliation,” but the usage we now propose is to include all employer discipline constituting a discharge or “other material adverse action” in violation of public policy (§ 4.01).

Areas of particular note include:
(1) Although the decisional law is sparse here, the cause of action in question is not limited to retaliatory discharge or other circumstances amounting to a constructive discharge but includes “other material adverse action” likely to deter similarly situated employees. This is consistent with treatment of the retaliation concept in employment statutes generally.

(2) In determining whether to recognize the cause of action in a particular case, courts will need to analyze whether the statute or other law providing the basis for the public-policy claim bars an additional civil remedy or provides the employee with an adequate alternative remedy for the retaliation. The policy of the statute on preclusion of common-law remedies ordinarily should control. Even if the statute does not preclude common-law remedies, courts in shaping the common law will decline to recognize the tort on the ground that it unnecessarily (given the statutory remedies) intrudes on the employer–employee relationship.

(3) Section 4.02 defines the range of activities protected against retaliatory discharge by the employer. These include (a) refusing to violate a law or code of professional or occupational conduct protective of the public interest; (b) fulfilling a public duty or other obligation imposed by law; (c) filing a charge or claiming a benefit in good faith under an employment law; (d) refusing to waive a nonnegotiable or nonwaivable right or agree to a condition of employment whose enforcement would violate public policy; or (e) reporting in a reasonable manner employer conduct that violates a law or code of ethics protective of the public interest. A sixth, residual subcategory is included for other situations where an employer retaliates against an employee for engaging in activity promoting a significant public interest. Employees are generally protected if they are retaliated against for reasonably and in good faith engaging in the listed activities; category (d) is limited, however, to rights or conditions that are in fact nonwaivable or unenforceable.

(4) In defining category (e)—whistleblowing—the draft protects both internal whistleblowers (those who complain to company officials) and external whistleblowers (those who complain to government officials). The draft does not require that the employee be correct on the law, but merely have a reasonable and good-faith belief about the law and act reasonably in reporting the claimed violation.

(5) The draft makes clear that the tort of wrongful discipline in violation of public policy is available to employees regardless of the contractual provisions for discharge. At-will employees are protected, but so are employees under a definite-term contract or under a collective-bargaining contract. This is the majority approach, but some courts have mistakenly held that employees who have bargained in advance for protections against improper discharge do not have tort protections.

(6) Sources of public policy are developed in § 4.03 to include federal as well as state laws, administrative regulations, ordinances, common-law rules, and established principles of professional or occupational conduct protective of the public interest.
CHAPTER 1
EXISTENCE OF EMPLOYMENT RELATIONSHIP

Introductory Note

a. Scope. This Chapter identifies the class of individuals who are treated as “employees” of an employer in order to set the main boundaries for the field of employment law and thus for the scope of the Restatement Third of Employment Law. The black-letter rules that follow are derived from judicial and administrative decisions determining whether there is an employment relationship for purposes of laws that protect or benefit employees or impose obligations on employers or employees. These rules will often help courts and agencies decide whether a group of individuals are covered “employees” under statutes that do not themselves provide a meaningful definition of the term. They will also help define (1) which relationships are governed by employment contract principles in Chapters 2 and 3 of this Restatement; (2) who is protected from the employment torts treated in Chapters 4-7; and (3) who owe duties to employers as developed in Chapter 8. The focus of this Restatement is on the employment relationship; no attempt is made to articulate the duties owed by an employer to non-employee agents or the responsibilities of such agents to their principals or other parties. These matters are covered in the Restatement Third of Agency (2006).

b. Terminology. This Restatement generally uses the terms “employer” and “employee,” rather than the terms “master” and “servant” used in the Restatement Second of Agency (1958). This reflects the purposes of employment law, which are to set the rights and duties of the parties to the employment relationship rather than to delimit the bounds of enterprise vicarious liability to third parties. It also reflects a change in common usage and the terminology of modern decisions—one more appropriate in a society where most individuals provide services for entities, commonly business
enterprises, rather than for individuals and their families.

§ 1.01 General Conditions for Existence of Employment Relationship

(1) Unless otherwise provided by law or by §1.02 or §1.03, an individual renders services as an employee of an employer if

(a) the individual acts, at least in part, to serve the interests of the employer,

(b) the employer consents to receive the individual’s services, and

(c) the employer precludes the individual from rendering the services as part of an independent business.

(2) An individual renders services as part of an independent business when the individual in his or her own interest exercises entrepreneurial control over the manner and means by which the services are performed.

(3) Entrepreneurial control over the manner and means by which services are performed is control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to service other customers.

Comment:

a. Overview. Section 1.01 defines the term “employee” both to set boundaries for the principles articulated in this Restatement and also to inform judicial and administrative construction of statutes governing the employment relationship. Section 1.01’s definition draws on judicial
decisions in employment-law cases applying the common-law test—sometimes referred to as the “right-to-control” test—for employee status. Most employment statutes do not meaningfully define who is a covered “employee”; a typical provision states that an “employee” is “any individual employed by an employer.” The U.S. Supreme Court in a number of cases has ruled that where the statutory language does not provide meaningful guidance, Congress is presumed to have intended the “common-law” test to apply.

The common-law right-to-control test was originally developed not to provide a comprehensive definition of employee status but, rather, to address the distinct question of when it is appropriate to hold a principal liable in respondeat superior for the torts of its agent. Under the test, the principal normally was vicariously liable only for the actions of those agents whose work the principal retained the “right to control.” A principal that retained the right to control the manner and means by which the work was performed was termed an “employer” and the agent in question an “employee.” Absent such control, the imposition of vicarious liability is normally considered inappropriate.

As formulated in § 220 of the Restatement Second of Agency (1958), the common-law test is a multi-factor inquiry that looks not only to the principal’s control of the physical details of how the service provider performs the work but also to other factors relevant to whether the service provider has entrepreneurial control over the manner and means by which the services are performed. These factors include “whether or not the one employed is engaged in a distinct occupation or business”; “the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision”; “the skill required in the particular
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occupation”; “whether the employer or the workman supplies the instrumentalities”; “whether or not
the work is a part of the regular business of the employer”; and “whether the principal is or is not in
business.”

Section 7.07 of the Restatement Third of Agency (2006) follows the same approach: offering
the “right to control the manner and means of the agent’s performance of work” as a general test of
employee status. It notes in Comment f, however, that “indicia… relevant to whether an agent is an
employee” include not only “the extent of control that the agent and the principal have agreed the
principal may exercise over details of the work,” but also the range of additional factors set forth in
the Restatement Second of Agency (1958).

The U.S. Supreme Court has similarly embraced a multi-factor common-law test for the
purpose of determining who qualifies as an employee under many federal employment statutes. The
Court has described that test as one that considers not only “the hiring party’s right to control the
manner and means by which the product is accomplished,” but also all other factors that look to
whether the individual is rendering service as an independent business person, including “the skill
required; the source of the instrumentalities and tools; the location of the work; the duration of the
relationship between the parties; whether the hiring party has the right to assign additional projects to
the hired party; the extent of the hired party’s discretion over when and how long to work; the method
of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the
regular business of the hiring party; whether the hiring party is in business; the provision of employee
benefits; and the tax treatment of the hired party.”

Employees do not provide their services as an independent business. In many cases, their
employer exercises a degree of control over the physical details of how their work is to be done that
precludes any ability to make entrepreneurial decisions in their own interest. In other cases, even
where the details of work are not closely supervised, the employer’s control of such matters as the
scheduling of performance, the use of equipment, and the hiring of assistants precludes the exercise of
entrepreneurial control. By contrast, individuals who retain entrepreneurial control can seek to
increase their personal economic returns not simply by working harder but also by working at their
discretion for other customers, by hiring assistants, and by deploying or substituting for labor their
own equipment or capital. Such individuals have been treated differently by employment laws
because their economic position often differs from that of employees who lack such control. Thus,
individuals who lack such control normally are employees, even if their work is not physically
controlled by their employers.

Some courts have invoked as an alternative to the common-law right-to-control test the so-called “economic-realities” or “economic-dependence” test. A test of economic dependence, taken
literally, would seem to sweep more broadly than does the right-to-control test, for an independent
business person can be economically dependent on other businesses, as in the case of a sole-source
provider to a particular purchaser. In the application of these tests, however, courts utilizing the
economic-realities and right-to-control tests have tended to rely on the same factors and reach similar
results.

Section 1.01 defines employees in an employment relationship. It does not define the term
“independent contractor.” All employees are agents of their employer (principal), in accord with the
definition of employee in § 7.07 of the Restatement Third of Agency (2006). But not all service
providers are sufficiently controlled by the entities they serve to be agents under § 1.01 of the Restatement Third of Agency (2006). As stated in Comment c to that Section, “the common term ‘independent contractor’ is equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are non-agent service providers.”

b. Formal descriptions not controlling. The underlying economic realities of the relationship, rather than any formal descriptions of the relationship, determine whether a particular individual is an employee. Thus, even an agreement between a principal and an agent stating that the agent is providing services, not as an “employee” but as an “independent contractor,” would not be controlling. Nevertheless, a contract between a service provider and a recipient of the services may help determine the extent of control that can be exercised by the principal and whether the service provider is free to operate as an independent business.

Illustration:

1. P, a producer of computer software, and A, a programmer, contract to have A help P’s regular programmers complete certain projects. A’s contract with P provides that A is “self-employed as an independent contractor” and “is not in an employment relationship” with P. A is paid through P’s accounts payable department rather than through its regular payroll. A is required to work on the projects with P’s regular employees during the same hours and under the same level of supervision from P’s managers. The language in A’s contract with P is not controlling. Whether A is an employee of P depends on whether P’s control over the scheduling and details of A’s work for P precludes A from servicing P as an independent
c. Power to control details of work is normally sufficient. The employer’s power to control the physical details of how an individual is to perform services for the employer is ordinarily sufficient to make the service provider an employee. Where the employer has such power, the service provider will not have entrepreneurial control over the scheduling of performance, the use of equipment to serve other customers, the hiring of assistants on the service provider’s account, or the investment of resources in labor-saving machinery.

Unskilled and low-skilled workers are usually subject to close employer control over the details of how their work is to be performed—particularly if they do their work on the employer’s premises or otherwise in the presence of the employer’s managers or supervisors. Such workers thus are normally treated as employees. Professionals and highly skilled workers, by contrast, are less likely to be subject to close employer supervision. Such workers nonetheless are treated as employees rather than independent business persons when they lack entrepreneurial control under § 1.01(3).

Service providers treated as employees are most often required to work during fixed time periods, usually for an hourly wage or salary. Service providers whose work is subject to close employer supervision are employees, however, regardless of the manner of their compensation or the flexibility of their work hours. Compensation for work completed, rather than for hours worked, flexible work times, and work on projects of limited duration may enable a service provider more easily to operate an independent business during time not devoted to the employer, but these features
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do not necessarily mean that the individual is rendering services to the employer as an independent business within the meaning of § 1.01(2).

In some cases employers authorize employees to hire assistants to help them complete assigned work under the supervision of the employer. If the employer retains the power to control the manner and means by which the assistants perform their services, both the hiring employees and the hired assistants are employees of the employer.

Illustrations:

2. P, a farmer and owner of irrigated acreage devoted to cucumbers, enters into agreements with A, B, C, and D to help P harvest the cucumbers for the current season. P assigns particular acres to each, and agrees to pay each on the basis of the number and quality of the cucumbers each picks. The pay is to be set as a percentage of the sales price that P receives from purchasers of the cucumbers. Also, A, B, C, and D can use their family members to assist them in the work. P retains the right and capability to control all farming operations in the fields.

A, B, C, and D are employees of P. The fact that A, B, C, and D can make more money by working harder and perhaps by making better decisions about which cucumbers to pick does not mean that they, severally or jointly, are acting as an independent business. A, B, C, and D have no discretion to make entrepreneurial decisions to make the fields more productive in order to enhance their personal profits.

3. P, an insurance company, hires attorney A to work full-time in P’s legal department
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to manage any employment-related legal controversies involving P. A is paid a salary and is
supervised by P’s general counsel.

A is an employee of P. A must follow the department’s legal practice, budget and
personnel policies, and cannot work for other clients. A is not operating an independent
business.

4. P, an insurance company, asks A, an attorney, to handle some disputed insurance
claims. A does so and bills P based on A’s hourly rate and expenses. P’s officers make
judgments on the settlement of cases, and although the results of A’s efforts are subject to
review by P’s general counsel, the details of A’s litigation strategy and staffing decisions
remain under A’s control. A works for a number of clients in addition to P. A is not an
employee of P. A operates a legal-services business independently of P’s insurance business.
A controls the method and manner of the legal work A does for P, the use of A’s skills and
time and thus the opportunity to work for other clients, and the costs of A’s legal office. A
thereby retains significant entrepreneurial control.

5. P, a hospital, enters into a contract with surgeon A that allows A to use P’s
operating rooms. P provides necessary materials as well as nurses to assist A and requires A to
follow certain hospital policies in preparing for operations. A has similar privileges at
hospitals not owned by P. P does not dictate A’s methods of operating on patients. Although P
collects payments from patients that cover both use of the hospital’s facilities and, as an
administrative convenience, the fees of A, P does not set the levels of A’s fees.

A operates an independent business and is not an employee of P. Despite P’s provision
of the location, supplies and assistants, A retains the power to control the conduct of A’s
operations, the level of A’s compensation and the ability to provide similar services at
hospitals not affiliated with P.

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\text{d. Exercise of entrepreneurial control. The principal’s power to control the details of how the}

service provider performs his work, while normally sufficient, is not necessary for the service
provider to be an employee. As a practical matter, an employer might not control the details of the
work of all its employees because of the nature of the work performed, the place where it is
performed, or the skills possessed by some employees. The key question is whether a service provider
functions as an independent business while performing services on the principal’s behalf. As set forth
in § 1.01(2) and (3), individuals provide services as independent businesses if they are able to seek to
serve their own interests through control over a significant part of their costs or opportunities for gain.
Such entrepreneurial control is control over such important business decisions as the hiring and
assignment of assistants, the purchase and use of equipment, and whether and when to serve other
customers. Employees, by contrast, can affect their remuneration or other personal interests only by
working harder or more skillfully on their employer’s behalf; they are not entrepreneurs operating
independent businesses. This is true even for employees whose salary is tied to the employer’s stock
or profits. Thus, an individual performing services on a continuing basis on work that is mobile or off
the employer’s premises but who provides no significant inputs beyond his own labor is normally an
employee, even where the employer does not control the daily details of work.

Under the foregoing analysis, sophisticated, highly trained professionals may be employees if
the employer controls the costs and the timing of their work; such individuals can seek to improve
their economic returns only by providing the employer more or better services. The same is also true
of executives who are subject only to the general control of a corporation’s board of directors;
executives are expected to exercise their discretion to further their employer’s business objectives
rather than any independent objectives of their own.

Illustrations:

6. P, the owner of a newspaper, contracts with workers to deliver newspapers to
residential customers. P assigns particular neighborhoods with designated customers to each
delivery worker. P daily sells the delivery worker a quantity of papers and requires the worker
to collect a set fee from the customers for each week of papers. P also requires the papers to
be delivered within a strict time schedule but does not otherwise exert control over the means
of delivery.

The paper deliverers are employees of P, even though not all of the details of their
delivery work are controlled by P. The price of the subscriptions sets the terms of
remuneration for their work, which varies only with the number of deliveries they make. Even
where the deliverers provide their own means of transportation, other costs are predetermined
and not within their control.

7. P, a commercial laboratory, hires A, a physician, as its senior pathologist. A is paid
an annual salary and directs the analytical work on matters assigned to A’s department. A is
expected to work full-time on these assignments on Monday, Tuesday, and Wednesday every
week, but may do consulting work for other businesses at other times.

A is an employee of P. Although, given A’s senior status and skill level, the details of A’s work may not be controlled by P and although A may be able to enhance his total personal income by consulting on days he is not assigned to work for P, A is not engaged in an independent business during A’s work at the laboratory.

8. P, a life insurance company, contracts with agents to sell its policies and collect premiums within particular geographic territories. The agents agree not to sell policies for other insurance companies or to sell other financial instruments. P pays the agents a small base salary, but most of their compensation derives from commissions on the sale of new policies and the renewal of old policies. P reimburses the agents for their reasonable expenses, including rental on offices used exclusively for selling P’s policies. P provides sales manuals and requires its agents to attend periodic sales conferences but does not insist on particular sales tactics or techniques. P reserves the right to terminate its relationship with any agents who do not sell and maintain an adequate level of policies.

The agents are employees of P. Despite the fact that P does not fully control how the agents sell and maintain P’s policies, the agents can influence their net remuneration only by working harder or more skillfully for P. They retain no entrepreneurial ability to attempt to increase their economic returns by making different business decisions.

9. Same facts as Illustration 9, except that P does not reimburse expenses of the agents and the agents are allowed to sell other financial instruments, including policies of other insurance companies.
§ 1.01

The agents are not employees of P. They remain free to attempt to enhance their net remuneration by making different business decisions such as attempting to sell different combinations of financial products. The agents can develop an insurance and financial services business that includes but is not limited to sales of P’s product.

10. P enters into a contract with A that authorizes A to operate a restaurant using only trademarks, materials, menus, and recipes supplied by P. A, however, retains control over the hiring, activity, and compensation of assistants. A also controls the general operations of the restaurant, including maintenance of the physical plant, and receives any profits, as well as incurs any losses, that derive from the difference between its revenues and its costs, including the fees for trademark, materials, and recipes it pays to P.

A is not an employee of P. P’s control of the menus, recipes, and trademarks does not provide it with control over the details of the restaurant’s operations. A retains entrepreneurial discretion over decisions such as the number and compensation of employees, design and layout of the restaurant, hours of operation, and prices.

11. Same facts as Illustration 11 except that A is compensated by P through a salary, which includes a bonus tied to the restaurant’s profits. A also does not control costs of the physical plant and does not set compensation or benefits for assistants. Any profits (or losses) from the operation of the restaurant belong to P.

A is an employee of P. A is not operating an independent business. Even though A’s bonus is tied to the restaurant’s profits, the entrepreneurial decisions that largely determine profits are made on behalf of P and are within P’s control.
12. P, a mattress retailer, hires A, B, and C to use their own trucks to deliver mattresses to P’s customers. A, B, and C may hire and pay assistants to help drive their trucks and unload the mattresses, and may use their trucks for other deliveries for other businesses. A, B, and C have time to make these other deliveries since they all own multiple vehicles and their deliveries for P do not exhaust the time these vehicles can be in use.

A, B, and C operate independent businesses and are not employees of P. P does not control the manner by which the deliveries of its mattresses are made. P also does not determine the profits of A, B, and C, which depend on customer demand for deliveries, on other business, and on how A, B, and C deploy their assistants, their vehicles, and their time.

13. Px, a rival mattress retailer, hires D, E, and F to use their own trucks to deliver mattresses to Px’s customers. Although Px does not prohibit the use of these trucks for other deliveries, Px does require that the trucks be in its warehouse at 5:30 a.m. every morning for loading, that the trucks be decorated with its advertising when its mattresses are being delivered, and that such advertising not be displayed when the trucks are used for other purposes. Px also requires D, E, and F to drive the trucks personally on all deliveries for Px and to give priority to its deliveries. In practice, D, E, and F rarely have time to make deliveries with their leased trucks for other businesses.

D, E, and F are employees of Px and do not operate independent businesses. Px, like P in Illustration 12, does not control the details of how the deliveries of its mattresses are made. Unlike P, however, Px’s drivers have very little scope for entrepreneurial discretion because Px’s requirements make it extremely difficult to use their trucks and assistants to work for
e. Individual must act at least in part to serve employer. An individual cannot be an employee of another party without acting at least in part to serve the other party’s interest. An individual who purports to serve an employer but in fact serves only his own interests does not provide the employer with an opportunity to benefit from the individual’s activity and is not an employee.

Individuals, however, may be employees even though they intend to serve their own interests or the interests of others while also serving the interests of their employer. As elaborated in § 1.04, moreover, an individual can be an employee of two or more employers when the employee acts to serve all of them at the same time.

Illustrations:

14. P hires A to serve as a cloak-room attendant in P’s restaurant. A accepts the position, intending to steal from the coat pockets of patrons during the first evening of work. A takes and hangs coats that evening, giving each patron a claim ticket for each coat. A also steals whatever is left in the pockets before absconding after that first night of work.

A is an employee of P for that evening. Although A served personal interests and acted unlawfully that night, A also served the interests of P by storing the coats of P’s patrons.

15. P hires A to drive P’s luxury automobile from Chicago to New York. P agrees to reimburse all of A’s reasonable expenses and to pay A a flat fee for personally completing the drive within two days. P decides to drive the car instead to California and to sell it to a car-
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theft ring there.

A is not an employee of P. Inasmuch as A did not act to serve P, A did not enter into
an employment relationship with P.

f. Employer must consent to receive services of employee. An employer must consent to
receive the services of an employee. Consent to accept services can be manifested through overt
action or statement or through acquiescence. Consent is not negated by an employee’s
misrepresentations. Employees retain their employment status even if they have misrepresented their
qualifications, at least until they are lawfully discharged for doing so.

Illustrations:

16. A and B, both experienced electricians, are hired to work for P, a construction
company. They do not disclose to P that they are employed as union organizers and will
continue in the union’s employ while also working for P.

A and B are employees of P. Although P’s hiring agents were not fully informed about
the union-organizing interests of those whom they were hiring, P’s agents nonetheless
consented to receive the services of A and B.

17. P hires A to help P’s business by setting up an internet site through which
payments can be made by computer transfers. A claims to have extensive computer-
programming experience and expertise. Failing to check A’s references, P accepts A’s
representations. A in fact lacks experience and plans to learn the computer skills on the job
1 attempting to set up P’s site.

2 A is an employee of P. A. Although not capable of serving P to the extent assumed by

3 P, A is still serving the interest of P in part, is under the direction and control of P, and has

4 been accepted as an employee by P.

5 18. Same facts as Illustration 17 except that A, not able to complete the work, hires B,

6 a skilled programmer, to assist her. A does not have P’s approval to delegate the work to

7 anyone else. B is not the employee of P, as P did not delegate hiring power to A or otherwise

8 consent to receive B’s services.

9
g. Employer must preclude individual from rendering service as part of an independent

10 business. For a hiring party to be an employer of a particular employee, that party must preclude the

11 individual from exercising entrepreneurial control over the manner and means by which the individual

12 performs services on behalf of the hiring party. An individual may be an employee of an independent

13 business that provides services to a customer, without the customer in any way controlling the

14 employee. In such circumstances, the customer is not an employer of the individual providing the

15 services. As explained in Comment b, however, whether a hiring party precludes an individual from

16 operating an independent business depends on the extent of that party’s actual control over the

17 individual, not on whether that party intends to enter into an employment relationship. (For treatment

18 of employment by multiple employers, see § 1.04.).

19

20

21
Illustration:

1. P contracts with B, an independent business, to design and set up an internet site promoting P’s products. P specifies what it wants on the site, but does not control how B accomplishes its work. With P’s consent, B assigns to C, one of its salaried employees, the task of completing the project for P. B has sole supervisory authority over C. C is an employee of B, but not of P, even though P has consented to C’s services.

h. Otherwise provided by law. The standard definition of employee provided by § 1.01 is subject to alteration by law. For instance, a statute could provide a narrower or broader controlling definition of a covered employee. A statute also may contain express exclusions from its definition of “employee” for purposes of the statute’s coverage. The National Labor Relations Act, for instance, excludes agricultural laborers, domestic servants, and supervisors, as well as independent contractors. The Social Security Act includes special rules for more than 30 types of workers, in some cases expanding the coverage of the Act beyond the standard definition of an employee.

REPORTERS’ NOTES

Comment a. Distinguishing employees from independent contractors by focusing primarily on the master’s right to control the “physical conduct” of employees is an understandable approach to setting the scope of the principal’s vicarious or “respondeat superior” liability. Such enterprise liability would seem appropriately predicated on the principal’s ability to control potentially tortious acts of its agents. Correspondingly, it would seem inappropriate to hold a consumer of a service purchased from an independent business not under that consumer’s physical control liable for torts committed in the course of rendering that purchased service. The right-to-control test was first developed in part to protect consumers or purchasers from vicarious liability for the acts of service providers they could not control. The early, seminal English cases, Laugher v. Pointer, 5 B. & C. 547, 108 Eng. Rep. 204 (1826), and Quarman v. Burnett, 6 M. & W. 499, 151 Eng. Rep. 509 (1840), involved unsuccessful attempts to hold hirers of horse-pulled coaches vicariously liable for the
negligence of the drivers. In Quarman, Baron Parke worried that the “purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman’s carelessness . . . .” See 6 M. & W. at 510, 151 Eng. Rep. at 514. The right-to-control test thus distinguished between the right to control the specific service or good purchased, such as the specific route taken by a taxicab (which purchasers could and did influence), and the right to control the details of how the service would be provided or the good produced (which purchasers typically could not or did not influence).

Even in this context, from the earliest days of its development, however, the right-to-control test has been used by many courts as an analytic tool to determine whether an agent is operating an independent business. In a case decided the same year as Quarman, involving two businesses rather than a consumer and a business, Lord Denman held a butcher not liable for the tort of a servant of a “drover” who drove a bullock to the butcher’s slaughterhouse after determining that the drover’s business was independent: “the mischief was done in the course, not of the butcher’s business, but of the drover’s.” Milligan v. Wedge, 12 Ad. & El. 737, 740-741, 113 Eng. Rep. 993, 994-995 (1840). Several years later Lord Denman used the same analysis to hold navigation commissioners not liable for the negligence of those hired to divert creeks because the diverters were persons “carrying on an independent business.” Allen v. Hayward, 7 Q. B. 960, 975, 115 Eng. Rep. 749, 755 (1845).

In the United States, as in Great Britain, nineteenth century courts applying the right-to-control test looked beyond the principal’s actual power to control the physical details of an employee’s work to inquire whether the tortfeasor’s services were delivered as part of an independent business or rather were integrated into the principal’s business. In Sproul v. Hemmingway, 31 Mass. 1, 14 Pick. 1 (1833), for instance, Chief Judge Shaw’s opinion held that the owners of a vessel towed by a steamboat whose operators negligently caused the vessel to damage another vessel at anchor were not liable to the owners of the damaged vessel because the steamboat operators were both not “subject to their order, control and direction” of the vessel’s owners and also were not “engaged in the business or employment of the owners, conducting and carrying on such business for the profit or pleasure of the owners.” Id. at 5. In Singer Mfg. Co. v. Rahn, 132 U.S. 518, 523-524 (1889), the Supreme Court used the right-to-control test to find a manufacturer liable for the negligent operation of a horse-drawn wagon by a traveling salesperson who “agree[d] to give his exclusive time and best energies” to the manufacturer’s business, even though the manufacturer in practice could not control the salesperson’s driving. See Richard R. Carlson, Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying, 22 BERKELEY J. EMP. & LAB. L. 295, 310 (2001) (stating that “control over work was never the exclusive test of status for either respondeat superior or other statutory purposes . . . . [B]y the end of the nineteenth century the courts had already identified and assembled most of the other basic ‘factors’ recognized today as evidencing one or the other type of worker status” (emphasis added)). See generally MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE § 4 (1989) (tracing the development of the master-servant relationship).

In the middle of the 20th century, in § 220(1), the Restatement Second of Agency (1958)
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defined a servant as “a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.” Section 220(2), however, elaborated that in “determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the places of work for the person doing work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.”

The principal’s control or right to control “the physical conduct” of the employee could be “very attenuated”. Id., Comment d. Thus, for example, “the full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking.” Id. In other comments on § 220, the Restatement recognized that there are other categories of undisputed employees whose physical acts are not or cannot be closely monitored by the firm, including “ship captains and managers of great corporations”; employees performing duties far from the workplace, like the “traveling salesman” who “may be . . . a servant and cause the employer to be liable for negligent injuries to a customer or for negligent driving while traveling to visit prospective customers”; and “skilled artisans employed by a manufacturing establishment, many of whom are specialists, with whose method of accomplishing results the employer has neither the knowledge nor the desire to interfere.” Id., Comments a, e, i.

Section 7.07 of the Restatement Third of Agency (2006) similarly states in Comment f that “[i]n some employment relationships, an employer’s right of control may be attenuated. For example, senior corporate officers, like captains of ships, may exercise great discretion in operating the enterprises entrusted to them, just as skilled professionals exercise discretion in performing their work.”


The economic-realities or economic-reality-of-dependence test has been used to interpret the meaning of “employee” under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. The leading case is Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947), which was cited with approval in Darden, 503 U.S. at 325-26. In Rutherford the Court found that skilled meat boners paid by the company on a piece-rate basis and denominated “independent contractors” were nevertheless employees under the FLSA because their work was part of the company’s integrated operation during defined hours on the company’s premises rather than part of an independent operation. See 331 U.S. at 730. In the view of some judges, however, the phrase “economic reality” “offers little guidance for future cases and...begs questions about which aspects of ‘economic reality’ matter, and why.” Sec’y of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring). See also Wheeler v. Hurdman, 825 F.2d 257, 272-72 (10th Cir. 1987).

For applications of this test in FLSA cases that consider factors similar to those considered under the common-law test, see, e.g., Imars v. Contractors Mfg. Servs., Inc., 165 F.3d 27 (6th Cir. 1998) (unpublished disposition); Baker v. Flint Eng’g & Constr. Corp., 137 F.3d 1436 (10th Cir. 1998); Dole v. Snell, 875 F.2d 802 (10th Cir. 1989); Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir. 1988); Sec’y of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987). As applied in modern FLSA decisions, these factors include: “(1) the degree of control exerted by the alleged employer over the worker; (2) the worker’s opportunity for profit or loss; (3) the worker’s investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer’s business.” Baker, 137 F.3d at 1440.

Decisions interpreting the meaning of employee under the federal antidiscrimination laws illustrate the lack of any sharp distinction between the common-law test, at least as formulated in Reid and Darden, and a multi-factor economic-realities test. In Worth v. Tyer, 276 F.3d 249, 263 (7th Cir. 2001), for instance, the court affirmed its pre-Darden multi-factor test, focusing on: “[t]he extent of the employer’s control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operation, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations.” See also, e.g., Adcock v. Chrysler Corp., 166 F.3d 1290, 1292 (9th Cir. 1999); Frankel v. Bally, Inc., 987 F.2d 86, 90-91 (2d Cir. 1993); Eyerman v. Mary Kay Cosmetics, Inc., 967 F.2d 213, 218-19 (6th Cir. 1992). Before Darden the federal courts formulated a “hybrid” test for claims under the antidiscrimination laws, and some courts purport to continue to use that test even after Darden. See, e.g., Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 980 (10th Cir. 2002); Wilde v. County of Kandiyohi, 15 F.3d 103, 105-06 (8th Cir. 1994). The antidiscrimination law decisions thus highlight the broad common ground covered by both the common-law test and economic-realities test in identifying not only right-to-
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control but also other indicia of entrepreneurial activity in determining whether or not to classify a service provider as an employee.

State courts also often apply a multi-factor analysis in difficult cases when determining employee status for purposes of employee protection laws, including the workers’ compensation statutes that were originally most influenced by a narrow, one-factor right-to-control test. For applications of broader tests, see, e.g., Ark. Transit Homes, Inc. v. Aetna Life and Cas., 341 Ark. 317, 321-322, 16 S.W.3d 545, 547-548 (2000); Re/Max of N.J. v. Wausau Ins. Co., 162 N.J. 282, 286, 744 A.2d 154, 157 (2000); Whittenberg v. Graves Oil and Butane Co., 113 N.M. 450, 456-457, 827 P.2d 838, 844-845 (Ct. App. 1992); S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations, 48 Cal.3d 341, 350-351, 769 P.2d 399 (1989); Anton v. Indus. Comm’n of Ariz., 141 Ariz. 566, 568-569, 688 P.2d 192, 194-195 (Ct. App. 1984); Woody v. Waibel, 276 Or. 189, 196-197, 554 P.2d 492, 496 (1976) (en banc). See also ARTHUR LARSON & LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 62 (3d ed. 2000) (“The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business or professional service.”); ARTHUR LARSON, THE LAW OF WORKMEN’S COMPENSATION § 43.10 (1976) (suggesting the courts focus on whether the worker operates “an independent business” “through which his own costs of industrial accidents can be channeled”).

Comment b. Courts have rarely, if ever, accepted an employer’s classification of its workers as controlling. See, e.g., Rutherford Food Corp. v. McComb, 331 U.S. 722, 728-729 (1947), also discussed above. The test for employee status is a functional one; it ordinarily does not turn on how the parties characterize their relationship. This is especially the case for protective employment statutes that generally bar waiver of statutory rights; employees do not lose the protection of such laws where their employer requires them to agree to independent contractor status. See also, e.g., Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 116-117 (2d Cir. 2000) (stating that while employee status for purpose of copyright law can be set by contract, contracts cannot waive protection under antidiscrimination laws); Imars v. Contractors Mfg. Servs., Inc., 165 F.3d 27 (6th Cir. 1998) (unpublished disposition) (decided that lower court improperly relied on contract stating that welder, who was not in business for himself, was an independent contractor); Estrada v. FedEx Ground Package Sys., Inc., 154 Cal.App.4th 1, 10-11, 64 Cal.Rptr.3d 327, 335-36 (2007) (determined that drivers were employees under California Labor Code and common law because of employer’s authority over their work, notwithstanding “Operating Agreement” that described them as independent contractors).

Illustration 1 is generally based on the facts in Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997). In Vizcaino, the court overturned the company’s decision to exclude from its benefit plans certain temporary workers labeled as “independent contractors.” Id. at 1015. In view of the Internal Revenue Service “the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent
contractor, or the like.” Treas. Reg. § 31.3121(d)-1(a)(3).

Comment c. Most unskilled workers, who usually are under the employer’s close control, are treated as employees, whether or not a multi-factor analysis is used. Thus, a farm-worker case like Sec’y of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987), on which Illustration 2 is based, can be decided without applying all of the factors contemplated by the multi-factor analysis often utilized for the FLSA or the Migrant and Seasonal Agricultural Worker Protection Act 29 U.S.C. § 1801 et seq. See also, e.g., Reyes v. Remington Hybrid Seed Co., Inc., 495 F.3d 403 (7th Cir. 2007) (company controlled migrant laborers’ work through rules and supervisors); Torres-Lopez v. May, 111 F.3d 633 (9th Cir. 1999); Antenor v. D & S Farms, 88 F.3d 925 (11th Cir. 1996); Cavazos v. Foster, 822 F.Supp. 438 (D. W.D. Mich. 1993). But cf. Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984) (cucumber pickers not employees where owner of fields “relinquished” control of harvest to workers). Cf. also Aimable v. Long & Scott Farms, 20 F.3d 434 (11th Cir. 1994); Howard v. Malcolm, 852 F.2d 101 (4th Cir. 1988) (both finding farmer was not a joint employer of farm workers whose work and compensation were controlled by farm labor contractor).

A potentially high level of compensation or payment by commission, rather than by wage or salary, does not preclude employee status where managers or supervisors control the details of work or otherwise preclude the service provider from operating an independent business. Thus, highly compensated salespersons, whether they work on the employer’s premises or outside those premises, may be treated as employees under various protective employment laws, regardless of the test formally applied. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (securities broker); EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988) (commission sales positions).

Supervisory control need not be continuously exercised if supervisors or managers have sufficient professional expertise to assert control when necessary to meet the employer’s objectives. Thus, attorneys may be employees of other attorneys or of their clients, as in Illustration 3, see, e.g., Madden v. Aldrich, 346 Ark. 405, 58 S.W.3d 342 (2001) (law firm employee); Crews v. Buckman Labs. Intern., Inc., 78 S.W.3d 852 (Tenn. 2002) (in-house attorney in a retaliatory-discharge case); Rand v. CF Indus., 797 F. Supp. 643 (D. N.D. Ill. 1992) (in-house attorney in an age-discrimination and Illinois contract-law case); and accountants may be employees of accounting firms or of their clients, see, e.g., Spicer Accounting Inc., v. U.S., 918 F.2d 90 (9th Cir. 1990) (accountant provided services as employee of taxpayer rather than as independent contractor); Smith Adcock & Co. v. Rosenbohm, 238 Ga.App. 281, 518 S.E.2d 708 (1999) (employee of accounting firm in a restrictive covenant case).

The skill or human capital that a professional brings to his or her work can be relevant to the question of control, especially where the professional decides where, when and for whom to perform services. Illustration 4 presents such a case. See, e.g., Cont’l Ins. Co. v. Biebel, 99 Wis.2d 804, 300 N.W.2d 83 (Ct. App. 1980) (unpublished disposition). A nonprofessional, but skilled manual worker may have similar independence, even where she works on the employer’s premises, if the employer does not provide similarly skilled supervision. See, e.g., Potter v. Mont. Dep’t of Labor and Indus.,
Illustration 5 demonstrates that an employer that may have sufficient expertise to control a skilled worker’s or professional’s services on its premises may agree with the service provider to not exercise that control. See, e.g., Harding v. Goodman, 13 Mass.L.Rptr. 287 (2001); McArthur v. Nat’l Emergency Servs., Inc., 1996 U.S. Dist. LEXIS 964 (D. W.D. Mich. 1996) (both liability cases with no right to control physician’s treatment). Thus, a contract between an employer and service providers may set the latter’s status as nonemployees by establishing a functionally independent economic relationship, but it cannot do so merely by characterizing the service providers as independent contractors.

Comment d. If the principal does not have a right to control all the physical details of work, there still may be in an employment relationship if the other factors indicate the service provider is not operating an independent business. Note, for instance, Judge Stahl’s analysis of the federal and Massachusetts test for employee status in Speen v. Crown Clothing Corp., 102 F.3d 625, 630 (1st Cir. 1996): “It is thus not so much the case that additional ‘subordinate’ factors might outweigh the existence of a right of control . . . as it is that the failure to demonstrate a ‘right of control’ in the narrowly-defined technical sense of that term serves as the gateway to a multifactored analysis.” Judge Stahl found the plaintiff-sales representative in that case not to be an employee for purposes of antidiscrimination statutes under a two-step analysis, first finding that the company did not have the power to control the details of his sales practices and next finding that other factors, including his discretion to sell other products, indicated that the representative was operating an independent business. Id. at 633-634.

Other courts have expressly recognized that a narrowly defined right-to-control inquiry is only part of an analysis of the more fundamental question of whether the service provider has entrepreneurial discretion to operate an independent business. For instance, in Corp. Express Delivery Sys. v. N.L.R.B., 292 F.3d 777, 780 (D.C. Cir. 2002), Chief Judge Ginsburg found the critical difference between employees and independent contractors to be not in “the degree of supervision under which each labors,” but rather in “the degree to which each functions as an entrepreneur—that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder.” See also N.L.R.B. v. Friendly Cab Co., Inc., 512 F.3d 1090, 1097-1099 (9th Cir. 2008) (“we place particular significance on Friendly’s requirement that its drivers may not engage in any entrepreneurial opportunities,” drivers cannot use cabs for outside business, and drivers lack “substantial investment in property and the ability to employ others”).

Unskilled workers who provide no additional input other than their own labor ordinarily will not be held to be providing services as part of an independent business regardless of an employer’s formal abdication of control over the physical details of their work-performance. This is illustrated by U.S. v. Silk, 331 U.S. 704 (1947), where the Supreme Court held, inter alia, that under the Social Security Act, 49 Stat. 636 & 639, unskilled unloaders of coal were employees of a coal company for
whom they worked despite not being directed by the company’s supervisors. The workers were paid based on the quantity of coal unloaded, but could enhance their compensation only by working longer and harder. See *Silk*, 331 U.S. at 716-718.

Similarly, working away from an employer’s premises does not afford unskilled workers without numerous assistants or significant capital the entrepreneurial discretion to operate an independent business. This is reflected in Illustration 6, which is a variation on the facts in NLRB v. *Hearst Publ’ns*, Inc., 322 U.S. 111 (1944), which considered the meaning of employee in the National Labor Relations Act of 1935 (N.L.R.A.), 49 Stat. 450.

Congress expressed displeasure with the Court’s opinions in both *Silk* and *Hearst* because these decisions were viewed as departing from the common-law test for distinguishing between employees and independent contractors. Congress amended both the Social Security Act and the N.L.R.A. to contain an express exclusion for independent contractors but without providing a definition of the term in either case. See 42 U.S.C. § 1301(a)(6) (excluding any individual having the “status of an independent contractor” from the definition of employee under the Social Security Act); 29 U.S.C. §152(3) (excluding “any individual having the status of an independent contractor” from the definition of employee in the N.L.R.A.); H.R. REP. No. 80-245, pt.1, at 18 (1947) (criticizing the *Hearst* court for not using common-law test). However, cases like *Silk* and *Hearst* could be decided in favor of employee status under a proper application of the common-law test. For somewhat variant post- *Hearst* treatment of newspaper deliverers by the N.L.R.B., see, e.g., *St. Joseph News-Press*, 345 N.L.R.B. 474 (2005); *A.S. Abell Co.*, 185 N.L.R.B. 144 (1970); *Citizen News Co.*, 97 N.L.R.B. 428 (1951).

Cases involving unskilled workers providing services on the employer’s business premises underscore that the employer effectively maintains control of the work even where by agreement there may be some minor relinquishment of control by the employer. Therefore, where an employer has given up control over low-skilled laborers, like farm workers, whom it could easily have supervised, there may still be an employment relationship if the laborers do not have sufficient resources to operate as independent business persons. See, e.g., *S.G. Borello & Sons, Inc.*, v. Dep’t of Indus. Relations, 48 Cal.3d 341, 256 Cal.Rptr. 543 (1989) (decision under California workers’ compensation law finding farm workers to be employees of farm owner despite owner’s relinquishment to workers of control of harvest).

Where workers provide services, unlike harvesting for farmers, that are independent from the business of the party they serve, however, courts may find even unskilled workers to be independent contractors. This may be true for those providing janitorial services, for instance, if their work is not controlled by the served business and if they have independent entrepreneurial discretion to hire and assign assistants, set their hours, and contribute some capital. See, e.g., *Cobb v. Sun Papers, Inc.*, 673 F.2d 337 (11th Cir. 1982); *Clesi v. Zinc Corp. of Am.*, 87 Fair Empl.Prac.Cas. (BNA) 215 (N.D.N.Y. 2001) (not reported). It would not likely be true for a janitor working for an employer whose business is property management. See, e.g., *Williams v. Atrium Vill.*, 2004 U.S. Dist. LEXIS 4101 (N.D. Ill.)
Illustration 7 highlights that individuals who bring substantial skill to their work are still employees, despite the absence of day-to-day supervision, when an employer controls their compensation, time and costs. See, e.g., Crooks v. Keene, 10 Mass. L. Rep. 56, 1999 Mass. Super. LEXIS 176 (1999) (senior pathologist on salary who was assigned work and who agreed not to undertake additional professional obligations could be employee for purpose of vicarious liability of laboratory); Baker v. Flint Eng’g & Constr. Co., 137 F.3d 1436, 1444 (10th Cir. 1998) (skilled rig welders were employees under the FLSA where employer’s control of the timing and compensation for their work did not “allow them to make any type of substantial profit above wages they are paid”). For other cases finding that physicians can be employees despite the employer not having the right to control the details of patient care, see, e.g., Cooper v. Binion, 266 Ga.App. 709, 598 S.E.2d 6 (2004); Clayton v. Harkey, 826 So.2d 1283 (Miss. 2002); Knorp v. Albert, 29 Kan.App.2d 509, 28 P.3d 1024 (2001); Rivera v. Hosp. Universitario, 762 F.Supp. 15 (D. P.R. 1991); Budzichowski v. Bell Tel. Co. of Pa., 503 Pa. 160, 469 A.2d 111 (1983); Impastato v. De Girolamo, 117 Misc.2d 786, 459 N.Y.S.2d 512 (Sup. Ct. Kings County 1983).

Where employers preclude skilled workers’ ability to act as independent business persons, courts find the skilled workers to be employees, regardless of whether the employers have the right or ability to control the details of the work. See, e.g., RLI Ins. Co. v. Agency of Transp., 171 Vt. 553, 762 A.2d 475 (2000) (flight instructor was employee of owner of flight school although owner was not licensed to fly and could not control instructor’s flights); In re Via Otto Ristorante, Inc., 158 A.D.2d 825, 551 N.Y.S.2d 650 (App. Div. 1990) (for purposes of unemployment insurance, musicians who entertained restaurant’s patrons were employees of restaurant because it set their pay rates and work hours); Palumbo v. Unemployment Comp. Bd. of Review, 148 Pa.Super. 289, 25 A.2d 80 (1942) (musicians were employees of restaurant that set their pay through union contract); Guepet v. Int’l TAO Sys., Inc., 110 Misc.2d 940, 443 N.Y.S.2d 321 (Sup. Ct. Nassau County 1981) (computer programmer held an employee under New York wage payment law); Anderson v. U. S., 744 F.Supp. 641 (E.D. Pa. 1990) (computer programmer held an employee under Pennsylvania workers’ compensation law where employer controlled his hours and place of work and pay); In re Claim of Curto, 109 A.D.2d 938, 486 N.Y.S.2d 425 (App. Div. 3d Dep’t 1985) (college soccer coach found to be an employee for unemployment insurance purpose despite his substantial control of his own work); St. John’s Lutheran Church v. State Comp. Ins. Fund, 252 Mont. 516, 830 P.2d 1271 (1992) (pastor was an employee for purposes of workers’ compensation). In all of these cases the employees were not operating an independent business because the employer controlled the extent to which the employees could make entrepreneurial-type decisions to enhance net remuneration.

Illustrations 8 and 9 present two variations involving insurance agents. Illustration 8 is close to the facts in Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992), where the Supreme Court remanded for further consideration under the common-law test to determine whether Darden was an employee under ERISA. As in the illustration, Darden was allowed to sell only Nationwide insurance policies. Id. at 318. Illustration 8 also is close to the facts of N.L.R.B. v. United Ins. Co. of Am., 390
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U.S. 254 (1968), where the Court upheld a determination by the Labor Board that debit agents were employees under the N.L.R.A. For examples of cases (like Illustration 9) involving insurance agents who have been found to be independent contractors, see, e.g., Weary v. Cochran, 377 F.3d 522 (6th Cir. 2004) (agent who could sell other insurance products, set his own hours, and paid for his own staff, office space and other expenses not an employee for purposes of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq.); Aberman v. J. Abouchar & Sons, Inc., 160 F.3d 1148 (7th Cir. 1998) (salesman who made calls for other companies, assumed most of his expenses, and managed his own time and manner of work not an employee under the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et seq.). See also Schwieger v. Farm Bureau Ins. Co. of Neb., 207 F.3d 480 (8th Cir. 2000) (close case finding independent contractor status under Title VII of the Civil Rights Act of 1964 through use of unstructured multi-factor analysis); Speen v. Crown Clothing Corp., 102 F.3d 625 (1st Cir. 1996) (salesman who controlled his own time, was responsible for his own costs, and sold products, was not an employee under the ADEA or ERISA); Schaff v. Ray’s Land & Sea Food Co., Inc., 334 Or. 94, 45 P.3d 936 (2002) (wholesale fish dealer not an employee of fish broker, for purposes of vicarious liability, as broker did not control dealer’s prices, expenses, or customers); Desimone v. Allstate Ins. Co., 2000 U.S. Dist. LEXIS 18097 (N.D. Cal. 2000) (insurance agents who controlled office expenses and hired and set compensation for assistants were independent contractors).

As represented by Illustration 10, courts consistently have treated franchisees as independent business persons rather than employees because franchisees generally retain control over many of the details of their operations, and make decisions about operating hours and hiring of employees that determine profits. See e.g., Adcock v. Chrysler Corp., 166 F.3d 1290 (9th Cir. 1999) (applicant for an automobile dealership was an independent contractor and not protected by Title VII); Mangram v. General Motors Corp., 108 F.3d 61 (4th Cir. 1997) (participant in the dealership development program was not an employee and not protected by ADEA); Hatcher v. Augustus, 956 F.Supp. 387 (E.D.N.Y. 1997) (convenience store franchisee was not an employee for the purposes of Title VII); Sentilles v. Kwik-Kopy Corp., 652 So.2d 79 (Ct. App. La. 1995) (print shop franchisee was not an employee and therefore could not avoid noncompetition clause in his contract). As represented by Illustration 11, however, a business’s delegation of operational power to a store manager does not make that manager a franchisee if she is paid by a salary and cannot improve her economic returns by making entrepreneurial decisions.

Illustrations 12 and 13 are based on two leading Labor Board decisions distinguishing between employees and independent contractors under the N.L.R.A. Compare Roadway Package Sys., Inc. 326 N.L.R.B. 842 (1998) (finding employee status), with Dial-A-Mattress Operating Corp., 326 N.L.R.B. 884 (1998) (finding independent contractor status). To decide cases involving owner-operators of delivery trucks the Board focuses on whether they have a “significant entrepreneurial opportunity.” See St. Joseph News-Press, 345 N.L.R.B. 474, 479 (2005) (newspaper deliverers were like drivers in Dial-A-Mattress who could “impact their own income, thereby demonstrating the entrepreneurial nature of their employment”); Corp. Express Delivery Sys., 332 N.L.R.B. 1522, 1522 (owner-operator drivers are employees as they have no “significant opportunity for entrepreneurial gain or loss”).
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(2000). This focus on the opportunity for entrepreneurial gain or loss has been approved in the courts. See, e.g., N.L.R.B. v. Friendly Cab. Co., Inc., 512 F.3d 1090 (9th Cir. 2008); Corp. Express Delivery Sys. v. N.L.R.B., 292 F.3d 777, 780 (D.C. Cir. 2002). See also Estrada v. FedEx Ground Package Sys., Inc., 154 Cal.App.4th 1, 64, 12 Cal.Rptr.3d 327, 337 (2007) (drivers were employees because they were “not engaged in a separate profession or business” and were not given a “true entrepreneurial opportunity”).

Comments e and f. These principles are in accord with § 221 of the Restatement Second of Agency (1958). They also are incorporated in §§ 1.01 and 7.07 of the Restatement Third of Agency (2006). The latter section defines employees as being within the class of agents, which the former Section defines as requiring the principal’s “assent” “that the agent shall act on the principal’s behalf.” Illustration 16 is based on N.L.R.B. v. Town & Country Elec., Inc., 516 U.S. 85 (1995), which is further elaborated in the notes to Comment b on § 1.04.

Comment h. Although the N.L.R.A.’s definition of employee, see 29 U.S.C. § 152(3), does not refer to managerial or confidential employees, beyond its exclusion of “any individual employed as a supervisor,” the Supreme Court has held that those who formulate and effectuate management policies, see N.L.R.B. v. Bell Aerospace Co., Div. of Textron Inc., 416 U.S. 267 (1974), and those who assist and act in a confidential capacity to persons who exercise managerial function in the field of labor relations, see N.L.R.B. v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981), are excluded from the protections afforded employees by the Act. For the Social Security Act classifications, see 26 U.S.C. § 3121(d).

§ 1.02 Volunteers Are Not Employees for Purposes of Laws Governing Employment Relationship

Unless otherwise provided by law, an individual is a volunteer and not an employee if the individual renders uncoerced services without being offered a material inducement.

Comment:

a. Relevance of agency principles. This section delineates the difference between employees and volunteers. Individuals who render services without coercion and without material inducement have not been extended the same kind of commitment by recipients of those services as those who
work for material gain. Volunteers also have not made the same kind of commitments to an employer as do employees. Volunteers therefore are not treated as employees for purposes of laws governing protections, benefits, and obligations in the employment relationship. Volunteers, however, may have certain protections from or obligations toward their principals that do not depend on employee status.

Nonprofit enterprises are generally subject to the same employment-law obligations toward employees as are for-profit enterprises. Thus, the distinction between volunteers and employees applies whether the principal operates as a for-profit, nonprofit, or government enterprise.

Laws providing protections or benefits to or imposing obligations on employees are not presumed to cover volunteers even though employers as principals may be vicariously liable for the torts of such individuals. The rule for vicarious liability is set forth in § 7.07(3)(b) of the Restatement Third of Agency (2006), which provides that “the fact that work is performed gratuitously does not relieve a principal of liability.” The suitability of vicarious liability for torts committed by volunteers is not, however, determinative of their employee status.

Illustration:

1. A, a high school student, tells the principal of his high school that he would be happy to serve as a host of students from a Canadian high school who are visiting as part of an exchange program sponsored by A’s school. As part of his duties as a host, A drives the Canadian students around the town in which the high school is located. During one drive A negligently speeds through a red light, hits another car, and injures that car’s driver, D.

Although the school may be vicariously liable to D for the negligence of A, A is not an
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employee of the school for purposes of employment laws.

b. Material inducement. An individual may be induced or motivated to work by the promise of any type of material gain, whether in the form of monetary compensation, some special benefit such as insurance, or an in-kind payment sufficient to constitute consideration for the individual’s service. Consideration may include payment to a third-party beneficiary of the individual providing service.

So long as the employer makes some kind of economic commitment to the employee, the employee’s compensation need not come directly from the employer; it may come from a third party, such as a tipping customer or another business, whose economic relationship with the employer is advanced by the employee’s work.

A worker who receives no compensation beyond reimbursement of expenses incurred in providing the service, however, is not being offered a material inducement because termination of the service obviates the need for reimbursement. Similarly, a worker provided insurance protection against the special hazards of the work also is not offered a material inducement because the insurance provides no more than potential reimbursement for the risks in providing the service.

Illustrations:

2. A is a “volunteer” firefighter. A’s town does not pay A a salary, but in compensation for her availability for firefighting services it makes substantial contributions to A’s purchase of life insurance, disability insurance, and health insurance policies, all of which cover more than injuries sustained while providing such services. A is an employee of
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the town, even though the compensation for her services is solely in the form of valuable benefits.

3. A, a young attorney and full-time employee of a private law firm, also participates in and organizes educational programs for the local bar association, P. While engaged in activities on P’s behalf, A is provided with the use of an office, clerical support, publicity, and reimbursement of her out-of-pocket expenses. A also claims tax deductions for expenses that P does not reimburse. P does not provide A with any additional benefits or monetary compensation. A is not an employee of P. A’s involvement with the bar association was not induced by any promise of material gain from P.

c. Promise of future material gain. Volunteer activities can sometimes result in later opportunities for paid employment. In some cases, a volunteer may hope that performing work will increase the likelihood of such opportunities materializing. Unilateral expectations of this type do not convert volunteer work into employee work. An employer’s promise of future compensated work to induce an individual to provide nonpaid service, however, is an offer of material gain that is sufficient to establish an employment relationship.

Illustrations:

4. Same facts as Illustration 3, except that A is active in the bar association, P, because she expects to meet and impress attorneys who will consider her favorably when hiring senior associates or junior partners for their firms. A is not an employee of P. Her
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unilateral expectation of future compensated work does not confer employment status.

5. Town P uses six officially “commissioned” police officers. Three of these officers, A, B, and C, are paid an annual salary and work regular hours each week. X, Y, and Z work only occasionally when P needs extra officers. They are not paid a salary and are denominated as “nonpaid regulars.” Based on the experience of past “nonpaid regulars,” X, Y, and Z all hope that their work as commissioned officers with P will lead to a paid position, either with P or in security with a private employer. P, however, makes no promises to X, Y, and Z. Should there be any openings for paid “regulars,” X, Y, and Z will be considered on the same terms as all applicants with relevant service.

X, Y, and Z are not employees of P. The fact that they have a reasonable belief that their non-paid work for P will lead to paid employment in the future does not constitute a promise by P of future employment or material gain.

6. Same facts as Illustration 5, except that X has an express agreement with P that if she continues to be available to do some nonpaid police work, she will be offered the next paid position as a road-construction flag holder in the county. X is an employee of P. P’s promise of a paid position in the future is a material inducement for X’s current nonpaid service.

d. Interns and student assistants. Interns who work without compensation or a clear promise of future employment normally are not employees for purposes of employment law. Similarly, students who render uncompensated services to satisfy education or training requirements for
graduation or for admission into a particular profession or craft generally are not treated as employees. These are important corollaries of the principle that an individual’s unilateral expectation of future opportunities is not sufficient to establish employee status. An individual remains a volunteer even if she renders uncompensated service as part of her training or education with the hope of obtaining a job with a particular employer rather than to develop skills that would be useful to many employers. Where an educational institution compensates student assistants for work that benefits the institution, however, such compensation encourages the students to work for more than educational benefits and thereby establishes an employment as well as an educational relationship. Furthermore, the noncoverage of interns and other student volunteers as employees does not preclude their being covered by laws other than those governing the employment relationship.

Illustrations:

7. A is a graduate student in biochemistry at university P. In order to complete the degree requirements, A must work in a laboratory under P’s auspices, either for pay or as a volunteer. A works in the laboratory of a professor, for which A is paid a yearly stipend and given full tuition remission. The professor has secured grants to support the research that A is assisting. A is an employee of P. P is providing A with significant benefits both in order to further A’s education and also to obtain A’s services on P’s funded research.

8. A is a social-work student at a university. In order to obtain a degree, A must complete an internship as a volunteer at a university-approved social-service agency. A elects to work at P, a hospital for the mentally disabled. P does not provide pay or other benefits to
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A. A is not an employee of P.

e. Volunteers perform uncoerced services. The presumed exclusion of volunteers from coverage under employment laws applies only to true volunteers and not to those who are compelled to work without compensation by law, physical coercion, or pressure from their employer. Coerced individuals are employees if their work serves the interests of an employer who consents to receive their services. Prisoners who are forced to do work in a prison for purposes of punishment or rehabilitation are not treated as employees of their prison, however, as the relationship of a prisoner with a prison is fundamentally different from that of an employment relationship. It may be that the application of some employment laws, for instance, could compromise the discipline central to the prison relationship.

Illustrations:

9. Because of a conviction for driving while intoxicated, A is required by a court order to work for a local school system. A elects to work as a driver at a school’s adult-education program, P, for which A does not receive compensation. P’s director has power to direct the work and to discharge A if the work is not satisfactory. Inasmuch as A is required to work for the school system in part to serve the system’s interests, A is an employee of P.

10. The state requires recipients of public assistance, such as A, to work as a condition of receiving benefits. A works in a janitorial position with the state housing authority, P. A is an employee of P.
f. Employer pressure. An employee who is pressured by his or her employer to provide services without compensation is not acting as a volunteer when performing these services. Such services are treated under employment laws as the services of an employee. This is true regardless of whether the services benefit the employer directly or indirectly by enhancing the employer’s public image.

Illustration:

11. P, a bank, periodically asks its tellers to come in voluntarily for a few hours on Saturday, when their branch is closed, to clean out automatic teller machines and to perform other miscellaneous tasks. The tellers are not required to respond to any particular request to “volunteer,” but their annual evaluations for pay increases and promotions include consideration of their “willingness to give extra effort” for the bank. The tellers render services to the bank on Saturday in their role as bank employees rather than as volunteers.

g. Coverage may be modified by law. Like the general definition of employee provided by § 1.01, the rule embodied in § 1.02 may be altered by legislation or other law.

REPORTERS’ NOTES

Comment a. Section 7.07(3)(b) of the Restatement Third of Agency is in accord with § 225 of the Restatement Second of Agency (1958), which states that “[o]ne who volunteers services without an agreement for or expectation of reward may be a servant of the one accepting such services.” Illustration 1 is based on Swearinger v. Fall River Joint Unified Sch. Dist., 212 Cal.Rptr. 400 (Ct. App.1985). State courts generally have held that a principal is liable for the torts of an agent whose
services the principal has power to control, even where such services are rendered gratuitously. See, e.g., McCauley v. Ray, 80 N.M. 171, 453 P.2d 192 (1968); Flores v. Brown, 39 Cal.2d 622, 628, 248 P.2d 922 (1952) (stating that the control test for vicarious liability is the same for those rendering "gratuitous services" as for those "performing services for compensation").


Individuals who receive “in-kind” benefits, such as food, clothing, and shelter, for their services are also employees. See, for example, the Supreme Court’s decision in Alamo Found. v. Sec’y of Labor, 471 U.S. 290 (1985), regarding “associates” who were paid no cash benefits for their service to a religious foundation. See also, e.g., Hallissey v. Am. Online, Inc, 2006 U.S. Dist. LEXIS 12964 (S.D.N.Y. 2006) (court referred to such benefits as free AOL access, discounts at AOL store, free software, and expanded space for web page).

Illustration 3 is based on York v. Ass’n of the Bar of the City of N. Y., 286 F.3d 122 (2d Cir. 2002), where the court held that York was not an employee under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000e et seq. Similarly, an individual remains a volunteer even though the individual receives or is promised insurance or other benefits to compensate for job-related harms. While such assistance, like reimbursement of expenses, may make voluntary service more attractive to the individual, the value of such assistance disappears once the individual stops his volunteer activity. See, e.g. Tawes v. Frankford Volunteer Fire Co., 16 A.D. Cases 660 (D. Del. 2005) (line-of-duty benefits such as life and health insurance for injuries sustained in duty were not enough to render volunteer an “employee”); WBAI Pacifica Found., 328 NLRB 1273 (1999) (payment of expenses and travel reimbursements do not establish employment relationship).

Whether payments labeled as reimbursements may actually serve as a material inducement to work is a question of fact that turns on both the nature of the payment and the social and economic status of the recipients. For instance, in Seattle Opera v. N.L.R.B., 292 F.3d 757 (D.C. Cir. 2002), the court upheld a finding by the Labor Board that “auxiliary choristers,” who received a flat fee as a
“transportation expense” reimbursement regardless of their actual travel costs, were employees under the NLRA. A worker’s negotiation of a special benefit may be relevant to whether a particular material enrichment is sufficient to negate volunteer status. See, e.g., Aspen Highlands Skiing Corp. v. Apostolou, 854 P.2d 1357 (Colo. Ct. App. 1992) (claimant was an employee under Colorado workers’ compensation law because he agreed to serve in ski patrol only after negotiating special benefit of free ski passes).

Comment c. Illustration 4, like Illustration 3, is based on York v. Ass’n of the Bar of the City of N. Y., 286 F.3d 122 (2d Cir. 2002). York claimed that she benefited from her service through the “networking opportunities” that it afforded, presumably because those opportunities might lead to more lucrative alternative employment. Id. at 126. The prospect of such opportunities was held not sufficient to establish employee status. Id.

Illustrations 5 and 6 are based on a series of cases that consider the status of non-paid police officers under the Fair Labor Standards Act (FLSA). See Cleveland v. City of Elmendorf, 388 F.3d 522 (5th Cir. 2004) (officers were judged to be volunteers); Todaro v. Twp. of Union, 40 F.Supp.2d 226 (D. N.J. 1999) (officers were volunteers because they did not reasonably expect to be compensated for their services); Rodriguez v. Twp. of Holiday Lakes, 866 F.Supp.1012 (S.D. Tex. 1994) (chief was not a volunteer for the purposes of FLSA). In Cleveland the court found that being called a “commissioned” police officer was not alone a sufficiently “tangible” benefit to establish employee status. See 388 F.3d at 529. The court noted that “in Rodriguez, the nonpaid officer concurrently received other paid work as a direct result of an explicit agreement with the police force, whereas in Todaro the nonpaid officers continued working for the police force with only a hope that their work might result in future paid positions.” Id. at 528. The distinction between speculative future opportunities and established current opportunities is consistent with the treatment as employees of service providers who are compensated only by customer tips. See also Hallissey v. Am. Online, Inc., 2006 U.S. Dist. LEXIS 12964 (S.D.N.Y. 2006) (finding employee status in part because of evidence that paid job openings were only posted for “volunteers,” and that AOL hired their “paid” staff almost exclusively from the current volunteers).

Illustration 7 is based on Cuddeback v. Fla. Bd. of Educ., 381 F.3d 1230 (11th Cir. 2004), a decision under Title VII of the 1964 Civil Rights Act. Illustration 8 is based on O’Connor v. Davis, 126 F.3d 112 (2d Cir. 1997), where the court found the student not to be an employee under Title VII because the student was not paid by the institution for which she performed services, but only by her college to support her education under its work-study program. See also, e.g., Jacob-Mua v. Veneman, 289 F.3d 517 (8th Cir. 2002) (graduate student not an employee because not compensated); Ivan v. Kent State Univ., 863 F.Supp. 581 (N.D. Ohio 1994) (graduate-student researcher who was paid stipend and granted retirement benefits was an employee).

The courts have not found students who receive scholarship grants or loans or other aid covering only the costs of their education to be employees even if the aid is conditioned on the students providing some service to the university, such as participation on money-generating athletic
teams, that could not be provided by nonstudents. This has been true even in especially appealing cases where workers’ compensation benefits were denied to students on athletic scholarships who had been injured while playing a money-generating sport. See, e.g., Waldrep v. Tex. Employers Ins. Ass’n, 21 S.W.3d 692 (Tex. Ct. App. 2000); Rensing v. Ind. State Univ., 444 N.E.2d 1170 (Ind. 1983). But see Univ. of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953) (en banc) (scholarship student injured during football practice could receive workers’ compensation).

Many students do not meet the initial conditions for being employees because their work serves only their own interest in learning and skill development rather than the interest of the institution providing the instruction or training. This can be true even for a for-profit enterprise providing practical training as a means of developing a labor pool for future recruitment. See the Supreme Court’s interpretation of the Fair Labor Standards Act in Walling v. Portland Terminal Co., 330 U.S. 148 (1947), where the railroad’s training brakemen were found to receive “no immediate advantage” from any work done by the trainees. Id. at 153.

The National Labor Relations Board has vacillated on the question of whether graduate students who are both paid a stipend and required to perform some teaching or research service to their university should be treated as employees under the NLRA. Compare Brown Univ., 342 N.L.R.B. 483 (2004) (graduate student assistants have a predominantly academic, rather than economic, relationship with their school, and therefore are not employees under the NLRA), with New York Univ., 332 N.L.R.B. 1205 (2000) (graduate students paid to be teaching assistants are employees; where teaching was not a prerequisite to a degree in most departments, assistants must have been motivated by monetary enrichment). Also, compare Boston Medical Center Corp., 330 N.L.R.B. 152 (1999) (holding that medical residents and interns, while students, are also statutory employees because they provide compensated services for the hospital), with Cedars-Sinai Medical Center, 223 N.L.R.B. 251 (1976) (interns and residents are “primarily students” and therefore not employees). See also infra Comment e.

Comment e. Illustration 9 is based on Doe v. Boys Clubs of Greater Dallas Inc., 868 S.W.2d 942 (Tex. Ct. App.1994) (finding that a club had a duty to control the volunteer’s actions, even if he volunteered under compulsion of a court order) and Arriaga v. County of Alameda, 892 P.2d 150 (Cal. 1995) (finding worker performing community service because of a speeding ticket was an employee for purposes of state workers’ compensation law). See also § 224 of the Restatement Second of Agency (1958), which states that “[o]ne compelled by law or duress to render services to another has power to subject the other to liability . . . .” An individual compelled to render services without receiving wages or other remuneration would not be eligible to receive unemployment compensation, however, because there would be no basis on which to calculate his or her benefits. See, e.g., Oregon Revised Statutes O.R.S. § 657.030(1) (requiring “remuneration or . . . contract of hire” to be eligible for benefits); Massachusetts General Laws M.G.L.A. 151A § 24(a) (requiring “wages” to be eligible for benefits).

Several courts have held that indigents who are required to work as a condition of receiving

The courts have been less clear about the treatment of welfare recipients as employees under the FLSA. Compare Johns v. Stewart, 57 F.3d 1544 (10th Cir. 1995) (workfare benefit recipients were not employees for the purposes of the FLSA), with Stone v. McGowan, 308 F.Supp.2d 79 (N.D.N.Y. 2004) (recipient was an employee and covered by FLSA). The Department of Labor’s FLSA regulations provide that “[i]ndividuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.” 29 C.F.R. § 553.101(c).

Prisoners do not become employees when they are forced to work in or for a prison as part of their punishment. See e.g., Bennett v. Frank, 395 F.3d 409, 409 (7th Cir. 2005) (since the FLSA is not intended for the protection of prisoners, “prisoners [who are required to perform services] are not employees of their prison, whether it is a public or a private one”); see also Sanders v. Hayden, 544 F.3d 812 (7th Cir. 2008) (same exception applies for civilly committed). Presumably extending employment laws to work done under a prison’s control pursuant to a penal sentence could threaten prison discipline and conflict with the imposition of punishment. Where the work is not part of a penal sentence and is done to benefit another entity that meets the definition of an employer, however, prisoners may be employees. For instance, some courts have held that the FLSA treats prisoners as employees of private companies for which they work under a work-release or supplemental work program. See, e.g., Watson v. Graves, 909 F.2d 1549 (5th Cir. 1990); Carter v. Duchess Cmty. Coll., 735 F.2d 8 (2d Cir. 1984). See also Baker v. McNeil Island Corr. Ctr., 859 F.2d 124 (9th Cir. 1988) (prisoner rejected for a library aide position in public library’s prison annex may be able to prove a claim of employment discrimination under Title VII, 42 U.S.C. § 2000e-2). For an exploration of the special treatment of prisoners under employment laws, see Noah D. Zatz, Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships, 61 Vand. L. Rev. 857 (2008).

Comment f. The courts have not permitted employers to circumvent the minimum wage and overtime regulations of the FLSA by using the threat of a loss of a benefit to pressure individuals to provide volunteer service. Compare Genarie v. PRD Mgmt., Inc., 2006 WL 436733 (D. N.J.) (the court rejected an apartment complex’s claim of volunteer status for the roommate of a live-in maintenance worker pressured by the complex to fill in for her partner by the threat of losing their rent-free apartment), with Roman v. Maietta Constr., Inc., 147 F.3d 71 (1st Cir. 1998) (the court accepted the employer’s claim that his employee-welder served as a volunteer crew chief on racing
cars owned by the employer’s son, in part because the welder had often before worked as a crew chief for his enjoyment without pay, including for the employer’s son before being employed by the father as a welder).

The FLSA excludes coverage of true volunteers for public employers. The statute also provides that public employers should not be allowed to pressure employees to volunteer additional services. Thus, “the term ‘employee’ does not include any individual who volunteers to perform services for a public agency . . . if— (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (ii) such services are not the same type of service which the individual is employed for such public agency.” 29 U.S.C. § 203(e)(4)(A). The Department of Labor has defined “volunteer” under this section to mean: “An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours.” 29 C.F.R. § 553.101(a). This regulation also states that “[a]n individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.” Id. at § 553.101(d). The statutory provision and regulation both are designed to discourage a public employer from pressuring an employee to volunteer extra services in order to keep his job. See Krause v. Cherry Hill Fire Dist., 969 F. Supp. 270, 278 (D. N.J. 1997) (holding public employer could not ask compensated fire fighters to offer volunteer services).

Comment g. Sometimes the statute provides some guidance as to whether volunteers may be treated as employees. The FLSA broadly defines the term “employ” to include “to suffer or permit to work.” 29 U.S.C. § 203(g). The Supreme Court, however, has held that this definition was “not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another.” Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947). See also Alamo Found. v. Sec’y of Labor, 471 U.S. 290, 303 (1985) (stating that FLSA regulations do not cover the”[o]rdinary volunteerism” of those who do not expect to receive any immediate benefits for their work).

State workers’ compensation laws’ treatment of volunteers and those coerced to work varies. A number of states, for instance, provide some workers’ compensation benefits, at least upon release, to prisoners injured in the course of doing assigned work while incarcerated. See, e.g., Wisconsin Statutes, W.S.A. § 303.21; North Carolina Workers’ Compensation Act, N.C.G.S.A. § 97-13 (c); Iowa Code, I.C.A. § 85.62. Some state legislatures have expressly addressed the question of whether college students receiving athletic scholarships should be eligible for workers’ compensation. See, e.g., Cal. Labor Code § 3352(k) (2005); Fla. Stat. § 440.02(15)(d)11 (2006) (both denying coverage). State workers’ compensation statutes include a range of other special provisions, including or excluding from coverage workers who might be considered volunteers. Kentucky, for example, exempts from coverage individuals providing services for a religious or charitable organization in return for aid or sustenance only, KRS § 342.650(3), while Indiana allows foster grandparents who
volunteer at state-owned psychiatric statutes to collect medical expenses under its workers’ compensations system, IC 22-3-2-2.3 (applied in Cmty. Action Program of Evansville v. Veeck, 756 N.E.2d 1079 (Ind. Ct. App. 2001)).


§ 1.03 Controlling Owners Are Not Employees for Purposes of Laws Governing Employment Relationship

Unless otherwise provided by law, an individual is not an employee of an enterprise if the individual through an ownership interest controls all or a part of the enterprise.

Comment:

a. Overview: An individual who renders services to an enterprise that the individual controls through ownership is not as a general matter treated as an employee of that enterprise for purposes of laws providing protections or benefits to or imposing obligations on employees. Two elements are generally required for controlling owner status: (1) an individual must control the significant economic and operational decisions of all or part of an enterprise; and (2) such control must be based on a significant ownership interest in the enterprise. Partial ownership alone is not sufficient to preclude employee status; rather such ownership must afford control over remuneration and significant organizational decisions.

An individual who owns an enterprise in whole controls his or her own remuneration and activities on behalf of the enterprise and is thus in a fundamentally different economic relationship
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with the enterprise than is an employee. That different economic relationship allows the controlling owner, subject to corporate formalities, to serve personal economic interests as if he or she were an independent entrepreneur. Similarly, an individual who through ownership of a part of an enterprise exercises control approximating that of a sole owner over his or her own remuneration and activities on behalf of the enterprise does not have an employee’s economic relationship with the enterprise.

Section 1.03 states the default rule that applies where the law is silent or ambiguous on the coverage of controlling owners. Some laws treat controlling owners as employees in order to further specific statutory goals, such as facilitating the collection and calculation of taxes or encouraging owners to make employee benefits broadly available to their workforce. (See Comment c.)

b. Corporations, professional corporations, and professional partnerships. As a general matter, in the case of a publicly traded corporation with a board of directors, the officers of the corporation, including the chief executive and operating officers, are employees under laws governing the employment relationship. A chief executive who owns all or a controlling block of voting shares in a corporation, however, is not an employee for purposes of these laws. In professional corporations, the professionals are controlling owners and not employees if they share ownership under terms providing that each in effect has control approximating that of a sole owner over that professional’s remuneration and activities on the corporation’s behalf.

The same standard is used to determine, for purposes of laws governing the employment relationship, whether an individual who provides services to an enterprise organized as a partnership is an employee as is used for an individual who renders services to an enterprise organized in corporate form. A professional partnership, like a professional corporation, may be organized under
terms providing that each partner has in effect control approximating that of a sole proprietor over that
professional’s remuneration and activities within the partnership. Partners who retain such control are
continuing to operate with the same kind of independence as do controlling owners of corporations.

Thus, professional members of a professional corporation are employees, despite their
ownership shares, if they do not exercise ownership control over their professional activities and
compensation. Similarly, professionals with the status of partners in a professional association
organized as a partnership are employees if they do not exercise ownership control over their
professional activities and compensation.

Illustrations:

1. A, B, C, and D, all licensed radiologists, form a professional corporation, P, under
the governing laws of the state in which they practice. P rents a building to house the offices
and examination rooms of the doctors. P also hires a business manager, nurses, nurses’ aides,
receptionists, and a clerical worker. A, B, C, and D are the only members of the board of
directors and the only shareholders of P. They agree to share in its profits based on the level of
fees garnered from the services they render to patients. The board discusses and jointly sets
some practice protocols, but each physician is responsible for her own patients, sets her own
fees, and does not have work reviewed by any of the other doctors unless she requests a
second opinion. The office manager has no power to control the professional activity of the
doctors.

A, B, C, and D are not employees of P for purposes of employment law. Although they
may be treated as employees for payroll purposes, they are co-owners, each with a substantial share of ownership and, through that ownership interest, control over the enterprise. In many respects, they retain the kind of control over their professional activities and opportunities for entrepreneurial activity that would exist were they formally independent businesses simply sharing office space and staff assistance.

2. Same facts as Illustration 1 except that additional shares of P are authorized and issued to another radiologist, E, fresh from a residency at a local hospital. E has only one-half as many shares as each of the other four physicians and is told that, for at least the first three years of his association with P, he will be assigned cases at set fees and his work will be reviewed regularly by one of the other physicians.

E is an employee of P. Although E shares in the ownership of the enterprise, his distinctly minor share and lack of control over his work and compensation indicate that he does not exercise ownership control over even part of the enterprise.

3. A, B, and C are partners in an accounting firm, P, which has more than 100 other partners. Each has responsibility for work for certain clients of the firm. The firm is managed by a six-member management committee on which A sits, but B and C do not. The committee is elected annually by all of the partners. Some partners, based on their prior level of compensation, have up to five times as many votes as other partners. The committee has the power to hire and terminate all personnel, including other partners, without a vote of the partnership. The committee also determines the compensation of all personnel, including the other partners, and maintains procedures for the review of all work done in the firm.
A, B, and C are all employees of P. Although they all have a level of control over their work, this control is not based on their ownership interest in the firm. A, unlike B and C, participates in the management of the firm, but this participation is based on an assignment of duties by the other partners, not on the level of A’s ownership.

4. A, B, and C form a partnership to practice law. They hire two associates, three secretaries, and a receptionist. Ten years later their partnership has grown to include D, E, and F as partners. The six partners employ eight associates, an office manager, several secretaries, and a receptionist. The six partners, each of whom controls a share of the partnership, meet periodically to set managerial policies which determine how the partners share the time of the associates and secretaries. No partner is required to work under the supervision of any other partner, but often two or more partners work together on a matter involving the same client. Each partner’s compensation is based on the percentage of the fees paid to the firm that derive from the cases that partner brings to the firm and manages.

A, B, C, D, E, and F are not employees of the partnership. Each partner is a co-owner and each retains the type of control over his or her own work that he or she would have as the owner of an independent business sharing common resources with others.

c. Statutory variation. The principles expressed in § 1.03 apply only to laws governing the employment relationship. They do not necessarily apply to tax law or other areas of law not principally concerned with the employment relationship. Further, like the basic definition of employee in § 1.01, these principles provide a general background rule that is subject to modification to fit the
§ 1.03

Employment Law

purposes of particular laws. Thus, employees under the Employment Retirement Income Security Act (ERISA) include working owners, even those who as sole shareholders of corporations have complete control of the enterprises for which they work, presumably to encourage controlling owners to establish broadly available employee benefits for their workers.

In addition, some laws contain such a broad exclusion for managerial employees that issues of ownership and control do not arise as a practical matter. This is true, for example, of the hallmark legislation of the 1930s, the National Labor Relations Act of 1935 and the Fair Labor Standards Act of 1938.

Illustration:

5. Dr. A is the president and sole shareholder in professional corporation P. P has established for its employees a profit-sharing and pension plan, which has qualified for favorable tax treatment under the Internal Revenue Code and ERISA. A is the sole administrator and trustee of the Plan; he is also listed as one of several participants, all of whom work in the service of P. Under ERISA, only employees for purposes of that statute may be participants in qualified plans.

A is an employee of P for purposes of the ERISA and thus may accrue all of the benefits of the plan available to its participants, as defined by the plan in accord with the statute. (Note, however, that this status under ERISA does not necessarily make A an employee under other employment laws.)
REPORTERS’ NOTES

Comment a. The test for determining whether individuals who exercise significant ownership control over the employer qualify as employees covered by employment laws draws in part from Clackamas Gastroenterology Assocs. P.C. v. Wells, 538 U.S. 440 (2003). The Supreme Court’s opinion in Clackamas indicates that courts should “focus on the common-law touchstone of control,” id. at 449, as the starting point for determining when a service provider should be treated as a principal of the enterprise rather than as an employee agent, at least in the absence of some contrary indication in the statute or other law at issue. The “common-law touchstone of control,” as elaborated in § 1.01, is used to distinguish between employees and those who exercise entrepreneurial control in the course of providing services to a principal. The Clackamas decision suggests that this same “touchstone” indicates that those who exercise entrepreneurial control over at least part of an enterprise in their own independent interest are not in the same economic relationship with that enterprise as are its employees, and therefore should not be presumed to be included within the coverage of employment laws.

Controlling owners are not employees for purposes of employment laws but their actions on behalf of the employee entity can give rise to respondeat superior liability. Thus, a corporation is vicariously liable for torts committed by a controlling shareholder within the scope of the shareholder’s service to the corporation, regardless of that shareholder’s ownership stake in the corporation. Similarly, a partnership, as well as each individual partner, is liable for torts committed within the scope of service to the partnership by any partner, regardless of the partner’s ownership share in the partnership. See, e.g., Wallan v. Rankin, 173 F.2d 488 (9th Cir. 1948) (applying Oregon law); In re Georgou, 145 B.R. 36 (1992) (applying Illinois Partnership Act). Making enterprises vicariously liable for the torts of their controlling owners is sensible because the purposes of vicarious liability apply equally to controlling owners as they do to employees who are not in a position to make independent entrepreneurial decisions.

The purposes of employment laws differ. The exclusion of controlling owners is appropriate for the purposes of employment laws because such owners, like those who operate independent businesses but unlike employees, have discretion to advance their own interests independently of the interests of the enterprises that they serve. Those whose ownership stakes in an employer do not afford them such discretion, however, are in the same economic relationship with the employer as are other employees with no ownership and thus are treated alike for purposes of employment law. For instance, the Supreme Court several decades before Clackamas found that workers who served a cooperative in which they held ownership shares were employees under the Fair Labor Standards Act because their ownership interest did not allow them the discretion of independent business operators. See Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28, 32-33 (1961) (“The members are not self-employed; nor are they independent, selling their products on the market for whatever price they can command. They are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates. … The management fixes the piece rates at which they work; the management can expel them for substandard work or for failure to obey
the regulations.

Comment b. Illustrations 1 and 2 reflect two variations on the situation in Clackamas. The issue in that case was whether the four physician-shareholders of a limited liability corporation providing medical services should be counted as employees toward the 15-employee minimum threshold for coverage under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (ADA). The appeals court below found employee status on the ground that the four principals had elected to take advantage of the corporate form and thus could not escape their own treatment as employees of the corporation.

The Supreme Court reversed and remanded for reconsideration. It stated that it was “persuaded” by the Equal Employment Opportunity Commission (EEOC)’s test “of when partners, officers, members of boards of directors, and major shareholders qualify as employees.” Id. at 448-449.

The EEOC, the Clackamas Court noted, framed the question as “whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization’s control.” Id. at 449 (citing EEOC Compliance Manual § 605:0009). The Court noted the federal agency’s list of at least six relevant factors:

Whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work
Whether and, if so, to what extent the organization supervises the individual’s work
Whether the individual reports to someone higher in the organization
Whether and, if so, to what extent the individual is able to influence the organization
Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts
Whether the individual shares in the profits, losses, and liabilities of the organization.

Id. at 449-450. The Court remanded the case for a review of the record in light of the EEOC’s test.

Illustration 3 is loosely based on Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996). See also the analysis of a 500-partner law firm in EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002) (Posner, J.) (requiring production of documents to determine whether equity partners of firm may be employees where ultimate power resides in unelected management committee of which they are not members), and the treatment of the California Fair Employment and Housing Act, Cal. Gov’t Code § 12900 et seq., in Strother v. Southern Cal. Permanente Med. Group, 79 F.3d 859 (9th Cir. 1996) (partner in a 2400-2500 member partnership might demonstrate that she was an employee).

For a decision finding one of four general partners not to be an employee in part because he “exercised substantial control over how to allocate the firm’s profits”, see Solon v. Kaplan, 398 F.3d
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629, 633 (7th Cir. 2005). See generally Leonard Bierman & Rafael Gely, So, You Want to Be a Partner at Sidley & Austin?, 40 Houston L.Rev. 969 (2003).

Comment c. The National Labor Relations Act (NLRA)’s express exclusion of “any individual employed as a supervisor,” 29 U.S.C. § 152(3), as well as its implied exclusion of managerial employees, see NLRB v. Bell Aerospace Co., 416 U.S. 267, 289 (1974), for instance, necessarily subsumes all individuals who would be outside the employee class because they are controlling owners. Similarly, the Fair Labor Standards Act exempts from its minimum wage and maximum hour requirements “any employee employed in a bona fide executive, administrative, or professional capacity.” 29 U.S.C. § 213(a)(1).

One divided panel of the National Labor Relations Board has also interpreted the NLRA to exclude from its protections workers who collectively can set corporate policy through their ownership of voting shares, even where their individual ownership is too small to enable them to exercise any control over their own work or compensation. See Citywide Corporate Transportation, Inc. 338 N.L.R.B. 444 (2002) (2-1 panel decision finding limousine drivers who owned 200 of the 277 voting shares of a limousine service company to be managers and not employees). For a view of how collective bargaining is compatible with employee ownership, see Michael C. Harper, Reconciling Collective Bargaining with Employee Supervision of Management, 137 U. Penn. L.Rev. 1 (1988).

Illustration 5 is based on Yates v. Hendon, 541 U.S. 1 (2004), where the Court held that the sole shareholder and president of a professional corporation may be an “employee” of the corporation and thus a “participant” in its pension plan. Id. at 16.

The Court in Yates expressly disclaimed reliance on any common-law definition of employee, even though common law principles were invoked in Clackamas and in Darden (in the latter, for the general definition of employee under ERISA). Id. at 12. Instead, the Yates Court found in “other provisions of the Act . . . multiple indications that Congress intended working owners to qualify as plan participants.” Id.

State workers’ compensation laws vary in their view of whether controlling shareholders and partners can recover benefits as employees. A majority of jurisdictions allow corporate officers to recover for injuries sustained while providing service to their enterprise, even where the officers are sole or controlling owners. See, e.g., Henk v. E. Air Taxi Inc., 91 N.J. Super 317, 320-21, 220 A.2d 200, 201 (1966); Gottlieb v. Arrow Door Co., 364 Mich. 450, 454, 110 N.W.2d 767, 769 (1961). Some states allow shareholder-employees to elect whether or not to be covered by workers-compensation insurance. See, e.g., Okla. Stat. tit. 85, § 3.9. The treatment of partners also varies. Compare, e.g., Brinkley Heavy Hauling Co. v. Youngman, 223 Ark. 74, 76, 264 S.W.2d 409, 410 (1954) (active partner not an employee), with Trappey v. Lumbermen’s Mutual Cas. Co., 229 La. 632, 638-39, 86 So. 2d 515, 516-17 (1956) (covering partner as employee). Many states have addressed the

§ 1.04 Employees of Two or More Employers at the Same Time

An individual is an employee of two or more employers if the employee and each of the employers meet the conditions of an employment relationship set forth in §1.01 either

(a) through the employee’s service to each employer in separate courses of conduct, or

(b) through the employee’s service to each employer in a single course of conduct.

Comment:

a. Overview. Individuals may work for more than one employer at a time. A worker may act to serve the interests of more than one employer; more than one employer may consent to receive such services; and more than one employer may have sufficient power, at least in combination, to control the manner and means of performing the work such that the individual is not rendering the services as an independent business. Individuals who work for more than one employer often do so in different time slots or periods. Individuals also may work concurrently for more than one employer who themselves are engaged in a joint project, in some cases with one employer providing services to the other.

b. Working for two or more employers through separate courses of conduct. When workers work more than one job, often one job is primary and another is secondary or part-time. Sometimes two jobs are full-time, though during different time periods. Sometimes workers are under contract to
provide services to several businesses whenever the need for their services arises. In these cases the workers involved may be employees of more than one employer. Workers also may provide services to two or more employers in separate courses of conduct during the same general time period at the same work site. This may occur where one employer does not know of the existence of the second employer, as in the case of a detective doing undercover work searching for evidence of a crime while providing services to a bank or a retail store. It also may occur where two separate employers share a worker, such as a messenger or a chauffeur, to provide services when needed.

Illustrations:

1. A provides service as a courier for P, a credit union. P requires A to report for work each day and to complete any inter-office and other deliveries that are required for that day. A normally can complete these deliveries in three hours but sometimes the work takes an additional hour or two. A’s pay is based on the number of hours worked. A also works a night shift at a local factory, R, for which A is paid an hourly wage.

   A is an employee of P as well as of R. P controls both the manner and means of the courier work and the extent of A’s compensation for that work. R has the same control over the factory work.

2. A and B are paid by a union, P, to organize employees of electrical contractors. A and B are also experienced electricians who are hired by R, a nonunion electrical contractor, to work on R’s contracts with its clients. A and B provide electrical services to R during work time and also attempt to organize their co-workers during their breaks and before and after
§ 1.04

work hours.

A and B are employees of P as well as R. A and B provide services to P and R through separate courses of conduct.

c. Joint employment: working for two or more employers through a single course of conduct.

Employees can serve two or more employers through a single course of conduct. For example, an employee may be hired to coordinate the work of different employers, or may be hired and paid by one employer to do work for a second employer.

For these cases, too, the employers’ relationship with the individual must satisfy all of the conditions set forth in § 1.01. For an individual to be employed by more than one employer through a single course of conduct, each putative employer must in some way preclude the individual from rendering his or her services as an independent business. For instance, a company that merely supplies employees to work for a “user” company under the user company’s sole direction and to be paid by the user company is not an employer of the supplied workers. Similarly, a company that uses and benefits from the services of a supplying company’s employees is not an employer of the supplied employees if the company does not have the power to direct their work or set their compensation.

Illustrations:

3. C contracts with P, a cleaning service, to clean C’s house one afternoon each week. P assigns A to provide C with this service. P trains A, sets A’s compensation for this work, supplies A with cleaning supplies, and makes sure A satisfies C’s requests. C tells A each week which rooms are to be cleaned and which other specific cleaning tasks are to be
A is an employee of P but not of C. P controls the manner and means of A’s work and sets A’s compensation. C, like any customer, only determines the nature of the services purchased from P’s business.

4. A and B are janitors who work for P, a cleaning and maintenance service. P has assigned A and B to clean a bus terminal owned by R. P pays A and B and has power to discipline, transfer, or promote them. R’s supervisors set A’s and B’s work schedules and direct the details of their work; R also can reject as unsatisfactory any janitor assigned to it by P.

Both P and R are employers of A and B. P has primary power to set their compensation, while R has primary power to control the details of their work.

5. A is a driver of a large concrete-mixer truck owned and operated by the P corporation. The R construction company rents the truck for a particular project. P assigns A to operate the truck in accord with P’s mechanical and safety specifications while it is used on R’s project. R’s supervisors tell A what work they want the truck to accomplish. A’s compensation is set by P and is paid by P. If dissatisfied with A, R can request that P assign another driver. Only P can discharge A.

A is an employee of P but not of R. P alone sets the terms of A’s compensation and controls the details of how A is to provide service to R.

6. A, B, and C work at premises and on sewing machines rented by P. Almost all of this work is final-assembly work for garments to be delivered to R. R supplies the cut fabric as
well as other materials for these garments. R sends supervisors to P’s premises to insure that all work is done according to R’s specifications. R’s contract with P requires P to complete garments within time periods set by R. R also compensates P for the work done on the garments based on its calculation of P’s expenditures. P has hired A, B, and C, to do R’s work, has power to discharge them, and sets their compensation.

A, B, and C are employees of R as well as of P. Because A, B, and C work almost exclusively on R’s garments, R effectively determines the compensation of A, B, and C when it sets the payment to P for assembled garments. R also effectively controls the working time and conditions of A, B, and C by requiring that work be done in accord with its schedule and by sending supervisors to P’s premises to insure that work is done according to its specifications.

7. A, B, and C work on P’s sewing machines at premises rented by P. P owns many sewing machines that it uses to cut and assemble clothes for several different labels from fabric that it secures from several sources. P does only about one-fourth of its work for R, which owns one of the labels. R does not supervise P’s work.

A, B, and C are employees of P but not of R. R does not have effective control over A, B, and C’s compensation, since P operates an independent business that sets their wages. Nor does R have effective control over the details of A, B, and C’s work.

8. Six entrepreneurs start a professional Women’s Hockey League (WHL). Each secures the right to use a stadium appropriate for hockey in their respective cities. Together they choose and hire a commissioner who is given the power to operate a draft to assign
players to different teams, to set minimum and maximum salary levels, to develop procedures
for the initiation and termination of player contracts, to establish a standard player’s contract,
and to arbitrate disputes between individual clubs and players. Control over player discipline
is divided between the commissioner and the individual teams.

Each player in the league is an employee of one of the six teams and of the WHL.

Each team along with the WHL determines the working conditions and compensation of the
team’s players. The players offer joint service to the league and to the individual teams.

d. Assigned employees. Employees who are asked by their employer to provide services to
another employer may be employees of both if the first employer sets their compensation and derives
some benefit from the second employer or from an enhanced public image, while the directly
benefited second employer directs their work.

Illustration:

9. In part to improve its public image, P, a large retail company, supports the efforts of
R, a national charitable institution, to rebuild homes in depressed areas. P periodically asks all
of its employees to work on one of R’s projects, under the direction of R’s staff, during
designated weekends. Those of P’s employees who do not “volunteer” are subject to
disciplinary action. (Thus, they are not true volunteers; see § 1.02, Comment e.) The
employees of P serve as employees of P and also as employees of R during the time they
perform work on R’s projects.
§ 1.04 Employment Law

1 e. Some laws may limit obligations to one of several employers. In some cases, the relevant law imposes obligations on only one statutory employer even where there is more than one common-law employer. For example, the obligation to withhold federal income and Social Security taxes from wages is imposed by the Internal Revenue Code only on the “person having control of the payment of such wages,” whether or not another entity also fits the common-law definition of employer (perhaps because of its control of the employee’s work). Similarly, regulations promulgated by the Department of Labor under the Family Medical Leave Act (FMLA) acknowledge joint employment for some purposes, such as “determining employer coverage and employee eligibility” and covering prohibited interference with or retaliation against rights secured by the Act, but state that “[i]n joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of benefits.”

REPORTERS’ NOTES


Section 226 of the Restatement Second of Agency (1958) states that “a person may be the servant of two masters . . . at one time as to one act, if the service to one does not involve abandonment of the service to the other.” Section 227 also states that a “servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. He may become the other’s servant as to some acts and not as to others.” These sections are not inconsistent because they allow for the alternative possibilities that the loaned servant is the servant of just one master or the servant of both, depending upon the act and the masters’ division of

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control. See § 227 Comment d.

The Restatement Third of Agency, § 7.03 Comment d (2006), acknowledges the common existence of joint employment in the modern economy. The comment states that “[l]iability should be allocated to the employer in the better position to take measures to prevent the injury suffered by the third party. An employer is in that position if the employer has the right to control an employee’s conduct.” This comment also notes that “[s]ome cases allocate liability to both general [a lending] employer and special [a borrowing] employer on the basis that both exercised control over the employee and both benefited to some degree from the employee’s work.” Id.

Comment b. As suggested by Illustration 1, most employment laws cover part-time workers. Consider, for example, the part-time courier in Holliday v. Vacationland Credit Union, 149 LC 34,843, 85 Empl. Prac. Dec. & 41,657 (N.D. Ohio 2004). See also, e.g., Danes v. St. David’s Episcopal Church, 242 Kan. 822, 833, 752 P.2d 653 (1988) (church organist qualified as employee to recover workers’ compensation). However, if a part-time skilled worker has sufficient control over how and when he performs his work to be able to influence his ultimate remuneration for the work, he may be functioning as an independent business rather than as an employee. See, e.g., Alberty-Velez v. Corporacion de P. R., 361 F.3d 1, 11 (1st Cir. 2004) (television entertainer found to be independent contractor not covered as employee under Title VII). Professionals such as lawyers and doctors who serve more than one client exemplify skilled workers with sufficient control over their work and time that they are generally not treated as part-time employees of their clients or patients. On the other hand, talented workers may hold simultaneous positions with more than one employer, each of whom controls work performed for them as well as the attendant compensation.

Illustration 2 is based on NLRB v. Town & Country Elec., Inc., 516 U.S. 85 (1995), in which the Supreme Court upheld the Labor Board’s interpretation of the NLRA that individuals hired by one employer while also on the payroll of a union seeking to organize that employer are statutory employees of both employers. The Court quoted Professor Seavey’s statement that “one can be a servant of one person for some acts and the servant of another person for other acts, even when done at the same time”, and noted Seavey’s example of “a city detective, in search of clues, [who] finds employment as a waiter and, while serving the meals, searches the customer’s pockets.” Id. at 95 (citing W. Seavey, Handbook of the Law of Agency § 85, p. 146 (1964)).

Comment c. Illustration 3 demonstrates the early established common-law principle, discussed in the reporters’ notes to comment a on § 1.01, that purchasers of goods or services do not become employers merely because they specify the goods or services they are purchasing. Purchasers do not ordinarily act as employers unless they determine the net compensation of service providers or supervise how the services are to be rendered. A customer who orders specific services from a cleaning business is like a customer who orders specific items from a restaurant menu or a customer who orders a taxi to proceed to a particular address.

Illustration 4 is based on the facts in Boire v. Greyhound Corp., 376 U.S. 473 (1964). In Boire
the Labor Board found Greyhound to be a joint employer of maintenance employees that it actively supervised, but which were also employed by a firm which supplied and paid the employees. Id. at 475. The Labor Board’s joint employer analysis under the NLRA is similar to the analysis courts utilize in FLSA cases. See, e.g., Dunkin’ Donuts v. NLRB, 363 F.3d 437, 440-441 (D.C. Cir. 2004); NLRB v. Western Temporary Serv., 821 F.2d 1258, 1266-67 (7th Cir. 1987); NLRB v. Browning-Ferris Indus. of Penn., 691 F.2d 1117, 1122-1123 (3d. Cir. 1982); NLRB v. Checker Cab Co., 367 F.2d 692, 698 (6th Cir. 1966); Continental Winding Co., 305 N.L.R.B. 122 (1991); Millcraft Paper Co., 270 N.L.R.B. 812, 813-14 (1984). As an employer may have a responsibility under the NLRA to bargain collectively over any subject that it may control, the power to control test fits well the purposes of this statute. For an FLSA case treating supplier and user employers as joint employers under the FLSA, see Barfield v. New York City Health and Hospitals Corp., 537 F.3d 132, 143 (2d Cir. 2008).

Illustration 5 is based on Murin v. Frapaul Constr. Co., 240 N.J. Super. 600, 573 A.2d 989 (App. Div. 1990), which found that the driver was not an employee of the construction company for purposes of the state workers’ compensation law and thus could sue the construction company for the negligence of one of its actual employees. Id. at 611, 994. In New Jersey, as in other jurisdictions, a worker may be an employee of two or more employers for purposes of workers’ compensation. See, e.g., Domanoski v. Borough of Fanwood, 237 N.J. Super. 452, 455-56 (App. Div. 1989). See also, e.g., Beaver v. Jacuzzi Bros., Inc., 454 F.2d 284, 285 (8th Cir. 1972) (“an employee may be employed by more than one employer even while doing the same work” and thus has only a workers’ compensation claim against either); Daniels v. Pamida, Inc., 251 Neb. 921, 927, 561 N.W.2d 568, 571-572 (1997) (loaned employee may be employee of two employers and may recover workers’ compensation from either). As noted in Murin, it is typical for employers to maintain ultimate control over the work of employees that they assign to operate valuable equipment for other employers. See 240 N.J. Super. at 610, 573 A.2d at 993 (citing Restatement Second of Agency § 227 (1958).

Illustrations 6 and 7 are based on Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003) and Lopez v. Silverman, 14 F.Supp.2d 405 (1998), both cases involving FLSA claims in the garment industry. The court in Zheng relied on Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947). In Rutherford a slaughterhouse was found to be an additional employer of boners who cut beef at the slaughterhouse. The Court stressed that while the slaughterhouse did not directly pay the boners, it effectively set their wages because they did no cutting for other customers and it shared equally in the revenues received by the boning supervisor, the boners’ nominal employer. See id. at 726, 730.

Courts have engaged in a similar analysis in cases involving farm workers. For instance, in Antenor v. D & S Farms, 88 F.3d 925, 938 (11th Cir. 1996), the court held that bean growers, in addition to labor contractors, were employers of bean pickers under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. § 1823, as well as the FLSA, because of the growers’ power to control the work and effectively determine the compensation of the pickers. Compare Antenor with Aimable v. Long and Scott Farms, 20 F.3d 434, 437, 440-41 (11th Cir. 1994), where the court found that a farm was not an employer of farm workers provided by a farm labor
contractor who also provided housing and transportation and had sole supervisory control. See also
Charles v. Burton, 169 F.3d 1322, 1334 (11th Cir. 1999) (farm operators were employers under the
AWPA); Torres-Lopez v. May, 111 F.3d 633, 645 (9th Cir. 1997) (farm owner found to be an
employer of farm workers); Howard v. Malcolm, 852 F.2d 101, 106 (4th Cir. 1988) (plantation owner
not an employer of farm workers). See also Ansoumana v. Gristede’s Operating Corp., 255 F.Supp.2d
184, 195-96 (S.D.N.Y. 2004) (drug store was employer of delivery workers provided by contractors).

Courts also have used the FLSA’s “joint employer” criteria under other federal and state
statutes. For example, in Moreau v. Air France, 356 F.3d 942, 953 (9th Cir. 2004), the court found Air
France not to be a joint employer of ground servers, including workers for a catering service, under
the federal Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 et seq., and its California
counterpart, the California Family Rights Act, Cal. Govt. Code § 12945.1. Applying the same test that
it applied under the FLSA in Torres-Lopez, supra, the Moreau court stressed that Air France did not
share in the control of the means and manner of work or the compensation of the servers. Id. at 950-
51. In Grace v. USCAR, 521 F.3d 655, 667 (6th Cir. 2008), by contrast, the court found a joint
employer relationship under the FMLA because one employer set and paid wages, while the other
controlled and supervised the work.

Courts interpreting employment discrimination law generally have applied the same functional
test for the existence of joint employment relationships as used by courts under the FLSA. See, e.g.,
applicable because federal employer had control over working conditions of employees supplied by
(employment agency not an employer, under Title VII, of temporary employees that it does not
supervise or pay); Amarnare v. Merrill Lynch, 611 F. Supp. 344, 349 (S.D.N.Y. 1984) (employment
agency and investment bank were joint employers under Title VII).

Whether two or more employers employing the same employee in the same course of conduct
are each liable for the other’s conduct is a question decided under the particular law that is the source
of the legal duty. For instance, a joint employer may be liable under the antidiscrimination laws for
the discriminatory conduct of agents of another joint employer of the same victimized employee only
if it had knowledge or constructive knowledge of this conduct. See Caldwell v. ServiceMaster, 966 F.
Supp. 33,48 (D.D.C. 1997) (employer that supplied and paid salary to alleged victims of
discrimination by employer that used their services was not liable for discrimination of which the
supplier employer was not given notice). Accord, Grace v. USCAR, 153 Lab. Cas. (CCH) 35,214
(E.D. Mich. 2006), aff’d on other grounds, 521 F.3d 665 (5th Cir. 2008).

Illustration 8 represents the typical arrangement in a professional sports league. It is based on
North Am. Soccer League v. NLRB, 613 F.2d 1379, 1382-83 (5th Cir. 1980). A sports league often
has the authority and responsibility to bargain collectively with union representatives of the players of
all teams in the league.

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Comment e. The employer obligated to withhold an employee’s expected income taxes is defined by 26 U.S.C. § 3401(d) (1) to mean “the person having control of the payment of such wages.” The employer obligated to withhold Federal Insurance Contributions Act (FICA) taxes, pursuant to 26 U.S.C. § 3102(a), is not defined in the Code, but courts have imposed FICA withholding obligations on the same employer paying the wages. See Otte v. United States, 419 U.S. 43, 51 (1974).

The FMLA regulations are framed to define the treatment of “joint employment” under the Act. 29 C.F.R. § 825.106. They state that “[w]here two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers ... .” Id. § 825.106(a). For applications, see, e.g., Moldenhauer v. Tazewell-Pekin Consolidated Communications Center, 536 F.3d 640, 645 (7th Cir. 2008) (city and county were not joint employers because they did not “exercise any control” over plaintiff’s employment); Grace, 521 F.3d at 667. “Factors considered in determining which is the “primary” employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits.” 29 C.F.R. § 825.106(c).
CHAPTER 2
EMPLOYMENT CONTRACTS: TERMINATION

Scope: The next two Chapters consider contract law issues that arise in the context of the employment relationship. Chapter 2 addresses the default rule that employment relationships are terminable at-will and the contractual exceptions to that rule, while Chapter 3 discusses compensation and employee benefits. These issues are a part of the general law of contracts and agency, as articulated in the Restatement Second of Contracts and the Restatement Third of Agency. This Restatement deals only with employment relationships (see Chapter 1).

§ 2.01 Default Rule of an At-Will Employment Relationship

Unless a statute, other law or public policy or an agreement or binding promise or statement under § 2.02 limits the right to terminate, either party may terminate an employment relationship with or without cause.

Comment:

a. Rebuttable presumption of at-will employment. At its core, employment is a contractual relationship. All contracts need default rules that provide starting points for bargaining between the parties and that control in the event different rules are not supplied in the contract or by law. The courts in 49 states and the District of Columbia recognize the principle that employment is presumptively an at-will relationship. (The sole exception is Montana, which by statute requires “good cause” for an employer’s termination of a nonprobationary employee.) The at-will presumption states a default rule that applies when the agreement between the parties or other
binding promise or statement under § 2.02 does not provide for a definite term or contain a limitation on either party’s power to terminate the relationship.

Illustrations:

1. Employer X and employee E enter into an employment agreement providing for a one-year term, renewable for an additional year if neither party serves the other with at least 30 days’ notice prior to termination of the one-year period. Two months into the relationship, X terminates the agreement. X is subject to liability for breach of contract (10 months of pay subject to mitigation of damages) because the parties’ agreement provides for a definite term, which overcomes the presumption of at-will employment. (The “cause” sufficient to terminate such an agreement before its term ends is discussed in Comments i and j to § 2.03. Mitigation of damages and other remedial issues are the subject of Chapter 9.)

2. Employer X and employee E enter into an employment agreement providing for a $50,000 “annual salary” plus benefits. Two months into the relationship, X serves E with notice of termination of the agreement. X is not, without more, in breach of contract because this agreement is presumed to provide only for at-will employment. The statement of employment at an annual rate of salary does not, standing alone, guarantee a year’s employment or otherwise overcome the presumption of at-will status.

b. Contrary agreement. Agreements and binding employer promises or statements that would overcome the presumption of at-will employment are discussed in § 2.02. An example is provided in Illustration 1 above.

c. Statutory provision. The at-will default rule serves to guide courts in evaluating the rights
and obligations of the parties under their agreement; it does not supersede controlling legislation. Virtually all legislation regulating the employment relationship restricts to some extent the kinds of adverse employment decisions employers may make. To take an important example, many statutes bar employers from making adverse decisions against employees because the employees exercise a right under those laws by filing a claim or participating in investigatory and enforcement proceedings authorized by the law. Section 2.01 should be read in a manner consistent with such statutory restrictions. (See also § 4.02(c).)

Illustration:

3. Employee E works on at-will basis for employer X. E subsequently files a charge against X with the U.S. Equal Employment Opportunities Commission pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq., alleging that X denied him a promotion on account of his race. Because of E’s filing of the charge, X terminates E’s employment, arguing that at-will employees can be fired with or without cause. If X has violated Title VII’s antiretaliation provision, § 704(a), 42 U.S.C. § 2000e-3(a), the at-will presumption does not defeat the claim. The result is the same even if a written employment agreement between X and E explicitly provides that “either party may terminate this relationship, with or without notice, and with or without cause.”

d. Other law or public policy. In addition to statutory restrictions of the type illustrated above, in some cases a well-established public policy may also supply a basis for limiting the employer’s power to terminate an at-will employment relationship. The tort of wrongful discipline in violation of public policy is discussed in Chapter 4. Although in many cases the source of public policy is
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legislation, some jurisdictions have recognized in appropriate cases non-statutory sources of public
policy such as decisional law and certain established principles of professional or occupational
responsibility; this development is discussed further in § 4.03. Section 2.01 should be read in a
manner consistent with such public-policy limitations.

e. Termination. The at-will presumption applies not only to employer discharges of
employees but also to other adverse employer actions or decisions falling short of discharge,
including those that reasonably elicit a resignation from the employee. Compensation and benefits
issues are treated in Chapter 2.

Illustration:

4. Employer X enters into an at-will employment agreement with employee E, providing that E will function as a marketing representative and will be paid at a rate of $50,000 per year plus benefits. Two months into the relationship, X announces that because of declining demand for X’s product, E will henceforth be paid at the annual rate of $40,000 plus benefits. E continues to work and sues for breach. Because no contractual, statutory, or public policy restriction applies, X has not breached the at-will agreement by reducing E’s salary prospectively. (Note: This Illustration rests on the premise that no nonmodifiable employee entitlement was created to the prior $50,000-per-year salary rate.) The same result is reached if E quits and sues for breach. (Note: Under these circumstances, the reduction may be regarded as a “constructive discharge” for purposes of the unemployment insurance laws, and E may thus be able to receive unemployment benefits even though employees who voluntarily quit are typically excluded from such benefits.)
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Comment a. The early history of the now firmly established at-will rule is usefully discussed in Jay M. Feinman, The Development of the Employment At Will Rule, 20 Amer. J. of Legal Hist. 118 (1976). As set forth in Appendix A to these Notes, the at-will default rule is presently recognized in 49 states and the District of Columbia. Montana is the only U. S. state to have enacted a statute requiring a showing of “good cause” for all employer terminations of an employee’s employment effected after the employee has completed a probationary period. See Montana Wrongful Discharge of Employment Act. Mont. Code Ann. §§ 39-2-901 to –914, upheld against a state constitutional challenge for restricting judicial remedies in Meech v. Hillhaven West, Inc., 238 Mont. 21, 776 P.2d 499 (1989). Since 1930 Puerto Rico by statute requires “just cause” for discharge of employees working under an indefinite term of employment. The exclusive remedy for a termination without cause is monetary compensation based on years of service; reinstatement is not an authorized remedy. See Puerto Rico Law 80, 29 L.P.R.A. § 185a; also Otero-Burgos v. Inter American University, 2009 U.S. App. LEXIS 3490 (1st Cir. 2009) (university professor claiming termination in violation of tenure contract is not an hired “without a fixed term” within the meaning of Law 80). Attempts at changing U.S. law have not been successful. In 1991, the National Conference of Commissioners of Uniform State Laws approved, and circulated to the states for their consideration, a “Model Employment Termination Act” that provided a statutory requirement of “good cause” for an employer’s termination of an employee. As of March 2009, no jurisdiction has adopted the Model Act. See generally Theodore J. St. Antoine, The Making of the Model Employment Termination Act, 69 Wash. L. Rev. 361 (1994) (views of drafter of Model Act). The Montana experience is assessed in Barry D. Roseman, Just Cause in Montana: Did the Big Sky Fall? (American Constitution Soc’y Issue Br., September 2008); Andrew P. Morriss, The Story of the Montana Wrongful Discharge from Employment Act: A Drama in 5 Acts, in Employment Law Stories, ch. 9 (Samuel Estreicher & Gillian Lester eds., Foundation Press 2006).

While the positive law is well settled, there is a continuing debate among commentators concerning whether the at-will default rule is sound policy. Early seminal articles include Clyde W. Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 U. Va. L. Rev. 481 (1976); Lawrence Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 Colum. L. Rev. 1404 (1967). Critics highlight the unfairness of allowing employers to make adverse decisions of considerable importance to employees and their families without having to demonstrate cause before a neutral arbiter. They note that employees often labor under the misconception that employers in fact do not have the legal authority to discharge or discipline without cause. Moreover, they suggest that because of the prevalence of statutory restrictions on employers, coupled with the many exceptions to the at-will rule that will be treated in this Restatement, employers as a practical matter assume their employment decisions are subject to regulatory or judicial scrutiny, and hence will be able to adjust to a cause regime without difficulty. See, e.g., Paul C. Weiler, Governing the Workplace: The Future of Labor and Employment Law 72-78 (Harvard Univ. Press 1990).

Several justifications have been offered for the at-will default rule. The first is that the rule reflects the background assumptions of the parties to the employment contract, and if the parties want a different rule governing termination, they are free to negotiate it. See, e.g., Richard Epstein, In
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Defense of the Contract At Will, 51 U.Chi. L. Rev. 947 (1984), This rationale has been challenged by some writers who point to limited survey evidence that employees believe they have rights against termination without cause when in law they do not. See, e.g., Pauline T. Kim, Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World, 83 Cornell L. Rev. 105 (1997); also her Norms, Learning, and Law: Exploring the Influences on Workers’ Legal Knowledge, 1999 U.Ill.L. Rev. 447. Other studies emphasize the incidence of employment relationships reverting to at-will status in response to court decisions recognizing limits on termination without cause, as evidence that the agreements that parties in fact reach correspond to the at-will default rule. See, e.g., Andrew P. Morriss, Bad Data, Bad Economics and Bad Policy: Time to Fire Wrongful Discharge Law, 74 Tex. L. Rev. 1901 (1996).

A second justification for the at-will default rule is that it reflects not so much the premises of the parties but, rather, the property rights of the employer, and for that reason any departure from that baseline should be bargained for, in the absence of a statutory or public-policy restriction. Those critical of the rule are likely to counter that employees have a need for job security and build up reasonable expectations that increasing years of service should ripen into a property right in one’s job that cannot be lost without a showing of cause. For a proposal along these lines, see William B. Gould, IV, The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework, 1986 B.Y.U.L. Rev. 885.

Ultimately, the issue from a policy perspective is whether the additional protection afforded employees by a cause regime (in addition to existing statutory and other protections) would outweigh the economic and administrative costs inherent in subjecting all employment decisionmaking to legal scrutiny; and even if that were the case, whether such a change in the legal landscape should be effected by courts rather than the legislature. On the difficulties in designing an appropriate adjudicative mechanism, see Samuel Estreicher, Arbitration of Employment Disputes Without Unions, 66 Chi.-Kent L. Rev. 753 (1990).

Legislation protecting employees from “unfair dismissal” is common in other developed countries; often the law requires adjudication in specialized tribunals outside of the civil courts and limits remedies to an established multiple of lost income (subject to £75,000 cap in Great Britain). Canada’s common law permits termination without cause of employees not working under a fixed-term contract if adequate notice of termination is furnished. See, e.g., Wallace v. United Grain Growers, [1997] 3 S.C.R. 701. On the difficulties of comparative analysis in this area, see Samuel Estreicher, Unjust Dismissal Laws: Some Cautionary Notes, 33 Amer. J. Comparative L. 210 (1985), updated in Global Issues in Employment Law 74-85 (Samuel Estreicher & Miriam Cherry eds., West/Thomson 2008).

Although the general rule, as reflected in Illustration 2, is that the statement of an annual or monthly salary or salary rate does not, standing alone, evidence an intention to guarantee a year’s or month’s employment, a Georgia statute appears to offer a different rule: “If a contract of employment provides that wages are payable at a stipulated period, the presumption shall arise that the hiring is for such period ....” O.C.G.A. § 34-7-1. That law also states that “[a]n indefinite hiring may be terminated at will by either party.” Id. The Georgia decisions hold, however, that mere reference to an annual salary does not require application of the state statutory presumption. See
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Comment b. The rule of at-will employment, recognized in § 2.01, states a presumption or default rule only, which can be overcome by other evidence of the intent of the parties. Agreements and binding employer promises or statements providing for other than at-will employment are discussed in § 2.02. This Restatement rejects much-criticized early jurisprudence that seemed to establish a hard-and-fast barrier precluding consideration of such other evidence. See decisions discussed in Feinman, supra.

Comment c. Although the reported decisions typically involve terminations of employment, the principles applicable to terminations generally apply as well to other adverse employer decisions such as refusals to promote or improve wages or other working conditions. See, e.g., Scott v. Pacific Gas and Electric Co., 11 Cal.4th 454, 46 Cal.Rptr.2d 427, 904 P.2d 834 (1995); Mitchell v. Connecticut General Life Ins. Co., 697 F.Supp. 848 (E.D. Mich. 1988); see also § 4.01, Comment b. Moreover, as Illustration 4 suggests, even where the applicable law may be limited to terminations, the courts recognize that certain adverse employer decisions may prompt a reasonable employee to quit his or her job rather than continue to work. For purposes of applying statutory or other public-policy limitations on employer authority, the quit may be treated as a dismissal under the doctrine of “constructive discharge.” See Pennsylvania State Police v. Suders, 542 U.S. 129 (2004). The constructive-discharge doctrine also has been invoked to enable a claimant to obtain unemployment insurance benefits despite having quit employment in certain circumstances. The general topic of compensation and benefits is taken up in Chapter 3.

Illustration 4 assumes that the employees did not have a nonmodifiable entitlement to the prior salary rate. For further discussion, see § 2.05, Comment b and Chapter 3.

§ 2.02 Agreements and Binding Employer Promises or Statements Providing for Terms Other Than At-Will Employment

The employment relationship is not terminable at will by an employer if:

(a) an agreement between the employer and the employee provides for (1) a definite term of employment, or (2) an indefinite term of employment and requires cause to terminate the employment (§ 2.03); or

(b) a promise by the employer to limit termination of employment reasonably induces detrimental reliance by the employee (§ 2.02, Comment c); or
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(c) a policy statement made by the employer limits termination of employment

(§ 2.04); or

(d) the implied duty of good faith and fair dealing applicable to all employment

(§ 2.06) limits termination of employment; or

(e) any other principle recognized in the general law of contracts limits termination of employment (§ 2.02, Comment d).

Comment:

a. Scope. This Section lists the principal contractual variations from at-will employment (in the sense of obligations parties can assume but are not imposed by law, other than the implied covenant of good faith and fair dealing, § 2.05). The agreements and undertakings listed in § 2.02 (a)-(d) are considered in depth in §§ 2.03-2.05 and the Comments thereto.

b. Collective-bargaining agreements. Under the National Labor Relations Act of 1935, as amended, 29 U.S.C. §§ 151 et seq., and the Railway Labor Act of 1926, as amended, 45 U.S.C. §§ 151 et seq., as well as many federal and state government labor laws, workers can select an exclusive bargaining representative to negotiate collective-bargaining agreements with their employers. These collective agreements typically provide for an employment relationship other than at-will employment through a “just cause” limitation on discharge and other disciplinary decisions, and a multi-step grievance procedure culminating in final, binding arbitration before a neutral decisionmaker jointly selected by the parties. Section 2.01 is to be read in a manner consistent with such agreements. (This Restatement does not, however, restate collective-bargaining law.)

c. Promissory estoppel. Section 2.02(b) makes clear that promises by employers that reasonably induce detrimental reliance by employees, or individuals about to become employees, are
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enforceable in accordance with the well-established doctrine of promissory estoppel, as developed in § 90 of the Restatement Second of Contracts. The promise in question, however, must be sufficiently definite to reasonably induce the action taken in reliance on the promise and must in fact induce such reliance. See id. and Comment b. Where the conditions for promissory estoppel are present, promises may be enforceable even though an agreement itself would not be enforceable for lack of a written document. (Remedies are the subject of Chapter 9 of this Restatement.)

Illustrations:

1. Spouses W and H are quality-control managers for Employer X. Because of a corporate reorganization H’s employment is terminated. W, a very successful employee at X, could readily obtain equivalent employment elsewhere. Knowing that H will be seeking employment with one of X’s competitors, W speaks to her supervisor, who assures her that “your employment will not be affected if H goes to work for one of our competitors.” Because of X’s assurance, W turns down a better-paying offer of employment in the same industry. However, after H begins working for a competitor, X terminates W’s employment for that reason. W has a valid claim in promissory estoppel.

2. Same facts as in Illustration 1, except that W does not receive an offer of equivalent employment with another company. W does not have a valid claim in promissory estoppel because she cannot demonstrate detrimental reliance.

d. Other principles recognized in contract law. Section 2.02(e) makes clear that other established principles in the general law of contracts also may be applicable in appropriate cases.
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Comment b. Under J. I. Case Co. v. NLRB, 321 U.S. 332 (1944), collective-bargaining agreements are presumed to bar individual agreements between employers and those employees who are in the bargaining unit. In some industries, however, such as the sports and entertainment industries, the parties contemplate the negotiation of individual agreements alongside collective agreements. State-law contract claims may be preempted by § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), if they are inconsistent with the rule of J. I. Case Co. or resolution of the claim would require interpretation of the collective agreement, see Lingle v. Norge Div., 486 U.S. 399 (1988); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). See, e.g., Newberry v. Pacific Racing Assn., 854 F.2d 1142 (9th Cir. 1988); Daren v. United States Steel Corp., 830 F.2d 1116 (11th Cir. 1987). There may, however, remain some scope for state-law enforcement of promises made to employees before they became members of the bargaining unit, see Caterpillar Inc. v. Williams, 482 U.S. 386 (1987), or upon decertification of the union bargaining agent, see Trans Penn Wax Corp. v. McCandless, 50 F.3d 217 (3d Cir. 1995). For a case holding enforceable individual employment agreements between the employer and union-represented employees providing greater protections than the operative collective-bargaining agreement, see Troy v. Rutgers, The State University, 168 N.J. 354, 774 A.2d 476 (2001).

Comment c. As a general matter, application of the doctrine of promissory estoppel in the employment context enjoys substantial judicial support. See, e.g., Stewart v. Cendant Mobility Corp., 267 Conn. 96 (2003); Helnick v. Cincinnati Word Processing, Inc., 543 N.E.2d 1212, 1217 (Ohio 1989). But see City of Midland v. O’Bryant, 18 S.W.3d 209 (Tex. 2000) (promissory estoppel cannot be used to modify at-will employment). Some courts, however, will not allow an oral promise otherwise enforceable under the doctrine to preclude application of the Statute of Frauds. See McInerney v. Charter Golf, Inc., 680 N.E.2d 1347, 1352 (Ill. 1997); but see Restatement Second of Contracts § 139, at 354 (1981) (doctrine may be invoked to protect reliance interests arising from oral agreements otherwise barred by the Statute of Frauds).

In the at-will context, moreover, courts may limit the remedy to reliance damages. See, e.g., Jarboe v. Landmark Community Newspapers of Indiana, Inc., 644 N.E.2d 118, 122 (Ind. 1994) (employee terminated for excessive absenteeism even though he had been assured he could stay on sick leave beyond three-month maximum could recover only for lost wages between the date of termination and the date of his medical release to return to work.). New York has adopted a narrow view of the doctrine in the employment setting. See Weiner v. McGraw-Hill, 57 N.Y.2d 458 (1982). See generally Robert A. Hillman, The Unfulfilled Promise of Promissory Estoppel in the Employment Setting, 31 Rutgers L.J. 1 (1999); Cortlan H. Maddux, Employers Beware! The Emerging Use of Promissory Estoppel as an Exception to Employment At Will, 49 Baylor L. Rev. 197 (1997). (The topic of remedies is addressed in Chapter 9.)

Illustration 1 is drawn from Stewart v. Cendant Mobility Corp., supra.
§ 2.03 Agreements for a Definite or Indefinite Term

(a) An employer must have cause for termination of

(1) an unexpired agreement for a definite term of employment, or

(2) an agreement for an indefinite term of employment requiring cause for termination.

(b) In the absence of an express agreement otherwise by an employee, the employee is under no reciprocal obligation to have cause to terminate the employment relationship.

Comment:

a. Scope. The agreements that are the subject of this Section are based on consideration or bargained-for exchange and are thus enforceable under the general law of contracts. Oral and written agreements, agreements for a definite or indefinite term, agreements contemplating acceptance by performance followed by such performance, and agreements not providing reciprocal obligations on the employee, are all covered by this Section.

b. Agreements. This Section concerns agreements that are negotiated between an employer and its employee or employees. Typically, such agreements involve an exchange of express promises, an offer contemplating acceptance by performance followed by such performance, or some other statement or conduct manifesting a promise by the employer to which the employee indicates assent, although no particular form of words is required.

Illustrations:

1. Employer X and employee E enter into a contract providing for a one-year term, renewable for an additional year if neither party serves the other with 30 days’ notice prior to
termination of the one-year term. Two months into the relationship, X serves E with notice of
termination of the agreement effective before the end of the first year. X is in breach of
contract.

2. X, eager to recruit E, a manager for a competitor in California, to a similar position
at X’s facility in Florida, promises E “permanent employment” and a starting annual salary of
$100,000. E accepts the offer in a letter to X’s president and starts the process of moving to
Florida. Before E arrives in Florida, however, X announces that, because of a business
downturn, X no longer requires E’s services. Because X’s offer was accepted by E, the
parties entered into an enforceable agreement, and X’s attempted termination is in breach of
the agreement. (In effect, the promise of “permanent employment” requires X to provide
“cause” for terminating E’s employment; what constitutes “cause” sufficient to terminate
such an agreement before the end of the agreed term is discussed in Comment i below.)

3. Same facts as Illustration 2, except that E does not verbally accept the offer but
instead moves to Florida and begins work there for X, thus accepting the offer by
performance. Since X’s promise contemplates acceptance either by words or by beginning
work in Florida pursuant to the offered terms, the parties entered into an enforceable
agreement, and X’s attempted termination is in breach of contract.

c. Oral agreements. This Section does not deal with the Statute of Frauds issues that may
arise in a particular jurisdiction. Rather, the position of this Restatement is that so long as an oral
employment agreement falls outside of the Statute (and hence is not required to be in a writing), that
oral agreement can constitute an agreement providing terms other than at-will employment within
§§ 2.02(b) and 2.03.
Illustration:

4. X Corporation enters into an oral agreement for an eight-month term of employment with Employee E. The agreement does not require a writing under the applicable Statute of Frauds because it is capable of full performance within one year. The definite term in the agreement overrides the presumption of at-will employment.

d. Consideration or bargained-for exchange. The agreements that come under this Section must be enforceable under generally applicable contract law. (See the requirements for valid agreements stated in Chapters 3 and 4 of the Restatement Second of Contracts.) The general contract requirement of consideration or bargained-for exchange does not necessitate identical or parallel consideration from both parties to the agreement. A single promise by the employee to work for the employer at stated terms is ordinarily sufficient to support a number of promises by the employer, including, for example, a promise to provide employment at stated terms and a promise not to terminate the relationship prior to the end of the contractual term except for cause.

e. Unilateral contracts. Some jurisdictions employ a form of “unilateral contract” analysis to hold enforceable unilaterally promulgated employer statements that are disseminated to the employees who continue working after receiving those statements. In addition, even in jurisdictions not relying on such analysis, certain employer statements (discussed in § 2.04) may give rise to binding obligations even in the absence of consideration or bargained-for exchange or a showing of detrimental reliance by the employee. (For further discussion, see § 2.04, Comment b.)

f. Mutuality. Mutuality of obligation is not required for there to be an enforceable employment agreement. Thus, even where an employer agrees to a “cause” limitation on discharge or other discipline and, as is typical, the employee does not agree to limit his or her prerogative to quit
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the job at any time, with or without cause, the employment agreement is nevertheless enforceable.

Even where an employee does agree to provide cause for a voluntary termination, the general rule is
that specific performance is not available to enforce a “personal services” contract. At the same time,
the parties can provide for a reasonable period during which the departing employee may not work
for a competitor; such a promise in appropriate circumstances may be enforceable by injunction.

(Employee obligations are the subject of Chapter 6.) The parties can also require that the employee
give advance notice of an intention to quit employment if the employee wishes to receive severance
pay or other benefits considered non-vested in the circumstances. (For further discussion of vested,
i.e., nonmodifiable, employee benefits, see § 2.05, Comment b & Chapter 3).

   g. Implied terms. In some cases, the parties to an otherwise enforceable employment
   agreement expressly or impliedly refer to stated policies or established practices of the employer or
   in the trade to supply omitted terms in the agreement.

Illustration:

   5. P receives a letter from C, a local college, offering P a position as assistant
   professor of geometry on a year-to-year contract. Prior to P’s beginning work for C, P and C
   had no communication regarding whether or when P might be eligible for tenure. (“Tenure”
is a form of cause limitation on termination of employment often found in educational
   settings.) However, C’s handbook for professors states that “assistant professors are eligible
   for tenure after 5 years of instruction.” C’s practice is to conduct a tenure review of assistant
   professors in their fifth year of teaching. C conducted no such review of P and shortly before
   the end of P’s fifth year notifies P that his contract will not be renewed.

   C is in breach of contract. P’s eligibility for tenure review in his fifth year of
instruction was an implied term of the employment agreement under the established practices of C.

**h. Indefinite-term agreements.** Agreements that limit the employer’s power to terminate the employment relationship can override the presumption of at-will employment even if the term of employment is indefinite. This Section thus departs from decisions holding that contracts for indefinite employment should always be treated as terminable at will or subject to a high level of skepticism, resulting in special proof burdens to defeat the at-will presumption. Whether the parties contracted for indefinite employment with limits on the employer’s power to terminate is normally a question for the trier of fact. What would constitute “cause” for terminating such an agreement is discussed in Comments *i* and *j* below.

**Illustrations:**

6. At his August 1 job interview with X Corporation, E, a biochemist resident in California, inquires about future job security if he were to accept a job with X. X’s president responds that E would enjoy “permanent employment” and adds: “I hope you will stay forever.” On August 31, X’s president writes to E stating “this letter confirms our offer to you for employment as a biochemist at an initial salary of $50,000 per year.” In October, E moves to Connecticut to begin work in X’s facility there on November 1. On his first day on the job, E is given a copy of X’s personnel manual, stating that X “reserves the right to hire, discharge for cause, promote, demote, reclassify, and assign work to employees.” A year later, E is provided with an updated version of the manual that omits any reference to “for cause” in connection with any management decisions. On these facts, the trier of fact can
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decide that X and E entered into an agreement for an indefinite term with a limitation on X’s right to discharge E without “cause”; if so decided, the later manual’s omission of the “for cause” language does not apply to remove the limitation in the agreement between X and E.

7. Same facts as Illustration 6, except X’s personnel manual when first provided to E on November 1 does not contain the “for cause” language. Because sophisticated parties would typically enter into a written agreement setting forth the terms of an unusual agreement—such as one promising a prospective managerial employee essentially lifetime employment absent cause to terminate—it may well have been understood by both X and E that X’s oral statements that E would enjoy “permanent employment” and would “stay forever” were not intended as a binding promise of lifetime employment absent cause. Nevertheless, E reasonably may have understood the statements in precisely those terms, and, if there is any ambiguity about the terms of their agreement, recourse may be had to the bargaining history between the parties and any relevant policies, procedures, or practices of the employer. In an appropriate case, this issue would go to the trier of fact to determine the terms to which the parties had agreed.

1. Cause for termination: substantive dimension.

(1) Definite-term agreements. When parties negotiate an express agreement for a fixed term of employment, they ordinarily provide in the agreement for a special payout in the event of early termination without cause; in the absence of such a provision, the default rule generally applied by the courts is that termination without cause requires payment of the contractual salary and other benefits for the duration of the term, subject to any mitigation of damages under applicable law. “Cause,” if not defined in the parties’ agreement, will in these circumstances usually refer to
misconduct, other malfeasance by the employee, or other material breach of the agreement, such as persistent neglect of duties, gross negligence, or a failure to perform the duties of the position due to a permanent disability. The parties are, of course, free to define in the agreement their own special understanding of what would constitute cause sufficient to terminate the agreement without breach. However, absent explicit language in the agreement, cause does not include changes in the economic condition of the employer, such as a downturn in demand for the employer’s product, a fall in the employer’s share price, or the sale of the business.

(2) **Indefinite-term agreements.** Where an employer and employee have negotiated an indefinite-term agreement with limits on the employer’s power of termination, the definition of cause for termination expressly agreed to by the parties controls. However, if the agreement is silent on the question, then, given the potential length of indefinite-term agreements, the reasonable presumption is that the parties intended not only that the employee’s misconduct, malfeasance, inability to perform the work due to permanent disability, or other material breach may constitute cause for termination, but also that significant changes in the economic circumstances of the employer can supply such cause.

(3) **Factual cause.** Where the parties have provided for a definite term of employment or for an indefinite term with a cause limitation on the employer’s power of termination, the reasonable presumption is that the parties intended any cause requirement to be confined to situations of undisputed or otherwise proven employee misconduct, malfeasance, failure to perform the work due to permanent disability, or other material breach; and did not intend also to permit termination based on the employer’s reasonable, good faith but erroneous belief that the employee engaged in such conduct. This is in keeping with conventional views of cause as an objective concept, and with the concomitant understanding that an erroneous belief of justification for early termination of a definite-
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term contract, even if grounded in good faith and based upon facts obtained after an appropriate investigation, does not constitute legally sufficient cause to terminate under the agreement.

Illustrations:

8. X Corporation, eager to recruit E from E’s managerial position with a competitor in California to work at X’s facility in Florida, promises E in writing a four-year term of employment beginning with a $100,000 annual salary. E accepts the offer, moves to Florida, and begins work for X in Florida. Two years into the relationship, X announces that because of a business downturn, it is closing the Florida facility and terminating E’s employment. Absent a specific agreement conditioning the full four-year term of employment on X’s continuing its operations at the Florida facility, X is in breach of contract. Although the parties in their agreement did not provide an express term defining cause for termination of the employment relationship, X may not legally terminate its obligations to E under a definite-term agreement absent E’s malfeasance, inability to perform the work due to permanent disability, or other material breach. Change in the economic circumstances of the employer does not legally justify X’s early termination of E’s employment.

9. Same facts as in Illustration 8, except that X promises E “permanent employment … unless you screw up badly,” rather than a definite term of employment. Two years into the relationship, X announces that because of a business downturn, it is closing its Florida facility, and terminates E’s employment. Absent evidence of an agreement to limit cause to terminate E’s employment to the employee’s misconduct, malfeasance, or other material breach, X has a legally sufficient business reason for terminating the indefinite-term employment agreement and is not in breach of contract.
10. Same facts as in Illustration 8, except that two years into the employment relationship, X determines in good faith and based upon facts obtained after reasonable investigation that E has sexually harassed X’s employees in violation of Company policy or applicable law. X is in breach of contract if the trier of fact determines that E did not in fact engage in the claimed sexual harassment; even though X acted in good faith, X lacked cause for early termination of the fixed-term agreement.

11. Same facts as in Illustration 8, except that two years into the relationship, X determines that E is no longer a “good fit” with X’s organization and terminates E’s employment. Unless the parties intended a different standard to apply, cause for terminating an indefinite-term agreement based on the employee’s conduct requires a showing that such conduct is undermining the operations of the employer or that the employee is no longer adequately performing the job. Mere personality issues not implicating operational concerns ordinarily do not suffice. To avoid a finding of breach, X must demonstrate that E was no longer functioning effectively as a manager.

j. Cause for termination: procedural dimension. The cause required to terminate an agreement under § 2.03 also may have a procedural dimension, with respect to both the employer and the employee. Where the agreement specifies the procedures for termination, its terms control. If those terms, for example, require the terminated employee to exhaust certain internal remedies, such as an appeal to the board of directors, those remedies ordinarily—absent proof of futility—must be reasonably exhausted before the employee may bring a lawsuit claiming that the termination was not based on a proper cause. However, even where the agreement is silent on procedures for termination, the fact the parties have provided for a cause limitation on the employer’s power to terminate
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normally requires the employer to give reasons for the termination and be held to the regular and

even-handed application of the grounds for terminating an employee for cause.

Illustration:

12. Same facts as in Illustration 8, except that two years into the relationship, X
determines that E has an alcohol-abuse problem and for that reason terminates E’s
employment. Several of E’s colleagues at the Florida facility appear to have a similar
problem, but their employment has not been terminated. It is assumed that an employee’s use
of alcohol adversely affecting job performance would be sufficient cause for an early
termination of the employment agreement. However, X’s toleration of comparable conduct
by other employees derogates from the requisite showing of cause to terminate E’s
employment and at least raises an issue for the trier of fact. Ordinarily in these circumstances,
instead of terminating E, X should make it clear that, prospectively, it will not permit alcohol
use affecting job performance by any employee and should thereafter mete out discipline in
an evenhanded manner. (Issues may also arise under disability discrimination and “lawful
activity” laws.)

REPORTERS’ NOTES

Comment a. With respect to definite-term agreements, this Section reflects long-established
law. With respect to agreements establishing a limitation on employer termination but otherwise
providing for an indefinite term, this Restatement urges a general rule of enforceability; the
indefiniteness of the term may be part of a showing made by the employer to the trier of fact that the
parties did not intend an enforceable agreement. See Reporters’ Note to Comment g below.

Comment b. Illustrations 2-3 are loosely based on Ohanian v. Avis Rent A Car System, Inc.,
779 F.2d 101, 107 (2d Cir. 1985) (applying New York law) (oral promise of lifetime employment
absent “just cause” held not within Statute of Frauds because contract was capable of performance
within one year; “under New York law, ‘just cause’ for termination may exist for reasons other than an employee’s breach.”).

Comment c. Oral agreements for an express term can include situations where the term is delimited by a definite future event. The boxer Mike Tyson was held to be under a binding agreement to his trainer “for so long as [Tyson] fought professionally.” The New York high court explained: “The range of the employment relationship … is established by the definable commencement and conclusion of Tyson’s boxing career. Though the times are not precisely predictable and calculable to dates certain, they are legally and experientially limited and ascertainable by objective benchmarks.” The court did not consider the applicability of the Statute of Frauds. See Rooney v. Tyson, 91 N.Y.2d 685, 692, 674 N.Y.S.2d 616, 697 N.E.2d 571 (1998). For conflicting applications of the Statute of Frauds to agreements for an indefinite term, compare, e.g., Ohanian, discussed in Comment b above, with McInerney v. Charter Golf, Inc., 176 Ill.2d 482, 491, 680 N.E.2d 1347 (1997).

Comment d. A number of courts have adopted a form of “unilateral contract” analysis to uphold the enforceability of certain promises contained in unilaterally promulgated employee handbooks or personnel manuals. A typical formulation is found in Ex parte Amoco Fabrics & Fibers Co., 729 So. 2d 336, 339 (Ala. 1998) (“First, the language contained in the handbook must be examined to see if it is specific enough to constitute an offer. Second, the offer must have been communicated to the employee by the issuance of the handbook, or otherwise. Third, the employee must have accepted the offer by [continuing his] employment after he became generally aware of the offer. [The employee’s] actual performance supplies the necessary consideration.”). These decisions ordinarily require an express promissory statement by the employer sufficiently definite to constitute an offer, dissemination to affected employees and, in some jurisdictions, reliance by employees on the statement. See listing in Appendix B to these Notes and further discussion of unilateral-contract analysis in § 2.04, Comment b. The modifiability of obligations created in such circumstances is the subject of § 2.05.

Comment f. Mutuality of obligation was required in some early common law rulings; modern decisions suggest, however, that a promise is not illusory if the power to terminate is conditioned by an obligation to give notice, however brief, or on the occurrence of events beyond the promisee’s control. See E. Allan Farnsworth, Contracts § 2.14, at 77-79 (1990); 1A A. Corbin, Contracts, § 163 (1963). For a 1921 decision anticipating the demise of mutuality, see Armstrong Paint & Varnish Works v. Continental Can Co., 301 Ill. 102, 108, 133 N.E. 711, 714 (“Where there is no other consideration for a contract, the mutual promises of the parties constitute the consideration, and these promises must be binding on both parties or the contract fails for want of consideration, but, where there is any other consideration for the contract, mutuality of obligation is not essential. If mutuality, in a broad sense, were held to be an essential obligation in every valid contract to the extent that both contracting parties could sue on it, there could be no such thing as a valid unilateral or option contract.”).

Comment g. Although ordinarily an agreement under this Section requires an exchange of express promises, an offer contemplating acceptance by the employee’s performance or some other promissory statement by the employer to which the employee indicates assent, there may be special
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circumstances where the well-established practices of the employer indicate conduct manifesting a promise by the employer which the employees accept by starting or continuing employment, or where the conduct of the parties helps supply (or clarify) a missing (or ambiguous term. See generally Restatement Second of Contracts § 4 and Comment a, at 14 (1981). As suggested by Illustration 5, such circumstances may be present in the tenure system of modern colleges and universities. Courts sometime use the language of “implied in fact” contract to allow reference to promissory statements contained in employee handbooks or personnel manuals unilaterally promulgated by the employer. In some cases, as in Illustration 5, the parties have in fact negotiated an express contract, with the handbook or manual either supplying a clarifying a missing or ambiguous term. See Torosyan v. Boehringer Ingelheim Pharm., 234 Conn. 1, 662 A.2d 89 (1995), discussed in Comment h below. Some jurisdictions avoid language of “implied contract” and openly acknowledge that the “defendant’s obligations to discharge plaintiff in accordance with the manual and its duty to accord her a three-step grievance review were not implied; they were expressly set forth in the manual itself.” Wade v. Kessler Inst., 172 N.J. 327, 798 A.2d 1251 (2002) (discussing applicability of implied covenant of good faith and fair dealing).


This Restatement disagrees with this approach of extreme skepticism; the law should recognize that in particular circumstances the parties may have intended an enforceable agreement providing for indefinite employment while containing a limit on termination. Whether the parties in fact entered into such an agreement is generally a question for the trier of fact. For example, New Jersey has moved away the skepticism previously expressed in Savarese. In Shebar v. Sanyo Business Corp., 111 N.J. 276, 544 A.2d 377, 383 (1988), the court held that an oral promise not to terminated from employment except for cause is not a contract of life employment under Savarese: “To the extent plaintiff alleges a contract of life employment, … this claim is barred by Savarese. To the extent that plaintiff alleges a promise of employment for cause only, Plaintiff’s breach of contract claim should be analyzed by those contractual principles that apply when the claim is one than an oral employment contract exists.”

Illustrations 6-7 are drawn from the facts in Torosyan v. Boehringer Ingelheim Pharm., 234 Conn. 1, 662 A.2d 89 (1995); see also Boothby v. Texon, Inc., 414 Mass. 468, 608 N.E.2d 1028 (1993). The court in Torosyan used the terminology of “implied contract” apparently in the belief that “express” contracts, at least in that jurisdiction, require a particular form of words. The case plainly involved sufficient evidence of an express agreement for indefinite employment containing a limit on termination of employment by the employer. As the state high court noted and held to be not
clearly erroneous: “The trial court found that, in the circumstances of this case, the oral and written
statements constituted promises to the plaintiff” and “that, by working for the defendant, the plaintiff
accepted those promises.” 234 Conn. at 22. In any event, the “implied contract” approach, as
formulated by Chief Justice Peters in Torosyan, is consistent with the requirement that agreements
falling within § 2.03 be enforceable under traditional contract principles:

Pursuant to traditional contract principles… the default rule of employment at will can be
modified by the agreement of the parties. “Accordingly, to prevail on the … count of his
complaint (that) alleged the existence of an implied agreement, the plaintiff had the burden of
proving by the fair preponderance of the evidence that (the employer) had agreed either by
words or conduct, to undertake (some) form of actual contract commitment to him under
which he could not be terminated without cause.”

234 Conn. at 15 (citations omitted). The court also noted that “[t]ypically, an implied contract of
employment does not limit the terminability of an employee’s employment but merely includes
wages, working hours, job responsibilities, and the like.” Id. at 14.

Comment i. “Cause” in definite-term contracts ordinarily refers to the employee-agent’s
material breach or inability to perform. See generally Restatement Second of Agency § 409(1)
(requiring conduct by the agent “constitut[ing] a material breach of contract, or who, without
committing a violation of duty, fails to perform or reasonably appears unable to perform a material
part of the promised service because of physical or mental disability.”). Changes in the employer’s
business circumstances generally do not constitute cause. See, e.g., Drake v. Geochemistry and
132 N.J.L. 154, 39 A.2d 70 (N.J. 1944). Some decisions require that the employer’s stated
justification be the actual reason for the termination, although the traditional rule is that the
employer’s motivation is irrelevant as long as adequate cause in fact existed. See, e.g., Wilde v.
Houlton Regional Hospital, 537 A.2d 1137 (Me. 1988).

The courts’ general approach to “cause” in cases involving indefinite-term employment
seems to afford greater latitude to take account of demonstrable changes in the employer’s business
circumstances. See, e.g., Cotran v. Rollins Hudig Hall Int’l, 17 Cal.4th 93, 69 Cal.Rptr.2d 900, 948
P.2d 412, 414 n.1 & 422 (1998) (“We give operative meaning to the term ‘good cause’ in the context
of implied employment contracts by defining it … as fair and honest reasons, regulated by good faith
on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or
goals, or pretextual”; noting, however, “[w]rongful termination claims founded on an explicit
promise that termination will not occur except for just or good cause may call for a different
standard, depending on the precise terms of the contract provision.”); Life Care Centers of America,
Inc. v. Dexter, 2003 WY 38, 65 P.3d 385, 392 (2003) (same); Ohanian, supra, 779 F.2d at 108 (“just
cause can be broader than breach and here there may be just cause to dismiss without a breach. To
illustrate, under the terms of the contract it would be possible that despite plaintiff’s best efforts the
results achieved might prove poor because of adverse business conditions. From defendant’s
standpoint that too would force Avis to make a change in its business strategy, perhaps reducing or
closing an operation. That is, there would be just cause for plaintiff’s dismissal. But if this is what
occurred, it would not constitute a breach of the agreement.”). See also Crawford Rehabilitation
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An intermediate case between fixed-term and indefinite-term agreements is suggested by Uintah Basin Medical Center v. Hardy, 2005 UT App. 92, 110 P.3d 168 (Utah App. Ct. 2005), where the agreement did not include a fixed termination rate but provided it would “continue to bind parties … until terminated after ninety (90) days’ written notice for just cause of termination by either party or by mutual consent of the parties to a shorter notice period.” The agreement did not define “just cause,” and the appeals court held that the Cotran standard (quoted above) applies: “This broad definition of just cause allows an employer to discharge an employee not only for misconduct or poor performance but also for other legitimate business reasons.” 110 P.3d at 174. Such a justification could not, however, be “a mere pretext for a capricious, bad faith, or illegal termination.” Id.


§ 2.04 Binding Employer Policy Statements

Policy statements by an employer—made in such documents as employee manuals, personnel handbooks, and employment-policy directives provided, or made accessible, to employees—that, reasonably read in context, establish limits on the employer’s power to
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terminate the employment relationship are binding on the employer until modified or revoked.

Comment:

a. Scope. As a general matter employers of any size will use agreements for a definite or indefinite term to structure employment relationships only with their higher-level employees. When an employer is dealing with a large number of similarly situated employees, the employer may communicate the terms of the employment relationship through unilateral statements in such documents as employee manuals, personnel handbooks, and employment-policy directives that are provided, or made accessible, to employees. Such statements, reasonably read in context, may establish limits on the employer’s power to terminate the employment relationship at will or may provide for other undertakings that are to apply uniformly for similarly situated employees without further negotiation with individual employees. Under certain circumstances, such statements may give rise to an employment agreement under traditional contract principles and would thus be covered under § 2.03. In other situations, such statements may reasonably induce detrimental reliance under the promissory estoppel doctrine and be covered under §2.02(d). But even where the elements of an enforceable agreement or promise are not present, these unilateral policy statements may be binding on the employer until properly modified or revoked. (Such statements may also establish obligations with respect to compensation and benefits—the subject of Chapter 3.)

Unilateral employer statements may also establish, or purport to establish, obligations owed by the employees to the employer. Typically, these statements—which fill out the duties expected of employees—are enforceable only by the employer’s power to terminate employment or administer discipline and do not provide an independent basis for imposing liability on the employee. (Whether an employee’s breach of his or her obligations to an employer may give rise to liability, and whether
such obligations may be created by unilateral employer statements, are addressed in Chapters 6, 8, and 10.)

b. Rationale. Some courts have tried to fit the class of unilateral employer statements into a conventional contract law framework, reasoning that employees “accept” or “rely upon” these unilateral employer “offers” by continuing to provide their services under the issued statements. This has proved to be a conceptually awkward fit. Employees are rarely made aware, and even more rarely make themselves aware, of the content of these statements when they first accept employment, or of changes in these statements after they have begun employment. That is particularly true where the employer does not provide the statements in printed form directly to employees, but instead either provides the statements directly to supervisors while making them accessible to employees in a personnel office or general topic computer file or provides the statements in the form of brief summaries forwarded to the employee’s paper or electronic mail in-box. Such factual circumstances, where present, belie efforts to analogize the class of unilateral employer statements to unilateral contract offers under the Restatement Second of Contracts § 45, Comment a, at 118 (1981). Beyond that difficulty, traditional principles of consideration and bargained-for exchange rarely, if ever, apply when the employer’s unilateral statements or modification of the particular promises in them are not made in response to the expressed concerns of a prospective employee or of a particular employee threatening resignation. In most instances, and for much the same reasons, reasonable detrimental reliance by employees on such statements under the promissory estoppel doctrine will be rare. Moreover, many of the jurisdictions adopting unilateral-contract analysis do not follow the implications of traditional contract analysis because they permit unilateral modification by employers of promises contained in handbooks or personnel manuals even where the employer does not provide consideration for the modification and the employee does not consent to the change other than by
Against that background, other courts, and this Restatement, rest the binding effect of unilateral employer statements on general estoppel principles. Employers make certain unilateral statements regarding personnel policy for the purpose of governing the operational decisions of their supervisors and managers. Employers do so in their self-interest and for their benefit in order to advance productivity, employee welfare, or some other organizational objective. Absent language in the statement to the contrary, the employer’s purpose in promulgating a unilateral policy statement is to have it govern operational decisions while the statement is in effect, but not to bind the employer to adhere to the policies in the statement after giving reasonable notice to employees of changes in those policies. The courts reach this result in a number of ways: adjusting their unilateral-contract analysis to imply employees’ “consent” to a new unilateral contract from the fact that employees continue to work under the new terms; allowing unilateral modification where employers have expressly reserved their right to change their unilateral policy statements; or invoking something akin to promissory estoppel principles even in the absence of employee reliance or by presuming such reliance. To avoid these analytical contortions, § 2.04 provides a general rule that unilateral employer policy statement that are not enforceable agreements or promises under § 2.02 may still be enforceable but are modifiable on a prospective-only basis. Such statements are analogous to rules of practice promulgated by administrative agencies to govern their operational decisions; as a matter of administrative law, such rules are held binding on the agency until properly modified or revoked on a theory of “administrative agency estoppel” even though no statute or regulation may have required their promulgation in the first place. By the same token, unilateral employer statements that, reasonably read in context, are intended to govern operational personnel decisions should be binding on the employer until properly modified or revoked.
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c. Reasonably read in context. Only certain unilateral employer statements are binding on the employer. It is often a question for the trier of fact whether a particular statement or set of statements, reasonably read in context, constitutes a policy statement that is binding on the employer. Several factors should inform this inquiry. First, the presence of a prominent disclaimer in the text of the statement may indicate that it is a hortatory pronouncement rather than a statement to govern the employer’s operational personnel decisions. Any such disclaimer should be viewed, of course, in the context of the entire statement, other employer policies, and the employer’s course of conduct. Second, the mode of dissemination may be relevant; for instance, dissemination of a statement limited to supervisors, without providing access to the employees, suggests it is intended only as guidance to supervisors regarding the exercise of their discretion rather than a rule, regulation, or other policy governing personnel decisions. Third, a workplace culture featuring dominant reliance on bilateral agreements with employees may derogate from the significance of unilateral employer statements. These and other factors that emerge in particular circumstances are relevant to determining whether a unilateral statement is binding on the employer.

Illustrations:

1. Employer X Corporation promulgates an employee handbook, distributed to all employees, containing a procedure that supervisors “should” follow before reaching a decision to terminate a supervisee’s employment. The procedure includes a requirement of a prior warning, followed by an unpaid suspension from work for a repeated offense, and then followed by a “last chance” agreement in the event of a third offense. If those successive procedures fail to correct the behavior or performance problem, the procedure culminates in termination of employment for violation of the last-chance agreement. The procedure is “not
applicable” where the employee has engaged in violence or theft, offenses for which immediate termination is indicated. Employee E has been absent from work on several occasions on the Mondays following vacation days or following holidays falling on the previous Friday. E has received a prior warning for this absenteeism but no additional formal discipline. When E is once again absent on a Monday, X’s supervisor terminates E’s employment. Because the facts suggest that X promulgated the multi-step disciplinary procedure in the handbook to govern its supervisors’ decisions for infractions other than violence or theft, and presumably this procedure informed the actual practices of the employer as reasonably perceived by the employees, X has breached its contractual obligation to E.

2. Same facts as in Illustration 1, except that the employee handbook contains a prominent disclaimer on the first page:

“The statements contained in this handbook are not intended to create a contractual obligation of any kind. Employment at X Corporation is at will. That means that, except as provided by law, you and your employer have the right to terminate this relationship at any time, with or without cause or prior notice.”

All employees are required to sign an acknowledgment of receipt of the handbook, immediately below the disclaimer on the first page, which E had signed. In view of this disclaimer, X may not have breached any binding commitment to E. In some circumstances, despite this disclaimer, there may still be a question of fact as to whether X limited its power of termination by other language in the handbook or other statements or course of conduct.

d. Modification or revocation. This issue is taken up in § 2.05 below.
REPORTERS’ NOTES


The mode of distribution is treated here as one of several factors informing the determination whether the unilateral statements in fact establish binding commitments, although some courts deny enforcement altogether to statements distributed only to supervisors. Compare, e.g., Nicosia v. Wakefern Food Corp., 136 N.J. 401, 408-12, 643 A.2d 554, 558 (1994) (manual was distributed to 300 of a 3000-person workforce, half of which were not covered by collective bargaining), with Morosetti v. Louisiana Land and Exploration Co., 522 Pa. 492, 495, 564 A.2d 151, 152 (1989) (“The employees here … could show [only] an internal consideration of policy for what might be given, if and when they announced a policy for all employees. It is not sufficient to show only that they had a policy. It must be shown that they intended to offer it as a binding contract.”); Pine River State Bank v. Mettille, 333 N.W.2d 622, 626-627 & n.4 (1983) (“The offer must be definite in form and must be communicated to the offeree…. If the handbook constitutes an offer, and the offer has been communicated by dissemination of the handbook to the employee, the next question is whether there has been acceptance of the offer and consideration furnished for its enforceability.”).

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Ch. 2 Employment Contracts: Termination

Tentative Draft – Not approved as of publication date


A prominent example of the “unilateral contract” theory for enforcing a unilateral employer policy statement is the New Jersey high court’s decision in Woolley, supra. This Section, by contrast, adopts essentially the analytical framework of the Michigan high court in Toussaint, which better explains why these statements are enforceable. See Bankey v. Storer Broadcasting Co., 432 Mich. 438, 443 N.W.2d 112, 119-120 (1989) (en banc) (on certified question from the Sixth Circuit) (“Without rejecting the applicability of unilateral contract theory in other situations, we find it inadequate [here]. We look, instead, to the analysis employed in Toussaint which focused on the benefit that accrues to an employer when it establishes desirable personnel policies. Under Toussaint, written personnel policies are not enforceable because they have been ‘offered and accepted’ as a unilateral contract; rather, their enforceability arises from the benefit the employer derives by establishing such policies”).

Comment c. Illustration 1 is drawn loosely from Woolley, supra. All jurisdictions give considerable weight to the presence of a prominent disclaimer in the employer statement as derogating from the conclusion that the statement evidences a binding commitment. See, e.g., Lytle v. Malady, 458 Mich. 153, 579 N.W.2d 906, 911 (1998) (en banc); Suter v. Harsco Corp., 184 W.Va. 734, 403 S.E.2d 751 (1991); Eldridge v. Evangelical Lutheran Good Samaritan Society, 417 N.W.2d 797 (N.D. 1987); Larose v. Agway, Inc., 147 Vt. 1, 508 A.2d 1364 (1986); Thompson, 102 Wash.2d at 230, 685 P.2d at 1088. Courts disagree over whether (1) the disclaimer in a particular case renders the statement unenforceable as a matter or law, see, e.g., Lytle v. Malady, supra; and (2) the disclaimer in a particular case can adversely affect the rights of employees established under prior statements that did not contain such disclaimers. The latter issue is the subject of § 2.05 below. As to the former, Illustration 2 suggests that while the presence of a prominent disclaimer cuts against any finding of a binding commitment, there may other evidence in the case creating a bona fide dispute for the trier of fact as to whether a binding commitment nevertheless was established. For example, questions may arise as to the clarity of the disclaimer. See, e.g., Nicosia. Also, some courts have asked juries to evaluate disclaimers in light of the employer’s actual practice. See, e.g., McGinnis v. Honeywell, Inc., 101 N.M. 1, 791 P.2d 452, 457 (1990); Zaccardi v. Zale Corp., 856 F.2d 1473, 1476-77 (10th Cir. 1988). The Wyoming Supreme Court apparently will permit juries to disregard disclaimers in employee handbooks upon proof of detrimental reliance by employees on representations contained therein. See McDonald v. Mobil Coal Producing, Inc., 789 P.2d 866 (Wyo. 1990).

§ 2.05 Modification or Revocation of Binding Employer Policy Statements

(a) An employer may prospectively modify or revoke its binding policy statement by providing reasonable advance notice of the modified statement or revocation to the affected employees.

(b) Modifications and revocations apply to all employees hired, and all employees who continue working, after the effective date of the notice of modification or revocation.

(c) Modifications and revocations cannot adversely affect vested or accrued employee rights that may have been created by the statement, an agreement based on the statement (covered by § 2.03), or reasonable detrimental reliance on a promise in the statement (covered by § 2.02, Comment c).
Comment:

a. Scope. This Section deals with the issue of modification or revocation by employers of commitments made in previous unilateral statements. Absent an enforceable agreement under § 2.03 or employer promise inducing detrimental reliance under § 2.02, Comment c, and except for vested or accrued employee rights created by the statement, undertakings in unilateral statements do not bind the employer for all time. It is not reasonable to assume that an employer intended permanently to circumscribe its operational policies through such non-bargained-for promulgations.

b. The special case of vested or accrued employee rights. An employer cannot by unilateral action modify or rescind employees’ enforceable contractual rights. (The terms “vested” or “accrued” are often used to indicate nonderogable employee entitlements.) Such rights normally arise from express agreements covered by § 2.03. In appropriate circumstances, the employer’s unilateral policy statement itself may create vested or accrued employee rights, which, under this Section, also cannot be unilaterally modified or rescinded; any adverse change would require an agreement by the employee supported by consideration. Factors relevant to determining whether an employer’s policy statement creates a vested or accrued employee right include the text of the statement, other policies of the employer, the employer’s course of conduct, and usages in the particular industry or occupation. As the following example illustrates, the issue of nonderogable rights often arises in the context of employee compensation and benefits, which is the subject of Chapter 3.

Illustration:

1. Upon commencing employment for X Corporation on January 1, 2000, E, an insurance salesperson, is told he will be paid under an “Accrued Commission Plan” in effect for all of X’s sales force. That plan provides a sales commission of seven percent on the
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premiums of the policies sold or renewed. On January 1, 2004, X modifies the compensation
plan so that commissions are based not on a percentage of premiums, but rather on a stated
flat rate for each policy sold or renewed. E challenges the application of the “flat rate”
commission system to renewals of policies sold while the original plan was in effect. E’s
claim against X should go to the trier of fact because the foregoing facts create a bona fide
dispute as to whether the original plan applied only to sales of policies made while that plan
was in effect or whether it also governed all future renewals of those policies despite any
later change in the compensation plan.

c. Modification or revocation. This Section provides that, in general, undertakings in an
employer’s policy statements are binding on the employer only from the date of distribution (or a
later stated “effective date”) until they are properly modified or revoked. Thus, terminations of
employment that occur while the original statement is in place are governed by that statement and
terminations that occur after notice of the statement’s modification has been given are governed by
the modified statement.

Illustrations:

2. On January 1, 2003, X Corporation distributes an employee manual to its
workforce promising that its employees would enjoy “job security” at X. One year later, on
January 1, 2004, X distributes an amended employee manual omitting any reference to “job
security” and containing the following disclaimer:

“The statements contained in this handbook regarding the duration of your
employment are not intended to create a contractual obligation of any kind.
Employment at X Corporation is at will. That means, except to the extent otherwise provided by law, you and your employer each have the right to terminate this relationship at any time, without or without cause or prior notice.”

Employees on the payroll after January 1, 2004, and employees hired after that date are required to sign an acknowledgment of receipt of the amended employee manual, directly below the disclaimer on the first page. Employee E is terminated without cause on November 1, 2003, before the amended employee manual is distributed to X’s workforce. E’s termination is governed by the original employee manual, and E may have a valid breach-of-contract claim under the manual.

3. Same facts as in Illustration 2, except that Employee E is terminated, without any stated reason, on February 1, 2004, after the amended manual is distributed to X’s workforce and after E signed the acknowledgment of its receipt. Absent an agreement or promise under §§ 2.02(b) and 2.03, or reasonable grounds for interpreting the “job security” language in the prior manual as creating a nonmodifiable employee right, E’s termination is governed by the amended employee manual, and E does not have a valid breach-of-contract claim under the manual.

d. Reasonable advance notice. This Section requires employers to give reasonable notice of a modification to or revocation of a binding unilateral employer statement by providing or making accessible to the employees advance notice of the modification or revocation. Ordinarily, the reasonableness standard is met when the manner of giving notice is the same or substantially equivalent to the manner in which the original statement was provided or made accessible. The ultimate question, however, is whether the employer provided notice reasonably calculated to alert
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employees to any modification or rescission of material terms in prior policy statements.

e. Effectiveness of modification or revocation. A substantial number of courts have held that employees who continue to work for the employer after receiving proper notice of a modification or revocation of a unilateral employer statement that changes a personnel policy to one that is less advantageous to the employees than the original statement are deemed to have “accepted” the changed personnel policy. A smaller number of courts have held that a changed personnel policy covers only those incumbent employees who have expressly agreed to the change; that is, it is not enough that employees continue to work for the employer after the employer gives proper notice for the change to affect them.

This Restatement adopts the first position and rejects the second. A requirement that a modification or revocation of a unilateral employer statement can be made effective for incumbent employees only by a bilateral agreement is contrary to the underlying basis for enforcing certain unilateral employer statements—that these statements are self-imposed limitations on the employer’s authority binding on the employer as a matter of equitable estoppel rather than traditional contract principles of consideration, bargained-for exchange, or even promissory estoppel. Furthermore, requiring express agreement by employees to changes in employer statements would be unworkable for companies with large workforces and would undermine sought-for uniformity of treatment among similarly situated employees.

Illustration:

4. Same facts as in Illustration 2, except that the amended employee manual states:

“The statements contained in this handbook regarding the duration of your employment are not intended to create a contractual obligation of any kind.
Employment at X Corporation is at will. That means, except as otherwise provided by law, you and your employer each have the right to terminate this relationship at any time, with or without cause or prior notice. Statements or promises contained in prior employee manuals or other X Corporation policy directives contrary in any way to the foregoing are superseded by this manual. If you wish to continue employment with X after February 1, 2004, you are deemed to have agreed to work under the terms of this manual.”

E continues employment after February 1, 2004, and is terminated on March 1, 2004. Absent an agreement or promise enforceable under §§ 2.02(b) and 2.03, or a reasonable basis for interpreting the “job security” language in the prior manual to create a nonmodifiable employee right, E’s termination is governed by the amended employee manual. There is no requirement that X obtain E’s agreement to be governed by the amended manual.

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an express reservation by the employer of the right to modify or revoke its unilateral statements prospectively is not required. The employer’s promises contained in the original statement are not “illusory” promises, for as the California Supreme Court noted in Asmus: “[T]he MESP was not illusory because the plaintiffs obtained the benefits of the statement while it was in effect. In other words, Pacific Bell was obligated to follow it as long as the MESP remained in effect…. As long as the MESP remained in force, Pacific Bell could not treat the contract as illusory by refusing to adhere to its terms; the promise was not optional with the employer and was fully enforceable until terminated or modified.” 999 P.2d at 79. Some jurisdictions require an express reservation of the right to modify unilateral employer statements. See Brodie v. General Chem. Corp., 934 P.2d 1263 (Wyo. 1997); O’Brien v. New England Tel. & Tel. Co., 422 Mass. 686, 664 N.E.2d 843, 849 (1996).

This Restatement therefore rejects the position of those courts that seemingly would require employees formally to agree to any change in terms that employees enjoyed under prior unilateral statements—irrespective of whether the prior statement created vested or accrued rights. See, e.g., Doyle v. Holy Cross Hospital, 186 Ill.2d 104, 237 Ill.Dec. 2d 100, 111-115, 708 N.E.2d 1140, 1144-1146 (1999); Brodie v. General Chem. Corp., 934 P.2d 1263 (Wyo. 1997) (on certified question from the Tenth Circuit). The holdings of some of these decisions remain unclear. See Demasse v. ITT Corp., 194 Ariz. 500, 503, 984 P.2d 1138, 1141 (1999) (on certified question from the Ninth Circuit; state high court assumed the “certified question’s predicate that [the] seniority layoff promise became part of the Demasse employees’ contract.”); Taylor v. Graham County Chamber of Commerce, 201 Ariz. 184, 33 P.3d 515, 530 (Ct. App. 2001) (citations omitted): Demasse answered certified questions from the Ninth Circuit “on the ‘premise that a contract exists,’ and that the layoff seniority provision had ‘become part of the employment contract.’”); Brodie, 934 P.2d at 1266-1269 (suggestion that court’s answer would have been different if the employer had expressly reserved the right to make unilateral changes: “The certified question in this case asks whether an employer may unilaterally modify when its employee handbook does not contain such a reservation.”); Torosyan v. Boehringer Ingelheim Pharm., 234 Conn. 1, 662 A.2d 89 (1995) (arguably prior “cause” term was based on bilateral agreement).

Absent circumstances giving rise to nonmodifiable or accrued employee rights, where employer obligations are predicated solely on prior unilateral statements, such obligations can be modified or rescinded prospectively by the same mechanism by which they were created—unilateral employer promulgation with reasonable advance notice given to affected employees.

Comment b. Occasionally, policies embodied in prior unilateral statements are reasonably understood as creating nonmodifiable or accrued employee rights. Any change in such rights adverse to the employee would in the circumstances require an agreement with the affected employee. As Comment b makes clear, § 2.05’s endorsement of the principle of modification or rescission by a later unilateral employer statement does not apply to such situations.


Comments c-d. Illustrations 2 and 3 depict the general principle that employer obligations established by unilateral employer statement bind the employer while those policies remain in effect,
and that any change in such policies effected by a later unilateral statement governs only post-change employer actions. Comment \(d\) emphasizes the importance of providing employees with reasonable advance notice of any change in previously binding policies contained in unilateral employer statements. Changes in prior policies should not be buried in complex documents. Rather, communication should be made in a manner reasonably calculated to give the affected employees actual notice of the changes.

Comment \(e\). Illustration 4 reflects the position of this Section that changes in obligations created by prior unilateral employer statements, not themselves creating nonmodifiable employee rights, do not require a formal agreement with the affected employees.

§ 2.06 Implied Duty of Good Faith and Fair Dealing

(a) Each party to an employment contract, including at-will employment, owes a nonwaivable duty of good faith and fair dealing to each other party, which includes an agreement by each not to hinder the other’s performance under, or to deprive the other of the benefit of, the contract.

(b) In at-will employment, the implied duty of good faith and fair dealing must be read consistently with the at-will nature of the relationship.

(c) In any employment relationship, including at-will employment, the employer’s implied duty of good faith and fair dealing includes the duty not to terminate or seek to terminate the employment relationship for the purpose of

(1) preventing the vesting or accrual of an employee right or benefit, or

(2) retaliating against the employee for performing the employee’s obligations under the employment contract or law.

Comment:

a. Scope. This Section identifies an important term of all employment contracts: the implied duty of good faith and fair dealing. As set forth in § 205 of the Restatement Second of Contracts, this
nonwaivable duty is implied in every contract, and there is no reason to exclude employment contracts from the rule. Each party to the employment relationship undertakes a duty of cooperation such that he or she will not hinder the other’s ability to accomplish that party’s performance under the agreement or deprive that party of the benefit of the contract.

b. Consistency with at-will contracts. As in all contracts, the implied duty of good faith and fair dealing serves as a supplementary aid to implementing the intentions of the parties, and should not be read to override or undermine an express term or the essence of the agreement. It is widely held in those jurisdictions that recognize the implied covenant in the employment setting that, in at-will employment, the implied covenant must be understood so as to be consistent with the at-will nature of the relationship—namely, except to the extent otherwise provided by law, either party may terminate the relationship without cause.

c. Application in at-will employment: opportunistic firings. This Section sets out two principal (though not necessarily exclusive) applications of the implied duty of good faith and fair dealing in the employment context. The first addresses opportunistic use by the employer of the prerogative to terminate the relationship as a means of preventing the vesting or accrual of an employee right or benefit. In the context of employee benefit plans covered by ERISA, such opportunistic firings would violate the antiretaliation clause in § 510 of the statute, 29 U.S.C. § 1140. This Section provides similar protection against opportunistic firings in other contexts, mainly involving compensation and other arrangements not covered by ERISA (which are the subject of the next chapter). For example, if an employer provides a form of contingent compensation tied to prior performance but conditioned upon the employee’s remaining on the payroll as of a certain date, termination of the employee without cause prior to that date, but after the employee has substantially performed his or her end of the bargain, is a breach of the implied duty
and will not be effective to prevent the vesting of the employee’s entitlement to the contingent compensation. This is so, not because the employer has undertaken a general obligation not to terminate employees without cause, or because termination of employment itself is actionable. Rather, in the context of this contingent compensation plan, the employer is under a duty to cooperate, and once an employee has substantially performed his or her services, unless there is independent cause for termination, the employer cannot use its right to terminate without cause to deprive the employee of the benefit of the contract. Serving to enforce the parties’ reasonable expectations when agreeing to the contingent compensation plan, the implied duty requires full payment of the amount owed.

Illustration:

1. Employer X assigns its sales people—all at-will employees—to specific territories. Each sales employee is paid 75 percent of the applicable commission upon executing a sales agreement with the customer, and 25 percent of the commission after the equipment is delivered to the customer and 30 days have transpired without a customer complaint. But the 25 percent is paid only if the employee is still on X’s payroll at that latter date. E, an at-will sales person employed by X, has procured a substantial order for X’s equipment from a customer, and has received 75 percent of the applicable commission. On January 1, the equipment is delivered to the customer. On January 15, E is fired without cause. E has an action against X for the remaining 25 percent of the applicable commission (but not for reinstatement).
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d. Application in at-will employment: employer retaliation. The second principal application of the implied duty in at-will employment involves retaliatory discharge or other significant discipline of employees for performing their contractual or statutory duties. Although employers in at-will relationships are not required to have cause for termination of an employee, they are under an implied duty of cooperation that requires they not terminate or otherwise discipline an employee for performing the employee’s contractual obligations. Similarly, where employees are under a legal duty to act or refrain from acting in particular ways, employers may not, without violating the implied duty of good faith and fair dealing, use their at-will power to terminate or otherwise discipline employees for performing those obligations. In this context, a violation of the implied duty provides a basis for challenging the termination or other discipline.

Illustration:

2. Employer X’s supervisor fires E, X’s at-will manager of accounting, for reporting to X’s president certain improprieties in the manner in which the accounts of a closed-down foreign subsidiary were reported in X’s financial statements. By virtue of E’s position with the company, E is under a contractual (if not legal) duty to certify that X’s financial statements are in accord with applicable accounting standards. X’s termination of E for performing this contractual obligation violates the implied covenant of good faith and fair dealing, and X has breached the employment contract.

e. Nonwaivable duty. The implied duty of good faith and fair dealing is read into every contract as a matter of law, and in that sense is not subject to modification or waiver by agreement of the parties. Of course, the agreement of the parties will frame the job duties of the employee and the
reasonable expectations of both sides, and hence will inform how the implied duty is applied in particular cases.

**Illustration:**

3. Same facts as Illustration 2, except that E is X’s manager of product quality control who hears “through the grapevine” that X is engaged in accounting improprieties. E then sends a statement to X’s president threatening “to go public” unless X begins to address in earnest those accounting issues. In retaliation for that conduct, X fires E. E cannot claim a violation of the duty of good faith and fair dealing because the disclosure to X’s president was unrelated to E’s job duties, nor was E under a legal duty to issue the statement. (In particular circumstances E, however, may have a claim under the whistleblower laws in a particular jurisdiction or may have a tort claim for wrongful discipline in violation of public policy under Chapter 4.)

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Comment a. The implied duty of good faith and fair dealing received early articulation in Kirke Le Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 87, 188 N.E. 163 (1933); seeds were also planted in Benjamin Cardozo’s opinion in Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917), if not earlier. The duty of good faith is defined in Restatement Second of Contracts § 205 (1981). Various formulations are used by courts recognizing the implied covenant in the employment context. See, e.g., Wade v. Kessler Instit., 172 N.J. 327, 345, 798 A.2d 1251 (2007) (“the breach of the implied covenant arises when the other party has acted consistent with the contract’s literal terms, but has done so in such a manner so as to have the effect of destroying or injuring the right of the other party to receive the fruits of the contract”) (citations omitted); Wieder v. Skala, 80 N.Y.2d 628, 637, 593 N.Y.S.2d 752, 756, 609 N.E.2d 105, 109 (1992).(citations omitted) ("It is the law that ‘in every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part’"); Jones v. Central Peninsula General Hospital, 779, 789 P.2d 783 (Alas. 1989) (“This covenant does not lend itself to precise definition, but it requires at a minimum that an employer not impair the right of an employee to receive the benefits of the employment
agreement.” [It] “also requires that an employee treat his employees alike.” Id. at 789 n.6); Metcalf v. Intermountain Gas Co., 116 Idaho 622, 627, 778 P.2d 744, 749 (1989) (“the covenant protects the parties’ benefits or relationship, and that any action which violates, nullifies or significantly impairs any benefit or right which either party has in the employment contract, whether express or implied, is a violation of the covenant”).

Some courts do not recognize the applicability of the implied covenant in at-will employment. See, e.g., Morriss v. Coleman Company, Inc., 241 Kan. 501, 518, 738 P.2d 841 (1987) (implied covenant “should not be applicable to employment-at-will contracts.”); Sanchez v. The New Mexican, 106 N.M. 76, 738 P.2d 1321, 1324 (1987) (“[T]here is no contract of employment upon which the law can impose the stated duty to exercise good faith and fair dealing. Sanchez was an ‘at will’ employee who could be dismissed for any or no reason.”). New York comes close to this position. See discussion regarding Comment d below. Wyoming recognizes the implied covenant in limited circumstances. See Finch v. Farmers Co-op Oil of Sheridan, 2005 WY 41, 109 P.3d 537, 544 (2005) (plaintiff “did not present any evidence to suggest the and [his employer] had a special relationship of trust and reliance that would support a claim of breach of the implied covenant of good faith and fair dealing. He cannot, therefore, maintain a claim on that theory.”).

Comment b. Courts recognizing the applicability of the implied covenant in the employment setting uniformly insist that the implied covenant must be read consistently with the underlying contract; and when employment is at-will, consistently with the at-will rule. See, e.g., Jenkins v. Boise Cascade Corp., 108 P.3d 380, 390 (Idaho 2005) (“the covenant of good faith and fair dealing does not alter the right to fire an at will employee; that is, the covenant does not create good cause as a requirement.”); E.I. DuPont d Nemours & Co. v. Pressman, 679 A.2d 436, 444 (Del. 1996) (as quoted below); Metcalf, 778 P.2d at 749 (rejecting “the ‘amorphous concept of bad faith’ as the standard for determining whether the covenant has been breached” because “it is difficult to distinguish a ‘bad faith’ discharge from a no-cause discharge (which is permitted under the at-will doctrine”) (citations omitted). Thus, in the opportunistic-firing context, courts hold that the implied covenant protects the employee right or benefit but does not generally provide a basis for overturning the discharge decision. See, e.g., Wakefield v. Northern Telecom, Inc., 769 F.2d 109, 112 (2d Cir. 1985) (applying either New York or New Jersey law) (“Wakefield may not … recover for his termination per se. However, the contract for payment of commissions creates rights distinct from the employment relation, and … obligations derived from the covenant of good faith implicit in the commission contract may survive the termination of the employment relationship.”).

In some jurisdictions, the covenant can be invoked as a contractual basis for challenging fraud or deceit by the employer or its agents; these courts, too, interpret the covenant consistently with the at-will rule. See E.I. DuPont d Nemours & Co. v. Pressman, 679 A.2d 436, 444 (Del. 1996) (“The application of the Covenant here relates solely to an act or acts of the employer manifesting bad faith or unfair dealing achieved by deceit or misrepresentation in falsifying or manipulating a record to create fictitious grounds to terminate employment. Since an assurance of continued employment is antithetical to at-will employment, no legally cognizable harm arises from the termination itself.”);

purported to recognize a broad exception from the at-will presumption for terminations “motivated by bad faith or malice or based on retaliation.” Monge itself involved a claim of retaliatory discharge for refusing sexual advances from a supervisor, which would in any event be actionable under federal and state antidiscrimination law. The New Hampshire high court subsequently narrowed Monge to situations “where an employee is discharged because he has performed an act that public policy would encourage, or refused to do that which public policy would condemn.” Howard v. Dorr Woolen Co., 120 N.H. 295, 297, 414 A.2d 1273, 1274 (1980). (The tort of wrongful discipline in violation of established public policy is the subject of Chapter 4.)


Comment d. Illustration 2 is based on the facts, while rejecting the holding, of Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 335, 514 N.Y.S.2d 209, 506 N.E.2d 919 (1987) (“No obligation can be implied … which would be inconsistent with other terms of the contractual relationship in which the law accords the employer an unfettered right to terminate employment at any time.” (quoting Murphy v American Home Prods. Corp., 58 N.Y. 2d 293, 304-305 (1983))). On the other hand, the New York high court has been willing to recognize the applicability of the implied covenant to obligations owed by a law firm not “to impede or discourage [an associate’s] compliance” with governing rules and standards for the legal profession. See Wieder v. Skala, 80 N.Y.2d 628, 638, 593 N.Y.S.2d 752, 757, 609 N.E.2d 105, 110 (1992).
APPENDIX A TO REPORTERS’ NOTES FOR CHAPTER 2*

STATUS OF EMPLOYMENT-AT-WILL DEFAULT RULE:
50 STATE+ D.C. SURVEY (Dated: Mar. 8, 2009)+

Alabama:
In Webb Wheel Prods., Inc. v. Hanvey, 922 So.2d 865, 870 (Alab. 2005), the court rejected plaintiff's cause of action for wrongful termination in violation of public policy. The court stated that “as a general rule in Alabama, an employment contract for an indefinite period is terminable at will by either party, with or without cause or justification.” Id. at 870.

Alaska:
In Blackburn v. State, Dept. of Transp. & Public Facilities, 103 P.3d 900, (Alaska, 2004) the state supreme court affirmed an order of summary judgment against an employee suing for wrongful termination. Plaintiff, a public sector employee, argued that an objective standard should be applied to probationary employees. The court held that the plaintiff came within the “legal presumption” of at-will employment: “Because we find nothing in the state statutes, the state personnel rules or the [collective bargaining agreement] that requires the state to apply any kind of objective standard to probationary employee retention decisions, or otherwise indicates that probationary employees are entitled to just cause protection, we affirm the superior court’s determination that Blackburn was an at-will employee whom the state could dismiss without just cause.” Id. at 906. The court did find that the plaintiff was entitled to a written statement of reasons for his dismissal under state personnel regulations.

Arizona:
In Demasse v. ITT Corp., 194 Ariz. 500, 984 P.2d 1138 (1999), the court answered certified questions from the Ninth Circuit concerning the modifiability of an employment contract that was assumed to have been formed by the employee’s legitimate expectations and reliance on the employer’s handbook. The opinion acknowledges the general rule that “[c]omplete at-will employment is for an indefinite term, and American courts have come to hold it can be terminated at any time for good cause or no cause at the will of either party.” 984 P.2d at 1142.

A.R.S. § 23-1501 (2009) states in relevant part that it is “[t]he public policy of this state … 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 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

* The Handbook for ALI Reporters and Those Who Review Their Work provides, as follows:
Unlike the Introduction, Introductory Notes, black letter, and Comment (including Illustrations), the Reporter's (or Reporters') Notes are regarded as the work of the Reporter (or Reporters). Nevertheless, they are submitted for review together with the other components of the Section to which they pertain. Reporter's Notes set forth and discuss the legal and other sources relied upon by the Reporter in formulating the black letter and Comment and enable the reader better to evaluate these formulations; they also provide avenues for additional research. In addition, the Notes furnish a vehicle for the Reporter to convey views not necessarily those of the Institute and to suggest related areas for investigation that may be too peripheral for treatment in the black letter or Comment. They are nevertheless written from the objective, third-person perspective characteristic of a work of the Institute. (p. 45; http://www.ali.org/doc/ALIStyleManual.pdf)

+ This is a survey of the status of the at-will default rule for employment agreements. It is not a survey of the various exceptions to the rule which are set forth in several chapters in this Restatement. The research assistance of Marlena Crippen and Nicholas Ahuja, 2008 summer associates at Jones Day New York, is gratefully acknowledged.
Appendix A: Status of Employment-at-Will Default Rule

Employment Law

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. Partial performance of employment shall not be deemed sufficient to eliminate the requirements set forth in this paragraph. …

The court in Demasse did not discuss the effect of § 23-1501. See also Taylor v. Graham County Chamber of Commerce, 201 Ariz. 184, 33 P.3d 515, 530 (Ct. App. 2001) (citations omitted): Demasse “neither involved nor addressed the EPA. In addition, the court in DeMasse answered certified questions from the Ninth Circuit Court of Appeals on the ‘premise that a contract exists,’ and that the layoff seniority provision had ‘become part of the employment contract.’”

Arkansas:

In Crawford County v. Jones, 365 Ark. 585, 232 S.W. 3d 433 (2006), the lower court had directed a verdict against the employee, but the supreme court found that there was enough evidence for the matter to go to a jury on the issue of retaliatory discharge under the state whistleblower statute. The court recognized that “[t]his court has stated the general rule ‘when the term of employment in a contract is left to the discretion of either party, or left indefinite, or terminable by either party, either party may put an end to the relationship at will and without cause.’” 232 S.W. 3d at 438 (citations omitted).

California:

In Ross v. Raging Wire Telecommunications, Inc., 42 Cal.4th 920, 70 Cal. Rptr.3d 382, 174 P.3d 200 (2008), an employee claimed that his termination was a violation of the public-policy exception to the employment at-will doctrine, specifically alleging that firing him for off-duty marijuana use violated a state statute permitting medicinal use of marijuana. The court held that no public policy violation had been stated. The state high court reaffirmed the general rule: “Either party to a contract of employment without a specified term may terminate the contract at will, but this ordinary rule is subject to the exception that an employer may not discharge an employee for a reason that violates a fundamental public policy of the state.” 174 P.3d at 208 (citations omitted).

Colorado:

In Widder v. Durango School Dist. No. 9-R, 85 P.3d 518, (Colo. 2004), a custodian for a local public school district alleged he was wrongfully terminated in violation of a state statute protecting teachers and other school personnel who act in compliance with the district’s discipline code. The high court remanded because the record was insufficient to permit judicial review of whether the school board’s decision was arbitrary under the state statute. The decision acknowledges Colorado’s default rule of employment at-will: “The general rule is that, absent a violation of constitutional rights, judicial review is not available to second-guess the firing of an employee who is terminable at will. Such an employee may be dismissed without cause.” Id. at 526.

Connecticut:

In Cweklinsky v. Mobil Chemical Co., 267 Conn. 210, 837 A.2d 759 (2004), the court declined to recognize a cause of action for defamation based on compelled self-publication. The court observed: “[R]ecognizing a cause of action for compelled self-defamation would significantly undermine the well-established doctrine of employment at will. ‘In Connecticut, an employer and employee have an at-will employment relationship in the absence of a contract to the contrary. Employment at will grants both parties the right to terminate the relationship for any reason, or no reason, at any time without fear of legal liability.’” 837 A.2d at 768 (citations omitted).

Delaware:

In Rizzitiello v. McDonald’s Corp., 868 A.2d 825 (Del. 2005), the court refused to find that plaintiff had been constructively discharged in violation of the implied covenant of good faith and fair dealing. The court stated: “[I]n Delaware, there is a ‘heavy presumption that a contract for employment, unless otherwise stated, is at-will in nature, with duration indefinite.’” Id. at 830.
Ch. 2 Employment Contracts: Termination

District of Columbia:

In Fingerhut v. Children's Natl. Med. Ctr., 738 A.2d 799, 805 (D.C. Ct. App. 1999), the court recognized an expansion of the public-policy exception to the state’s doctrine of employment at will: “In determining whether a public policy exception to the at-will doctrine applies to this case, we need only decide whether the alleged firing because Ms. Carl testified before the Council is sufficiently within the scope of the policy [against ‘injuring a witness in [her] person or property’] embodied in [D.C. Code § 1-224] so that a court may consider imposing liability on Children's Hospital for Ms. Carl's termination for otherwise permissible reasons.” The court noted that “[u]nder the at-will employment doctrine, an employer may discharge an at-will employee at any time and for any reason, or for no reason at all.” Id at 803 n. 6 (citations omitted).

Florida:

In Mason v. Load King Mfg. Co., 758 So.2d 649 (Fla. 2000), the court held that state unemployment benefits were appropriately denied because of plaintiff’s excessive unexcused absenteeism. Arguing that this was not “a ‘wrongful discharge’ case,” the dissent noted that that “[u]nder Florida law, barring an agreement to the contrary, an employer generally can discharge an ‘at-will’ employee without cause. Id., at 657, citing DeMarco v. Publix Super Markets, Inc., 384 So.2d 1253, 1254 (Fla.1980) (“where the term of employment is discretionary with either party or indefinite, then either party for any reason may terminate it at any time and no action may be maintained for breach of the employment contract.”).

Georgia:

In Balmer v. Elan Corp., 278 Ga. 22, 599 S.E.2d 158 (2004), former employees brought suit for breach of contract after their employer made an oral promise not to discharge or treat adversely at-will employees if they provided truthful information to a federal agency during an inspection. The court held that the employer’s oral promise did not modify the terms of employees’ at-will employment with employer: “Numerous Georgia cases have held that oral promises are not enforceable for at-will employees. … ‘Georgia courts have repeatedly held that a promise of an indefinite term is insufficient to support a cause of action for breach of contract.’” Id. at 228 (citations omitted). The court also relied on a state statute, O.C.G.A. § 34-7-1, which provides: “An indefinite hiring may be terminated at will by either party.”

Hawaii:

In Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai'i 92, 176 P.3d 91 (2008), the court rejected an attorney’s claim for breach of contract against her former law firm for wrongful discharge, holding that statements in the firm's manual did not alter the attorney's at-will status. The court stated: “This court has never recognized an ‘implied promise of fair treatment’ as a means of altering the at-will status of an employment relationship. In fact, this court has been unwilling for years ‘to imply into each employment contract a duty to terminate in good faith.’” 176 P.3d at 119 (citations omitted).

Idaho:

In Jenkins v. Boise Cascade Corporation, 108 P.3d 380 (Idaho 2005), the supreme court affirmed the lower court’s entry of summary judgment in favor of the employer, dismissing plaintiff’s claim for breach of contract and breach of the covenant of good faith and fair dealing. The court stated: “Unless an employee is hired pursuant to a contract that specifies the duration of the employment or limits the reasons for which an employee may be discharged, the employment is at the will of either party and the employer may terminate the relationship at any time for any reason without incurring liability.” Id. at 387. The court held that the employee manual did not contain any language that limited the employer’s right to terminate the plaintiff. Further, the court noted that the employer acted in good faith throughout the employment relationship and held: “[T]he covenant of good faith and fair dealing does not alter the right to fire an at will employee; that is, the covenant does not create good cause as a requirement.” Id. at 390.
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Illinois:

In McInerney v. Charter Golf, Inc., 176 Ill.2d 482, 680 N.E.2d 1347 (1997), the court held that an employee’s promise to forgo another job opportunity in exchange for a guarantee of lifetime employment could be sufficient consideration to modify an employment at-will contract although such an agreement would have to be in writing to satisfy the Statute of Frauds. The court noted: “[e]mployment contracts in Illinois are presumed to be at-will and are terminable by either party; this rule, of course, is one of construction which may be overcome by showing that the parties agreed otherwise.” 176 Ill.2d at 485.

Indiana:

In Meyers v. Meyers, 861 N.E.2d 704 (Ind. 2007), the state high court reaffirmed the employment at-will doctrine in a case involving an employee who claimed he was wrongfully discharged after complaining about unpaid wages. The court affirmed the trial court’s dismissal of the retaliatory discharge claim and held that the employment at-will doctrine “precludes [the employee] from asserting an action for wrongful discharge in retaliation for asserting a claim for unpaid wages.… ” Id. at 704 (citation omitted). The court noted that the at-will rule has narrow exceptions that operate only on “rare occasions.” Id. at 706.

Iowa:

In Theisen v. Covenant Med. Ctr., 636 N.W. 2d 74, 82 (2001), the court rejected a claim of negligent investigation in making a discharge decision because it would “create an exception swallowing the rule of at-will employment.”

Kansas:

In Morriss v. Coleman Company, Inc., 241 Kan. 501, 518, 738 P.2d 841 (1987), the court recognized an implied-contract exception to the employment-at-will default rule, and also ruled that the implied covenant of good faith and fair dealing “should not be applicable to employment-at-will contracts.”

Kentucky:

In Kentucky Technical Education Personnel Board v. Solly, 253 S.W3d 537 (Ky. 2008), the plaintiff was a limited-status, not-yet-tenured public school teacher who challenged the nonrenewal of her employment as based on sex discrimination. The court held that the plaintiff had not made out a prima facie case of statutory discrimination, noting she was an at-will employee: “At will employment in general allows employees to be terminated for any reason not prohibited by law. An employer may discharge an at will employee for good cause, for no cause, or for cause that some might view morally reprehensible.” Id. at 541 (citations omitted)

Louisiana:

In Quebedeaux v. Dow Chemical Co., 820 So.2d 542 (La. 2002), the court rejected a claim of employer vicarious liability for injuries sustained (including lost pay and benefits) during an altercation between coworkers. The court noted: “The employer-employee relationship is a contractual relationship. As such, an employer and employee may negotiate the terms of an employment contract and agree to any terms not prohibited by law or public policy. When the employer and employee are silent on the terms of the employment contract, the civil code provides the default rule of employment-at-will.” Id. at 545. In the court’s view, “the employment-at-will doctrine bars vicarious liability for damages arising out of termination of an employee under the circumstances of this case.” Id. at 546. The court also referred to a provision of the Louisiana Civil Code, La. C.C. Art. 2747 (2008), which provides: “A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for doing. The servant is also free to depart without assigning any cause.”
Ch. 2 Employment Contracts: Termination

Maine:

In Taliento v. Portland West, 197 ME 194, 705 A.2d 696 (Me. 1997), the court ruled against the plaintiff’s claim that he had been discharged in breach of contract, holding that the personnel manual merely provided a method of discharging an employee rather than clearly limiting to the employer to that method or otherwise restricting the employer’s power to terminate the employment relationship. The court stated: “[i]n Maine it has long been the rule that a contract of employment for an indefinite length of time is terminable at the will of either party…. [T]he only exception to the employer’s common law right to discharge an employee at will is a contract that ‘expressly restrict[s] [such a right] and clearly limits the employer to enumerated method or methods of terminating the employment.’” Id. at 699 (citations omitted).

Maryland:

In Porterfield v. Mascari Il, Inc., 344 Md. 402, 823 A.2d 590 (2003), the court held that an employee fired for consulting an attorney did not state a claim under the state’s public policy exception to the employment at-will rule. The major premise is that an employment contract is of indefinite duration, unless otherwise specified, and may be terminated legally at the pleasure of either party at any time. Onto this general rule have been grafted exceptions, some legislative and others judicially recognized.” 823 A.2d at 601-602 (citations omitted).

Massachusetts:

In White v. Blue Cross & Blue Shield of Massachusetts, 442 Mass. 64, 69, 808 N.E.2d 1034, 1038 (2004), the court rejected the doctrine of “compelled self-publication” in defamation cases because such a rule would work “a dramatic departure from the principles governing employment at will.”

Michigan:

In Lytle v. Malady, 458 Mich. 153, 166, 579 N.W.2d 906 (1998), the court ruled that the employer policy statement in question “is insufficient to overcome the strong presumption of employment at will, particularly where the original handbook also provided that ‘the contents of this booklet are not intended to establish . . . any contract between . . . [the employer] and any employee, or group of employees.’”

Minnesota:

In Anderson v. Johanningmeier v. Mid-Minnesota Women’s Ctr., Inc., 637 N.W.2d 270 (2002), the court held that the state whistleblower statute was not limited to violations of public policy. The court also noted: “Under the employment at-will doctrine, an employer can discharge an employee for any reason or for no reason.” Id. at 273 (citations omitted).

Mississippi:

In Harris v. Mississippi Valley State University, 873 So.2d 970, 987 (Miss. 2004), the state supreme court ruled against the plaintiff’s claim of wrongful discharge based on a violation of public policy because plaintiff did not come within the definition of whistleblower in the state statute. The court noted: “Mississippi adheres to the employment at will doctrine, which states absent an employment contract expressly providing to the contrary, an employee may be discharged at the employer’s will for good reason, bad reason, or no reason at all, excepting only reasons independently declared legally impermissible.”

Missouri:

In Crabtree v. Bugby, 967 S.W.2d 66 (MO 1998), the court overturned a jury verdict based on the state workers’ compensation statute because the instructions did not make clear that the employee’s filing of a workers’ compensation claim had to be the exclusive cause of the employee’s discharge. The court observed: “The purpose of the workers’ compensation law, including the rule of liberal construction, is to compensate workers for job-related injuries; it is not to insure job security. Nothing in the plain language of [the statute] expresses such a legislative intent. In addition, no
Appendix A: Status of Employment-at-Will Default Rule

words express any intent to wholly abolish the employment at will doctrine for those who have filed workers' compensation claims. We decline the invitation to give the statute such an expansive construction. Those who disagree with the state and this Court's precedent analyzing the statute are free to seek redress in the legislative arena.” Id. at 72 (citations omitted).

Montana:

Montana is the only U.S. state to have enacted a statute requiring a showing of “good cause” for all employer terminations of an employee’s employment effected after the employee has completed a probationary period. See Montana Wrongful Discharge of Employment Act. Mont. Code Ann. §§ 39-2-901 to –914, upheld against a state constitutional challenge for restricting judicial remedies in Meech v. Hillhaven West, Inc., 238 Mont. 21, 776 P.2d 499 (1989).

Nebraska:

In Trosper v. Bag’N Save 734 N.W.2d 704 (Neb. 2007), the state high court held that the plaintiff stated a cause of action for wrongful demotion in violation of public policy (in this case, for filing a workers’ compensation claim). The court noted: “Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at will employee any time with or without reason.” Id. at 707. Nebraska recognizes a public policy exception to the doctrine but that exception “is restricted to when a clear mandate of public policy has been violated, and it should be limited to manageable and clear standards.” Id.

Nevada:

In Chavez v. Sievers, 118 Nev. 288, 297, 43 P.3d 1022 (2002), because the legislature had exempted small employers from the reach of its employment discrimination statute, the court “decline[d] to recognize a public policy exception to the employment at-will doctrine based on race discrimination with respect to small employers.” 118 Nev. 297.

New Hampshire:

In Porter v. City of Manchester, 151 N.H. 30, 849 A.2d 103 (N.H. 2004), the high court clarified that the public-policy cause of action was grounded in tort and the employer’s liability was predicated on the doctrine of respondent superior; it then remanded the case for further proceedings. The court noted: “We have consistently recognized the prevailing rule in employment law is that in the absence of an employment contract, both parties are free at any time to terminate the employment relationship, with or without cause. This is commonly referred to as the at will rule.” 849 A.2d at 113 (citations omitted). The public-policy cause of action is “an exception to the at-will rule.” Id.

New Jersey:

In Wade v. Kessler Institute, 172 N.J. 327, 798 A.2d 1251 (2002), the state supreme court vacated a jury verdict because of jury instructions suggesting that defendant “could be found separately liable for breaching the implied covenant of good faith and fair dealing when the two asserted breaches basically rest on the same conduct.” 798 A.2d at 1262. The court noted: “In New Jersey, an employer may fire an employee for good reason, bad reason, or no reason at all under the employment at will doctrine. An employment relationship remains terminable at the will of either an employer or employee, unless an agreement exists that provides otherwise.” Id. at 1258 (citations omitted).

New Mexico:

In Trujillo v. Northern Rio Arriba Electric Cooperative, Inc., 41 P.3d 333 (N.M. 2001), the state high court rejected plaintiff’s claim for wrongful discharge based on breach of an implied contract. The court noted: “Employment without a definite term is presumed to be at will. In an at will employment relationship, both the employer and the employee have the right to terminate the employment relationship at any time and for any reason.” Id. at 341. After reviewing the provisions in the employee handbook, the court ruled that “we conclude that they are insufficient to create an implied contract between [employer] and [employee].” Id. at 342.

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New York:

In Smalley v. Dreyfus Corp., 10 N.Y. 3d 853 N.Y.S.2d 270, 882 N.E.2d 882 (2008), five at-will employees sued their employer for fraudulent inducement to enter into an agreement with and remain employed by the employer. The state high court affirmed the trial court’s dismissal of the claim: “[T]he core of plaintiffs’ claim is that they reasonably relied on no-merger promises in accepting and continuing employment with Dreyfuss and in eschewing other opportunities. Thus, … plaintiffs alleged no injury separate and distinct from termination of their at-will employment. In that the length of employment is not a material term of at-will employment, a party cannot be injured merely by the termination of the contract - neither party can be said to have reasonably relied on the other’s promise not to terminate the contract.” 882 N.E. 2d at 884.

North Carolina:

In Kurtzman v. Applied Analytical Industries, Inc., 347 N.C. 329, 493 S.E.2d 420 (1997), the court stated that “North Carolina is an employment-at-will state. This Court has repeatedly held that in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party.” 347 N.C. at 331.

North Dakota:

In Thompson v. Associated Potato Growers, Inc., 2000 N.D. 95, 610 N.W.2d 53 (2000), the court held that “an objective standard of reasonableness” applied in determining whether an employer’s termination was for cause in a contract that expressly required termination “for cause.” The court stated: “Under North Dakota law, employment is presumed to be at will, and an employer may terminate an employee with or without cause. By contract, however, the parties can modify the at-will presumption and define their contractual rights regarding termination.” 610 N.W.2d at 56.

Ohio:

In Leininger v. Pioneer Natl. Latex, 115 Ohio St. 3d 311, 2007 Ohio 4921, 875 N.E.2d 36 (2007), the plaintiff asserted a wrongful discharge claim based on Ohio’s public policy against age discrimination. The court ruled in favor of the defendant holding that it was unnecessary to extend the public policy exception to the at-will doctrine since the plaintiff could seek statutory relief. The court stated: “The common law doctrine of employment at will generally governs employment relationships in Ohio. … Moreover, either an employer or an employee in a pure at will employment relationship may legally terminate the employment relationship at any time and for any reason”. 875 N.E.2d at 39 (citations omitted).

Oklahoma:

In Darrow v. Integris Health Inc., 2008 Okla. 1, 176 P.3d 1204 (2008), the court held that the employee stated a claim for wrongful discharge in violation of public policy because the allegation of employer’s falsification of records sufficiently injected an element of state public policy. The court noted: “Oklahoma adheres to the so-called American employment at will doctrine. Employers are free to discharge at will employees in good or bad faith, with or without cause.” 176 P.3d at 1210. The decision reaffirms an exception to this doctrine is if the discharge was “contrary to a clear mandate of public policy and violates some law articulated in state constitutional, statutory or decisional sources.” Id. However, the court noted that this exception must be “tightly circumscribed.” Id.

Oregon:

In Ewalt v. Coos-Curry Electric Cooperative, Inc., 202 Ore. App. 257, 120 P.3d 1288 (2005), the plaintiff filed a claim for wrongful termination based on breach of contract. The state high court ruled for the defendant because plaintiff’s employment application and the employer’s bulletins given to plaintiff did not contain any language that altered his status.
of an at-will employee. The court noted: “As a general rule, an employment contract creates an at will arrangement that may be terminated by either the employee or the employer at any time, for any reason or for no reason.” 120 P.3d at 1291.

Pennsylvania:

In Rothrock v. Rothrock Motor Sales, Inc., 584 Pa. 297, 883 A.2d 511 (2005), the Pennsylvania supreme court extended its previous recognition of a retaliatory discharge cause of action for filing a worker’s compensation claim to include protection of the employee-son’s supervisor who refused to get his son to sign a waiver of workers’ compensation benefits. The court noted: “The at will employment doctrine has historically provided that absent an employment contract, an employer is free to terminate an employee at any time, for any reason.” 584 Pa. at 297. Further, the court stated: “we continue to hold to Pennsylvania’s traditional view that exceptions to at will termination should be few and carefully sculpted so as to not erode an employer’s inherent right to operate its business as it chooses…” Id. at 305.

Rhode Island:

In Neri v. Ross-Simmons, Inc., 897 A.2d 42 (R.I. 2006), the Rhode Island high court affirmed the lower court’s entry of summary judgment in favor of the employer, dismissing plaintiff’s claim for breach of an employment contract. Plaintiff argued that the employer violated its employee handbook that provided for specific protocol in the event of staff reduction. The court stated: “In this jurisdiction when the duration of a contract is uncertain, the contract is to be considered terminable at will.” Id. at 47. The court further held since there was a disclaimer in the handbook allowing employer to modify its policies, its “employees cannot have a legitimate expectation that a particular policy will remain in effect…” Id. at 48.

South Carolina:

In Conner v. City Forest Acres, 363 S.C. 460, 611 S.E.2d 905 (2005), the court held that the trial court erred in excluding certain evidence from the jury’s consideration. The court reaffirmed the so-called “handbook claim” as an exception to the default rule of employment at will, noting: “South Carolina recognizes the doctrine of at will employment. This doctrine provides that a contract for employment may be immediately terminated by either employer or employee when unsupported by consideration other than the employer’s duty to provide compensation in exchange for the employee’s duty to perform a service or obligation. Such a termination may occur at any time and for any reason or no reason at all, subject to certain limited exceptions to the at-will employment doctrine and subject to certain prohibitions against illegal discrimination which are not at issue in this case.” 611 S.E.2d at 910 (citations omitted). The court also referred to but did not rely upon S.C.Code Ann. §41-1-110 (Supp. 2004), which it stated “provides a handbook shall not create an employment contract if it is conspicuously disclaimed.” Id. at 911. The statute did not apply to handbooks that were issued prior to its enactment.

South Dakota:

In Aberle v. City of Aberdeen, 2006 S.D. 60, 718 N.W.2d 615 (2006), the South Dakota supreme court dismissed the plaintiff’s claim of wrongful termination based on an allegation that an employee manual created a contract that altered his status of an at-will employee. The court stated: “In the context of employment relationships, South Dakota is an employment at will state per the provisions of SDCL 60-4-4 [which provides: ‘An employment having no specified term may be terminated at the will of either party on notice to the other unless otherwise provided by statute.’]. … However, an employer may surrender its statutory at-will power via either an express or implied contract. … When no explicit surrender of the statutory at-will power is made by the employer, but policies or handbooks ‘contain[] a detailed list of exclusive grounds for employer discipline or discharge and a mandatory or specific procedure which the employer agrees to follow prior to any employee’s termination[,]’ an implied contract is created that binds the employer to the for-cause termination procedure.” 718 N.W.2d at 621 (citations omitted).
In Guy v. Mutual of Omaha Insurance Company, 79 S.W.3d 528 (Tenn. 2002), the court held that the state whistleblower statute did not preempt a preexisting common law action for retaliatory discharge in violation of public policy. The court also noted: “Tennessee has long adhered to the common law employment at will doctrine, which provides that an employment contract for an indefinite term is terminable at the will of either the employer or the employee for any cause or for no cause.” Id. at 535.

In The Ed Rachal Foundation v. D’Unger, 207 S.W.3d 330 (2006), The Texas supreme court reversed the lower court’s ruling and dismissed the plaintiff’s claim for wrongful termination in violation of public policy. Plaintiff alleged she was discharged because she did not follow her employer’s order to not report illegal activities in the workplace. The court held that the public-policy exception to the at-will rule in Texas affords protection to employees (whistleblowers) who report illegal activities, but it does not provide protection to employees who are asked not to report illegal acts. The court stated: “[E]mployment is presumed to be at-will in Texas absent an unequivocal agreement to be bound for a term.” Id. at 332. The court further noted: “Twice in recent years this Court rejected invitations to create a common-law cause of action for all whistleblowers, noting each time that a general claim would eclipse the Legislature’s decision to enact a number of narrowly tailored whistleblowers statutes instead. We reach the same result today.” Id. at 331.

In Touchard v. La-Z-Boy, 2006 UT 71, 148 P.3d 945 (2006), the plaintiff asserted a claim for wrongful termination against public policy because he was discharged for filing workers’ compensation benefits. The court ruled that retaliatory discharge for filing such a claim violates the public policy of the state of Utah. The court noted: “Under Utah law, all employment relationships ‘entered into for an indefinite period of time’ are presumed to be at-will. When employment is at-will, either ‘the employer or the employee may terminate the employment for any reason (or no reason) except where prohibited by law.’” 148 P.3d at 948 (citations omitted). However, the court noted that public policy exceptions to the at-will doctrine were to be construed narrowly and applied to “‘only those principles which are so substantial and fundamental that there can be virtually no question as to their importance for promotion of the public good.’” Id. at 950 (citations omitted).

In Adams v. Green Mountain R. Co., 177 VT 521, 862 A.2d 233 (Vt. 2004), the court held that judgment should have been entered for the defendant because plaintiff’s claim that her supervisor pulled her aside because her dispute with a supervisor might be heard by customers did not state a violation of public policy. The court noted: “In Vermont, at will employees such as plaintiff ‘may be discharged at any time with or without cause unless there is a clear and compelling public policy against the reason advanced for the discharge.’” 862 A.2d at 235 (citations omitted).

In Rowan v. Tractor Supply Company, 263 Va. 209, 559 S.E. 2d 709 (2002), the plaintiff filed a wrongful termination claim in violation of public policy. The Virginia supreme court held in favor of the employer because plaintiff’s claim did not fit into three recognized public-policy exceptions to the at-will doctrine. The court held: “While virtually every statute expresses a public policy of some sort, we continue to consider this exception to be a narrow exception and to hold that termination of an employee in violation of the policy underlying any one statute does not automatically give rise to a common law cause of action for wrongful discharge.” 559 S.E. 2d at 711.

In Ford v. Trendwest Resorts, Inc., 146 Wn.2d 146, 43 P.3d 1223 (2002), the Washington high court ruled in favor of the employer by holding that lost earnings are not the measure of damages for defendant’s breach of an employment at-will contract. The court noted: “In Washington, the general rule is that an employer can discharge an at will employee for
no cause, good cause or even cause morally wrong without fear of liability. Conversely...an employee has the absolute right to abandon his or her employment at will. This common law at will employment doctrine has been the background employment rule in Washington since 1923.” 43 P.3d at 1226.

West Virginia:

In Younker v. Easter Associated Coal Corp., 214 W.Va. 696, 591 S.E.2d 254 (2003), the court rejected plaintiff’s claim for breach of contract on the ground that the discharge violated the employer’s code of business conduct (CBC). The court reasoned: “This Court has traditionally recognized that an employment which is of an indefinite duration is rebuttably presumed to be a hiring at will, which is terminable at any time at the pleasure of either the employer or employee.” 591 S.E.2d at 258. The court also noted that representations made in an employee handbook can alter the status of an at will employee, but such representations “must be very definite.” Id. In this case, however, the CBC “does not reach that “very definite” level of specificity required to create a contract.” Id. at 259.

Wisconsin:

In Bammert v. Don’s Super Valu, Inc., 2002 WI 85, 254 N.W. 2d 347 (2002), a former employee brought a wrongful discharge claim against her employer claiming that she was discharged in retaliation for her husband’s being a cop and arresting her former boss. The plaintiff argued that her discharge subverted the state’s public policy to promote the institution of marriage. The Wisconsin high court noted: “In general, at-will employees are terminable at will, for any reason, without cause and with no judicial remedy…. The public policy exception generally favoring the stability of marriage, while unquestionably strong, provides an insufficient basis upon which to enlarge what was meant to be, and has always been, an extremely narrow exception to the employment at-will doctrine.” 254 N.W. at 368, 371.

Wyoming:

In Finch v. Farmers Co-Op Oil Company of Sheridan, 109 P.3d 537 (Wyo. 2005), the Wyoming high court affirmed summary judgment in favor of the employer, dismissing plaintiff’s claim for breach of contract, breach of the implied covenant of good faith and fair dealing, and promissory estoppel. The court stated: “In Wyoming, employment is presumed to be at will. In an at-will employment relationship, either the employer or the employee may terminate the relationship at any time, for any reason or for no reason at all.” Id. at 541 (citations omitted). The court held that the at-will disclaimer in the employee manual defeated the plaintiff’s claim for breach of contract and promissory estoppel. Further, the plaintiff could not succeed on the theory of breach of covenant of good faith and fair dealing since the plaintiff did not have a “special relationship of trust and reliance that would support [such] a claim.” Id. at 544.
APPENDIX B TO REPORTERS’ NOTES FOR CHAPTER 2*

ENFORCEABILITY OF EMPLOYEE HANDBOOKS/PERSOONNEL MANUALS:
50 STATE+ D.C. SURVEY (Dated: Mar. 13, 2009)+

Alabama:

Enforceability: In Leikvold v. Valley View Community Hospital, 141 Ariz. 544, 688 P.2d 17, 174 0 (1984) (en banc), the court held that employee handbooks could be enforced as a “unilateral contract”. The test, taken from Ex parte Amoco Fabrics & Fibers Co., 729 So.2d 336, 339 (Ala. 1998), provides:

“First, the language contained in the handbook must be examined to see if it is specific enough to constitute an offer. Second, the offer must have been communicated to the employee by the issuance of the handbook, or otherwise. Third, the employee must have accepted the offer by [continuing his] employment after he became generally aware of the offer. [The employee’s] actual performance supplies the necessary consideration.”

Modifiability: In Amoco, the high court did not give effect to a disclaimer introduced in the handbook “several years after the time at which the evidence indicates that Amoco had communicated the layoff policy to Stokes and Williams and they had accepted the policy by continuing their employment. One party cannot unilaterally alter the terms of a contract after the contract has been made.” 729 So.2d at 340.

Alaska:

Enforceability: In Jones v. Central Peninsula General Hospital, 779 P.2d 783 (Alas. 1989), the Alaska supreme court held that a policy manual was enforceable both as a “unilateral contract” and under the estoppel reasoning of the Michigan supreme court tin Toussaint in Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980). See Jones, 779 P.2d 783, at [*7-*8].

Revocability: In Jones, the court held that a later version of the manual creating the impression of recognizing certain employee protections was held to control over an earlier version containing a disclaimer (“The purpose of this manual is to provide information to all Society employees. It is not a contract of employment nor is it incorporated in any contract of employment.”) Id. at [*12]. The court explained that “a reasonable construction of the provisions and accompanying disclaimer leads to the conclusion that LHHS made a representation to its employees that it was bound to give effect to the rights granted until it saw fit to modify them.” Id. at [*14].

Arizona:

Enforceability: In Leikvold v. Valley View Community Hospital, 141 Ariz. 544, 688 P.2d 17, 174 0 (1984) (en banc), the court held that “personnel manuals can become part of employment contracts. Whether any particular personnel manual modifies any

* The Handbook for ALI Reporters and Those Who Review Their Work provides, as follows: Unlike the Introduction, Introductory Notes, black letter, and Comment (including Illustrations), the Reporter's (or Reporters') Notes are regarded as the work of the Reporter (or Reporters). Nevertheless, they are submitted for review together with the other components of the Section to which they pertain. Reporter's Notes set forth and discuss the legal and other sources relied upon by the Reporter in formulating the black letter and Comment and enable the reader better to evaluate these formulations; they also provide avenues for additional research. In addition, the Notes furnish a vehicle for the Reporter to convey views not necessarily those of the Institute and to suggest related areas for investigation that may be too peripheral for treatment in the black letter or Comment. They are nevertheless written from the objective, third-person perspective characteristic of a work of the Institute. (p. 45; http://www.ali.org/doc/ALIStyleManual.pdf)

+ The research assistance of Katherine Kohan and Matthew Carhart, members of the 2009 and 2010 graduating classes of NYU School of Law, respectively, is gratefully acknowledged.
Appendix B: Enforceability of Employee Handbooks/Personnel Manuals

Enforceability: If an employer does not have a policy statement, in a manual or otherwise, and, by its language or by the employer’s actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it. Having announced a policy, the employer may not treat it as illusory.

Modifiability: Demasse v. ITT Corp., 194 Ariz. 500, 984 P.2d 1138, 1144 (1999) (en banc), the court answered certified questions from the Ninth Circuit concerning the modifiability of an employment contract that was assumed to have been formed by the employee’s legitimate expectations and reliance on the employer’s handbook. The court stated that an employer’s attempted unilateral modification was ineffective without a bargained-for agreement with employees.

However, Arizona’s Employment Protection Act (EPA), A.R.S. § 23-1501 et seq. (2009), states in relevant part that it is “[t]he public policy of this state … 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 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. Partial performance of employment shall not be deemed sufficient to eliminate the requirements set forth in this paragraph. …

The court in Demasse did not discuss the effect of § 23-1501. See also Taylor v. Graham County Chamber of Commerce, 201 Ariz. 184, 33 P.3d 515, 530 (Ct. App. 2001) (citations omitted): Demasse “neither involved nor addressed the EPA. In addition, the court in DeMasse answered certified questions from the Ninth Circuit Court of Appeals on the ‘premise that a contract exists,’ and that the layoff seniority provision had ‘become part of the employment contract.’”

Arkansas:

Enforceability: In Crain Industries, Inc. v. Cass, 305 Ark. 566, 810 S.W.2d 910 (1991), the court reiterated that “where an employee relies upon a personnel manual that contains an express provision against termination except for cause he may not be arbitrarily discharged in violation of such a provision.” 810 S.W.2d at 912, quoting Gladden v. Arkansas Children’s Hospital, 292 Art.130, 728 S.W.2d 501, 505 (1987). The test seems to require proof of “reliance on a promise made in an employment handbook.” 810 S.W.2d at 913.

Modifiability: During the time plaintiffs worked for Crain, the handbook was changed to state expressly that it was not a contract of employment and that the employer reserved “the right to change it at any time.” In this case, the court agreed that the jury could find there had not been an effective motivation because the change had not been communicated to the employees: “While we might agree that an employer may change the terms pursuant to which its employee remain employed by it, we conclude that if such a change is to be effective it must be communicated to the employee.” 810 S.W.2d at 915.

California:

Enforceability: In Asmus v. Pacific Bell, 23 Cal.4th 1, 96 Cal.Rptr.2d 179, 999 P.2d 71,76 (2000), the California supreme court reaffirmed that promises in an employee handbook distributed to employees “may become unilateral implied-in-fact contracts when employees accept them by continuing employment.”

Modifiability: In Asmus, the following question had been certified to the state high court from the Ninth Circuit: “Once an employer’s unilaterally adopted policy – which requires employees to be retained so long as a specified condition does not occur – has become part of the employment contract, may the employer thereafter unilaterally terminate the policy, even though the specified condition has not occurred?” The high court answered in the affirmative: “An employer may unilaterally terminate a policy that contains a specific condition, if the condition is one of indefinite
duration, and the employer effects the change after a reasonable time, on reasonable notice, and without interfering with
the employees’ vested interests.” 999 P.2d at 72.

Colorado:

Enforceability: In Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987), the court stated that an at-will
employee may be able to enforce a handbook’s termination procedures under “ordinary contract principles” by showing
that the employee was making an offer to the particular employee which was capable of being assented to by the
employee; under a theory of an “offer of a unilateral contract” such that “his initial or continued employment constituted
acceptance of and consideration for those procedures”; or, alternatively, under “a theory of promissory estoppel”
recognized by the Michigan supreme court in Toussaint and other courts. Id., at 711-12 (citations omitted).

Modifiability: The Keenan court did not resolve the question of whether the plaintiff was bound by a revised
termination procedure for management personnel that became effective after he was hired but before he assumed a
management position. In Saxe v. Board of Trustees of Metro. State Coll. of Denver, No.05CA1251, 2007 WL 686067,
at *7-8 (Colo. Ct. App. March 8, 2007), the intermediate court discussed the “majority” position on modifiability
reflected in the California high court decision in Asmus and the “minority” position reflected in the Arizona supreme
court’s decision in Demasse. In the instant case, there was no need to choose between the two:

We need not resolve whether an employer may reserve the right to change any provision within an
employment handbook without notice or consideration because even courts endorsing unilateral
modification of an employment handbook have held that an employer may not abrogate an
employee’s vested benefits….Therefore, the Board’s ability to modify the 1994
Handbook…depends on whether the right to tenure was vested.

Connecticut:

Enforceability: The Connecticut supreme court has stated that “statements in an employer’s personnel manual may …
der under … appropriate circumstances give rise to an express or implied contract between employer and employee.”
Magnan v. Anaconda Industries, Inc., 193 Conn. 558, 564, 479 A.2d 781 (1984). The two most recent decisions at the
high court involved oral representations communicated directly to the plaintiff by management as well as statements
(oral promises made by personnel in human resources department and by patient health and security personnel when
plaintiff working in those units); Torosyan v. Boehringer Ingelheim Pharm., 234 Conn. 1, 662 A.2d 89, 92 (1995)
(“implied contract” based on “representations made to the plaintiff in his preemployment interviews and in an employee
manual given to employee on his first day of work…..”).

Modifiability: In Torosyan, which arguably involved an individual contract with the particular employee, the court held
that “for a new manual to have modified the preexisting terms of employment, [the employee] must have consented to
that modification.” 662 A.2d at 98. “[W]e disagree that the mere distribution of the manual and the [employee’s]
continued work necessarily demonstrated his consent to the proposed modification of the preexisting contract.” Id.

Delaware:

Delaware appears not to recognize the enforceability of unilaterally promulgated employee handbooks or personnel
manuals. In Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982), the court rejected plaintiff’s contention that a
handbook issued by the employer after he was hired changed his at-will status: “It was a unilateral expression of the
defendant’s policies and procedures on a number of topics, issued for guidance and benefit of employees. The Booklet
does not grant to any employee a specific term of employment and does not, therefore, alter plaintiff’s at will
employment status.” Id. at 1096-97. This holding was reaffirmed in Bray v. L.D. Caulk Dentsply Int’l, 748 A2d 406
(Table) (Del. 2000) (“the law is well settled…that an employee handbook, which does not set forth terms, conditions or
duration of employment, does not constitute a contract between an employer and employee.”); but cf. Gaines v.
Wilmington Trust Co., 608 A.2d 727 (Table) (Del. 1991) (“Because the termination was not contrary to the provisions
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in the Handbook, it is not necessary to rule on whether the provisions of the Handbook are legally binding on [the employer] either under contract or promissory estoppel theories.

District of Columbia:

Enforceability: In Strass v. Kaiser Fdn. Health Plan of Mid-Atlantic, 744 A.2d 1000, 1011 (D.C. 2000), the Court of Appeals reaffirmed decisions holding that “contractual rights may arise from language in employee manuals.” Disclaimers in employee handbooks “must contain language clearly reserving the employer right to terminate at will.” Boulton v. Institute of International Educ., 808 A.2d 499, 505 (D.C. 2002), quoting Sisco v. GSA Nat’l Capital Fed. Credit Union, 689 A.2d 52, 55 (D.C. 1997). In Clampitt v. American University, 957 A.2d 23, 37 (D.C. 2008) (citations omitted), the court granted summary judgment to the employer because the employee did not provide “‘significant, probative evidence’ that the manual was given to her or that it was published or distributed to all employees.”

Modifiability: The Strass court quoted from its earlier decision in Sisco, 689 A.2d at 57, which in turn was quoting from the Toussaint decision: “the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and officials at any given time, purport to be fair, and are applied consistently and uniformly to each employee.”

Florida:

There is apparently no state high court decision on point, but lower court decisions point to non-enforceability absent a bargained-for agreement. In Quaker Oats Co. v. Jewell, 818 So.2d 574 (Fla. Dist. Ct. App. 2002), the plaintiffs brought suit for breach of contract after Quaker failed to pay them overtime in accordance with provisions set forth in the company’s employment manual. Attached to the handbook was a cover letter which stated, “This employee handbook does not create any contractual rights for you or the Company.” Id. at 575. Rejecting the claim, the court held that “in the absence of language in the employee manual expressly providing that the manual constitutes a separate employment agreement, or the parties' explicit mutual agreement to that effect, policy statements in the employment manual do not constitute the terms of a contract of employment.” Id. at 578. See also The Hampton v. City of South Miami, 186 Fed.Appx. 967, 969 (11th Cir. 2006) (“Here, the City's personnel policies and Code did not contain language expressly providing that they constituted a separate employment agreement. Moreover, even if we may infer an employment contract from the policies and procedures embodied in the Code and personnel manual, because “no definite period of employment” was included for Hampton, under Florida law he could be terminated at will.”).

Georgia:

There is apparently no state high court decision on point, but indications point against enforceability of employee manuals at least in the private sector. In Balmer v. Elan Corp., 278 Ga. 227, 599 S.E.2d 158 (2004), former employees brought suit for breach of an oral contract after their employer made an oral promise not to discharge or treat adversely at-will employees if they provided truthful information to a federal agency during an inspection. The court held that the employer’s oral promise did not modify the terms of employees’ at-will employment with the employer: “Numerous Georgia cases have held that oral promises are not enforceable for at-will employees. … ‘Georgia courts have repeatedly held that a promise of an indefinite term is insufficient to support a cause of action for breach of contract.’” Id. at 228 (citations omitted). The court also relied on a state statute, O.C.G.A. § 34-7-1, which provides: “An indefinite hiring may be terminated at will by either party.” For due process considerations in the public sector, see Camden County v. Haddock, 271 Ga. 664, 523 S.E.2d 291 (1999).

In Jones v. Chatham County, 477 S.E.2d 889 (Ga. Ct. App. 1996), the appeals court considered whether a failure to follow termination procedures in a personnel manual constituted a breach of contract. Without mentioning when the personnel manual was given to the plaintiff and what the manual actually said, the court dismissed the complaint: “Under Georgia law, personnel manuals stating that employees can be terminated only for cause and setting forth termination procedures are not contracts of employment; failure to follow the termination procedures contained in them is not actionable.” Id. at 893.
Hawaii:


In Kinoshita, this court applied the principles and reasoning announced in Toussaint, emphasizing that the employer had “created a situation ‘instinct with an obligation.’”  724 P.2d at 117. The employment policies in Kinoshita were promulgated with a cover letter stating that the policies constituted “an enforceable contract between us under [the] labour law of the state in which you work. Thus your rights in your employment arrangement are guaranteed.” Id. at 598 n. 2, 724 P.2d at 114 n. 2. On appeal, this court reasoned that the employer was striving to create an atmosphere of job security and fair treatment, one where employees could expect the desired security and even-handed treatment without the intervention of a union, when it distributed copies of the rules to the employees who were to vote in a representation election. It attempted to do so with promises of specific treatment in specific situations; it encouraged reliance thereon[
]

In contrast to Kinoshita, in which the employer made specific written guarantees of continued employment, Gucci’s employee handbook clearly stated that Plaintiff’s employment was at-will and could be terminated at any time with or without notice. The clear and unambiguous language of Gucci’s employee handbook stated: “Your employment with Gucci is at will. This means that it may be terminated by you or by Gucci with or without cause and with or without notice.” In addition, Plaintiff admitted that she was advised and aware at the time of hiring that she was an at-will employee. Plaintiff acknowledged and agreed in writing several times that her employment could be terminated at any time, with or without notice, with or without warning, and with or without reason.

In Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai‘i 92, 176 P.3d 91 (2008), the court rejected an attorney’s claim for breach of contract against her former law firm for wrongful discharge, holding that statements in the firm’s manual did not alter the attorney's at-will status. The court stated: “This court has never recognized an ‘implied promise of fair treatment’ as a means of altering the at-will status of an employment relationship. In fact, this court has been unwilling for years ‘to imply into each employment contract a duty to terminate in good faith.’” 176 P.3d at 119 (citations omitted).

Modifiability: Language quoted from the Toussaint decision suggests a similar approach to Michigan’s on the modifiability of handbook promises.

Idaho:

Enforceability: In Metcalf v. Intermountain Gas Co., 116 Idaho 622, 778 P.2d 744, 747 (1989), the court held that “[u]nless an employee handbook specifically negates any intention on the part of the employer to have it become a part of the employment contract, a court may conclude from a review of the employee handbook that a question of fact is created regarding whether the handbook was intended by the parties to imply into each employment contract a duty to terminate in good faith.” 176 P.3d at 119 (citations omitted).

In Jenkins v. Boise Cascade Corporation, 108 P.3d 380 (Idaho 2005), the supreme court affirmed the lower court’s entry of summary judgment in favor of the employer, dismissing plaintiff’s claim for breach of contract and breach of the covenant of good faith and fair dealing. The court stated: “Unless an employee is hired pursuant to a contract that specifies the duration of the employment or limits the reasons for which an employee may be discharged, the employment is at the will of either party and the employer may terminate the relationship at any time for any reason.
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without incurring liability.” Id. at 387. The court held that the employee manual did not contain any language that limited the employer’s right to terminate the plaintiff. Further, the court noted that the employer acted in good faith throughout the employment relationship and held: “[T]he covenant of good faith and fair dealing does not alter the right to fire an at will employee; that is, the covenant does not create good cause as a requirement.” Id. at 390.

Modifiability: There appears to be no state high court decision on this point. In Parker v. Boise Telco Fed. Credit Union, 923 P.2d 493 (Idaho Ct. App. 1996), the plaintiff brought suit for breach of contract based on an older employee manual which restricted termination “for cause” only. A revised manual changed the “for cause” restriction to employment at will. In holding that the revised manual applied, the court relied on In Re Certified Question (Bankey v. Storer Broad. Co.), 443 N.W.2d 112 (Mich. 1989). Parker, 923 P.2d at 499. The court wrote that the “better approach” was the one followed by the Michigan Supreme Court in Bankey. Id. Similar to Bankey, the court held that an employer, without express reservation of the right to do so, could unilaterally change its policy from one of discharge for cause to one of termination at will. For this modification to become effective, reasonable notice of the change must be uniformly given to the affected employees.

Illinois:

Enforceability: In Duldulao v. St. Mary of Nazareth Hospital, 115 Ill.2d 482, 505 N.E.2d 314 (1987), the state supreme court held that “an employee handbook or other policy statement creates enforceable contractual rights if the traditional requirements for contract formation are present.” Id. at 318. The court set forth three factors that must be present for an employee manual to be viewed as a binding contract:

1. language of the policy state must contain a promise clear enough that an employee would reasonably believe that an offer has been made;
2. the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer; and
3. the employee must accept the offer by commencing or continuing to work after learning of the policy statement.

Id. Applying these principles to the instant case, the court found that “it is apparent that the document entitled ‘Employee Handbook’ created an enforceable right to the particular disciplinary procedures described therein.” Id. “An employee reading the handbook would…reasonably believe that, except in the case of a very serious offense, he or she would not be terminated without prior written warnings.” Id. at 319.

Modifiability: In Doyle v. Holy Cross Hosp., 186 Ill.2d 104, 115, 708 N.E.2d 1140 (1999), the court held that Duldulao invoked traditional contract principles, in concluding that terms and provisions of an employee handbook may give rise to a binding and enforceable contract. {I}t is well established in Illinois that modification of a contract requires consideration, just as the contract initially formed does.”

Indiana:

In Orr v. Westminster Village North, Inc., 689 N.E.2d 712 (Ind. 1997), the plaintiff, a groundskeeper for a retirement community, was terminated after the Director of Maintenance discovered him walking on a roof away from an attic filled with smoke and the odor of marijuana. The plaintiff contended that he was wrongfully discharged because Westminster did not follow the disciplinary procedures set out in an Employee Handbook. The Handbook stated that its “contents represent an official statement of the facility policy” but “is not a contract with the facility because it is subject to change”; and that although “in most cases disciplinary action will begin with an oral warning … if warranted … dismissal may occur immediately.” Id. at 715-16, 721. The high court initially noted that it recognized only three exceptions to the employment-at-will doctrine: (1) “if an employee establishes that ‘adequate independent consideration’ supports the employment contract”; (2) “a public policy exception”; and (3) “the doctrine of promissory estoppel.” Id. at 718. However, it acknowledged that it had not resolved “whether unilateral contracts in the employment context always require adequate independent consideration and whether an employee handbook can ever constitute a unilateral contract serving to modify the otherwise at-will employment relationship.” In this case, however, the Handbook could not in any event constitute a unilateral contract because it contained no “clear promise to follow a progressive disciplinary approach,
and, in fact, there are clear statements which provide that Westminster…may discharge employees without warning.” Id. at 717, 719-20.

Iowa:

Enforceability: In Thompson v. City of Des Moines, 564 N.W.2d 839, 844, 845 (Iowa 1997), the plaintiff claimed that his employer's reorganization which led to his termination was a breach of contract under the employee handbook and personnel manual (SPM manual). The court described relevant handbook provisions as follows:

Under the heading “Job Security” the handbook offers the assurance of “reasonable job security as long as your job exists and your work is satisfactory.” …The handbook then advises that employees “are not protected against removal, demotion or suspension for just cause.”

The handbook [further] stated “positions may be deleted depending on the need and availability of program funds which affect individual employees.”

It held that these provisions “did not create a “unilateral contract” that changed the plaintiff's employment at-will: “Neither the handbook nor the manual is couched in language sufficiently definite to constitute an offer of continuous employment.”

Other high court decisions also have not found a handbook’s promises enforceable for lack of definiteness or because of the clarity of disclaiming language. See Phipps v. IASD Health Services Corp., 558 N.W.2d 198 (IA 1997); Anderson v. Doulas & Lomason Co., 540 N.W.2d 277 (IA 1995); Fogel v. Trustees of Iowa College, 446 N.W.2d 451 (IA 1989).

Modifiability: There appear to be no decisions on this issue.

Kansas:

Although the case dealt with statutory interpretation, the most recent discussion of Kansas case law on employment handbooks is found in Kennedy v. Bd. of County Com'rs of Shawnee County, 958 P.2d 637, 650 (Kan. 1998) (citations omitted):

In Brown v. United Methodist Homes for the Aged, 815 P.2d 72 (Kan. 1991), the court concluded that sufficient evidence of an implied contract of employment existed in the personnel manual plus testimony about the employer's philosophy and practice to submit the question to the jury. In Morriss v. Coleman Co., 738 P.2d 277 (Kan. 1987), the court concluded that summary judgment was improper where the personnel manual plus verbal and nonverbal conduct of the employer's supervisors and the employer's policies in dealing with its employees were sufficient to raise a genuine issue of material fact with respect to an implied contract. In Allegri v. Providence-St. Margaret Health Ctr., 684 P.2d 1031 (Kan. Ct. App. 1984), the Court of Appeals concluded that summary judgment was improper where the employee handbook plus favorable evaluations and salary increases, an administrator's statement that Allegri could work until retirement, and his accommodating the employer's needs constituted sufficient evidence to require the matter to be submitted to a jury.

Modifiability: There appear to be no decisions on this issue.

Kentucky:

Enforceability: In Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354, 362 (Ky. 2005), the court held that on “a principle akin to estoppel” an employee handbook did confer contractual rights and remanded for a jury to decide if the provisions had been breached:

An express personnel policy can become a binding contract “once it is accepted by the employee through his continuing to work when he is not required to do so.” Hoffman-La Roche, Inc. v. Campbell, 512 So.2d 725, 733 (Ala.1987)….Toussaint v. Blue Cross & Blue Shield of Mich., 408
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Employment Law

Mich. 579, 292 N.W.2d 880, 885 (1980) (“[S]uch a provision may become part of the contract either by express agreement, oral or written, or as a result of an employee’s legitimate expectations grounded in an employer’s policy statements.”)

Modifiability: Parts Depot, 170 S.W.3d at 363: “The principle is akin to estoppel. Once an employer establishes an express personnel policy and the employee continues to work while the policy remains in effect, the policy is deemed an implied contract for so long as it remains in effect. If the employer unilaterally changes the policy, the terms of the implied contract are also thereby changed.”

Louisiana:

There appear to be no state high court decisions but the indications form the lower courts suggest non-enforceability of personnel manuals. In Stanton v. Tulane Univ. of Louisiana, 777 So.2d 1242, 1250-51 (La. Ct. App. 2001), the plaintiff, an at-will university professor, brought suit against the university for breach of employment contract, arguing that his Employment Handbook took “his employment relationship outside the at will category.” The appeals court rejected the claim: “Louisiana jurisprudence clearly and unequivocally upholds the principle that this sort of employment handbook is not a contract such as would eliminate application of the employment at will doctrine.”

Maine:

In Taliento v. Portland West, 197 ME 194, 705 A.2d 696 (Me. 1997), the court ruled against the plaintiff’s claim that he had been discharged in breach of contract holding that the personnel manual merely provided a method of discharging an employee rather than clearly limiting to the employer to that method or otherwise restricting the employer’s power to terminate the employment relationship: The court stated that “[i]n Maine it has long been the rule that a contract of employment for an indefinite length of time is terminable at the will of either party…. [T]he only exception to the employer’s common law right to discharge an employee at will is a contract that ‘expressly restrict[is] [such a right] and clearly limits the employer to enumerated method or methods of terminating the employment.’” 705 A.2d at 699 (citations omitted).

Maryland:

There appear to be no decision from the Maryland Court of Appeals, the state’s highest court, on these issues. In Staggs v. Blue Cross of Maryland, Inc., 486 A.2d 798 (Md. Ct. Spec. App. 1985), the plaintiff brought suit for wrongful termination based on an employee handbook containing several termination provisions. Denying the employer’s motion for summary judgment, the court held that “provisions in such policy statements that limit the employer’s discretion to terminate an indefinite employment or that set forth a required procedure for termination of such employment may, if properly expressed and communicated to the employee, become contractual undertakings by the employer that are enforceable by the employee.” Id. at 803. “In so holding, we caution that not every statement made in a personnel handbook or other publication will rise to the level of an enforceable covenant.” Id. at 804.

In Cutler v. Wal-Mart Stores, Inc., 927 A.2d 1 (Md. Ct. Spec. App. June 29, 2007), the court held that the handbook’s disclaimers precluded a contract action: although “personnel policies may give rise to contractual rights if they are properly expressed and communicated to the employee in a fashion that creates a reasonable basis for the employee’s reliance on the provisions,” disclaimers can effectively prevent such contractual rights from arising. Id. at 9 (citations omitted).

Massachusetts:

In O’Brien v. New England Tel. & Tel. Co., 422 Mass. 686, 664 N.E.2d 843, 848 (1996), the plaintiff claimed the defendant NET violated her contract of employment by discharging her without cause. The state high court stated that “if an employee reasonably believed that the employer was offering to continue the employee’s employment on the terms stated in the manual, the employees continuing to work after receipt of the manual would be in the nature of an acceptance of an offer of unilateral contract ….” Since O’Brien received a new copy of the manual annually, the manual stated that it applied to all non-management employees and “did not reserve the right to change the manual or to
discharge an employee without cause, O’Brien, as one of those employees, [was] entitled to whatever rights that the manual sets forth.” 664 N.E.2d at 849. But, the court dismissed her claim because the plaintiff did not follow the grievance procedure established in the manual and “that omission, as a matter of law, is fatal to her claim that NET violated the terms of her employment.”  Id.  

**Michigan:**

Enforceability: The court’s decision in Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 578, 292 N.W.2d 880 (1980), is one of the first to recognize the enforceability of unilateral handbook promises. In Lytle v. Malady, 458 Mich. 153, 166, 579 N.W.2d 906 (1998), the court ruled that the employer policy statement in question “is insufficient to overcome the strong presumption of employment at will, particularly where the original handbook also provided that ‘the contents of this booklet are not intended to establish . . . any contract between . . . [the employer] and any employee, or group of employees.’”  

Modifiability: In In Re Certified Question (Bankey v. Storer Broad. Co.), 432 Mich. 438, 443 N.W.2d 112 (1989), an employee brought suit in federal court against his former employer for breach of an employment contract. Under an employee manual, issued by the employer in 1980, employees could be discharged only for cause. However, the employer revised the manual in 1981, eliminating the “for cause” requirement and inserting an employment at-will provision. The Michigan supreme court, answering a certified question from the Sixth Circuit, held that “an employer may…unilaterally change a written discharge-for-cause policy to an employment at-will policy even though the right to make such a change was not expressly reserved from the outset.” 443 N.W.2d at 121. Rejecting “the applicability of unilateral contract theory” in this context (id. at 119), the court reasoned (id. at 120):

> It is one thing to expect that a discharge-for-cause policy will be uniformly applied while it is in effect; it is quite a different proposition to expect that such a personnel policy, having no fixed duration, will be immutable unless the right to revoke the policy was expressly reserved. The very definition of “policy” negates a legitimate expectation of permanence….In other words, a “policy” is commonly understood to be a flexible framework for operational guidance, not a perpetually binding contractual obligation. In the modern economic climate, the operating policies of a business enterprise must be adaptable and responsive to change.

**Minnesota:**

Enforceability: The Minnesota supreme court first addressed employee handbooks in Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1982). The plaintiff brought a wrongful termination suit, relying on the “Disciplinary Policy” and “Job Security” sections in an employee handbook. The “Disciplinary Policy” set forth a three-stage procedure requiring reprimand for the first two offenses and suspension or discharge for a subsequent offense. Id. at 626. The “Job Security” section described “in general, laudatory terms…the stability of jobs in banking.” Id. The court concluded that the section regarding disciplinary procedures was definite enough to constitute a unilateral offer to be bound by the dismissal procedure because it specifically set forth the procedures to be followed when terminating an employee and it applied in all situations where an employee violated company policy. Further, the offer was communicated to the employee when the bank distributed the handbook, and the employee accepted the offer and provided consideration by remaining a bank employee although free to seek other employment. Id. at 630.  

Modifiability: In Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701, 708 (MN 1992), the employer argued that plaintiff’s claim based on an earlier handbook was barred by the fact that a later handbook had effectively revoked the earlier offer for “a unilateral employment contract….” The court rejected the argument because the employer “did not expressly revoke the HRPM or any other prior employment contract [that] a pre-Handbook employee like Ferges may have had. Perkins never communicated any intent to revoke or rescind the HRPM as a term of its employment contract with its employee Ferges.” Id. at 708.  

**Mississippi**

Enforceability: In Bobbit v. The Orchard, Ltd., 603 So.2d 356 (Miss. 1992), the plaintiff was a former employee who
brought suit for wrongful termination based on an employee handbook. The court held that “when an employer publishes and disseminates to its employees a manual setting forth the proceedings which will be followed in an event of an employee’s infraction of rules, and there is nothing in the employment contract to the contrary, then the employer will be required to follow its own manual in disciplining or discharging employees for infractions or misconduct specifically covered by the manual.” Id. at 357.

Modifiability: There appear to be no decisions on this issue.

Missouri:

In West Cent. Missouri Reg’l Lodge No. 50 v. Bd. of Police Com'rs of Kansas City, Mo, 939 S.W.2d 565, 567-68 (Mo. Ct. App. 1997), although addressing a different point, the court reviewed the state law on employment handbooks:

The issue of whether the distribution of an employee handbook or policy manual creates a contract between an employee and an employer has been raised several times in Missouri. Typically, such cases involve terminated employees who have attempted to circumvent the employment-at-will doctrine by claiming that employee handbooks given to them by their employers constituted employment contracts. Since the Missouri Supreme Court decision in Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661 (Mo. 1988), Missouri courts consistently have held that the issuance of an employee handbook does not create an employment contract.

Montana:

Montana is the only U.S. state to have enacted a statute requiring a showing of “good cause” for all employer terminations of an employee’s employment effected after the employee has completed a probationary period. See Montana Wrongful Discharge of Employment Act. Mont. Code Ann. §§ 39-2-901 to –914, upheld against a state constitutional challenge for restricting judicial remedies in Meech v. Hillhaven West, Inc., 238 Mont. 21, 776 P.2d 499 (1989).

In Langager v. Crazy Creek Prods., Inc., 954 P.2d 1169 (Mont. 1998), the plaintiff brought suit seeking judicial review of an order issued by the state department of labor denying her compensation for two weeks of unused vacation time. The plaintiff provided Crazy Creek, her employer, with notice that she intended to quit her job two weeks later, at the start of her scheduled vacation. The Crazy Creek manager informed her that she would not receive any vacation pay if she did not return to work following her vacation, pursuant to the personnel manual. In response, Langager opted to terminate her employment and thus did not work her regular shift either prior to or following her scheduled vacation period. The court found that the employment handbook was part of the employment contract:

In the present case…the administrative record indicated that Crazy Creek not only distributed its personnel manual to each employee, but additionally convened a second meeting on February 8, 1994, during which it asked if any employees had questions regarding the provisions of the manual. That Langager not only received a copy of the manual, but also attended this second meeting during which the employer asked for input from its employees, indicated the manual’s terms were sufficiently bargained for. Moreover, Langager continued to work for Crazy Creek, thereby supplying the necessary consideration.

Further, the employer could not divest an employee of an accrued benefit. See id. at 1175.

Nebraska:

In Johnston v. Panhandle Co-op Assn., 225 Neb. 732, 408 N.W.2d 261 (1987), the court rejected the plaintiff’s claim that the employee handbook and his salary agreement constituted an express contract of employment for a definite term, that term being until his retirement or until he was dismissed for cause. The court agreed that a handbook prepared years after an employee was hired could meet the requirements for an enforceable unilateral contract, 408 N.W.2d at 266, but in this case the handbook provision did not contain a sufficiently definite promise: “The handbook does nothing more
than set out six examples of dismissals for cause. Nowhere does the handbook limit the reasons for dismissal to these six provisions or state there are any restrictions on the employer’s rights to discharge.” Id. at 268.

Nevada:

In Southwest Gas Corp. v. Ahmad, 99 Nev. 594, 668 P.2d 261, 261-62 (1983), the plaintiff brought suit for breach of an employment contract, claiming that the handbook created contractual rights between her and Southwest. The court agreed that the handbook could be found to be part of the original employment contract or a modification supported by sufficient consideration:

There is testimony by Ahmad that she had knowledge of the termination section of the handbook “throughout the length of [her] employment.” The fact that the company issued such handbooks to its employees and that Ahmad had knowledge of the pertinent provisions therein supports an inference that the handbook formed part of the employment contract of the parties. There is also evidence of formal delivery of the handbook after the commencement of employment. Her continued employment after formal delivery of the handbook provides sufficient consideration for modifying the employment agreement by inclusion of the handbook provisions.

New Hampshire:

In Panto v. Moore Bus. Forms, Inc., 130 N.H. 730, 547 A.2d 260 (1988), the First Circuit certified to the state high court the question whether an employee handbook that was unilaterally promulgated could become part of an employment contract. The state court answered that “an employer’s unilateral promulgation to present at-will employees of a statement of intent to pay and provide such economic benefits may be recognized under New Hampshire law as an offer to modify their existing relationship by means of a unilateral contract, which offer is subject to such an employee’s acceptance by continued performance of his duties.” Id. at 261-262. In this case, “the allegations of Panto’s amended complaint can be read to permit proof of facts indicating that the parties formed a unilateral contract, entitling Panto to the economic benefits in question for three months after ending his employment with Moore.” Id. at 262. The court noted that the defendant “could simply have avoided the entire issue [of contractual liability] by announcing in the written policy itself that [the policy] was not an offer, or a policy enforceable as a contractual obligation.” Id. at 268.

New Jersey:

Enforceability: In Woolley v. Hoffmann-LaRoche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985), modified on other grounds, 499 A.2d 515 (1985), the plaintiff brought suit against his former employer for wrongful termination, alleging that terms in an employee manual modified his at-will status to one terminable for-cause only after certain termination procedures were followed. The plaintiff, when hired, had no written employment contract with his employer. Several months later, the plaintiff received the personnel manual on which his claims were based. He was discharged from employment a decade later. The New Jersey supreme court held that the manual created an implied contract to be terminated for cause only after the termination procedures in the manual were followed. The court remanded the issue of whether “the manual elsewhere prominently and unmistakably indicates that those provisions shall not be binding or unless there is some other similar proof of the employer’s intent not to be bound.” 491 A.2d at 1270. The court reasoned (id. at 1267):

We conclude that these job security provisions contained in a personnel policy manual widely distributed among a large workforce are supported by consideration and may therefore be enforced as a binding commitment of the employer.

[T]he manual is an offer that seeks the formation of a unilateral contract -- the employees' bargained-for action needed to make the offer binding being their continued work when they have no obligation to continue.

Modifiability: The court in Woolley left open this question: “Further problems may result from the employer’s explicitly
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reserved right unilaterally to change the manual. We have no doubt that, generally, changes in such a manual, including
changes in terms and conditions of employment, are permitted. We express no opinion, however, on whether and to what
extent they are permitted to adversely affect a binding job security provision.” 491 A.2d at 1270-71.

New Mexico:

In Forrester v. Parker, 93 N.M. 781, 606 P.2d 191, 192 (1980), the court held that the company’s personnel policy guide
“did control the employee-employer relationship here in question. Forrester should have and did expect Parker to
conform to the procedures for terminating him as spelled out in the guide. For the guide constituted an implied
employment contract; the conditions and procedures provided in it in bound both Forrester and Parker.”

New York:

In Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441 (N.Y. 1982), the court held that an express limitation
on the right to terminate is an exception to the at-will doctrine. Plaintiff Weiner alleged that he was induced to leave his
former employer for McGraw-Hill by express assurances of job security. He claimed that he signed and submitted a
McGraw form job application specifying that his employment was subject to McGraw's handbook on personnel policies
and procedures. The application form represented that McGraw would resort to dismissal for just and sufficient case
only, and only after all practical steps toward rehabilitation or salvage of the employee had been taken and failed. It is
not clear, however, that promises in a personnel manual, standing alone, would be enforceable in New York.

North Carolina:

Analytical Indus., Inc., 493 S.E.2d 420 (N.C. 1997), the court declined to treat employee handbooks as part of the
employment contract:

Several cases decided by the Court of Appeals, and federal courts applying North Carolina law,
hold that an employer’s personnel manual is not part of an employee’s contract of
employment….We have not been persuaded to depart from the rules developed and applied in our
prior decisions.

North Dakota:

N.W.2d 622 (Minn. 1983) to affirm a jury instruction allowing for an employer to unilaterally change an employment
manual. The plaintiff brought a wrongful termination claim after he was terminated due to a reduction-in-force. The
plaintiff claimed that an earlier manual’s definition of just cause should have been applied while the defense claimed that
a later manual’s definition, which treated a staff reduction as cause should be applied. The jury found that the later
handbook definition applied and thus plaintiff’s claim was dismissed. In upholding the verdict, the state high court found
the following language in Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1084 (Wash. 1984), to be persuasive:

When the employment relationship is not evidenced by a written contract and is indefinite in duration, the
parties have entered into a contract whereby the employer is essentially obligated to only pay the employee for
any work performed. In this contractual relationship, the employer exercises substantial control over both the
working relationship and his employees by retaining independent control of the work relationship. Thus, the
employer can define the work relationship. Once an employer takes action, for whatever reasons, an employee
must either accept those changes, quit, or be discharged. Because the employer retains this control over the
employment relationship, unilateral acts of the employer are binding on his employees and both parties should
understand this rule.

Ohio:

In Wright v. Honda of America Mfr., Inc., 653 N.E.2d 381 (Ohio 1995), the court addressed what factors besides
“history of the relations” between an employer and employee can be considered in determining explicit and implicit terms in an employment agreement. The court held that the trier of fact can consider “evidence which includes, but is not limited to, information contained in employee handbooks, oral representations made by supervisory personnel that employees have been promised job security in exchange for good performance, and written assurances reflecting company policy.” Id. at 384. In the case, the court found that the plaintiff had “presented sufficient evidence to create a fact question as to whether Honda, through its policies, past practices and representations, altered the at-will nature of the employment by creating an expectation of continued employment.” Id. at 385.

Oklahoma:

In Russell v. Bd. of County Com’rs, Carter County, 952 P.2d 492, 500-501 (Okla. 1997), plaintiffs were deputy sheriffs who sought recovery of overtime and holiday work pay. A personnel policy manual was adopted by the personnel board which provided that county employees -- including “law enforcement officers” -- shall be compensated for overtime hours and receive holiday work pay. The deputies argued that they were law enforcement officers within the meaning of the county's personnel policy. The Board denied that they were law enforcement officers within the meaning of the manual’s overtime provisions. The court denied the Board’s motion for summary judgment:

Oklahoma jurisprudence recognizes that an employee handbook may form the basis of an implied contract between an employer and its employees if four traditional contract requirements exist: (1) competent parties, (2) consent, (3) a legal object and (4) consideration. Two limitations on the scope of implied contracts via an employee handbook stand identified by extant case law: (1) the manual only alters the at-will relationship with respect to accrued benefits and (2) the promises in the employee manual must be in definite terms, not in the form of vague assurances. Although the existence of an implied contract generally presents an issue of fact, if the alleged promises are nothing more than vague assurances the issue can be decided as a matter of law. This is so because in order to create an implied contract the promises must be definite….

We cannot, on this record, decide the contractual efficacy of the handbook as a matter of law. While the manual states that its purpose is “to provide a working guide” to county officials and that the personnel policies do not represent an “employment contract,” conflicting inferences may be drawn from other statements made in the same handbook. … The deputies’ evidentiary materials raise a material fact question whether the effectiveness of the Board’s written disclaimer is negated by inconsistent employer conduct.

Oregon:


Modifiability: There apparently is no high court ruling on this issue. In McPhail v. Milwaukee Lumber Co., 999 P.2d 1144 (Or. Ct. App. 2000), the plaintiff was promised employment by his employer until age 65; he claimed that his employer breached this agreement by firing him at age 51. The employer argued that the employee handbook, issued after plaintiff had been working for some years, provided for employment at will and that the plaintiff recognized that fact when he signed an acknowledgement form upon receipt of his copy of the handbook. The court ruled in favor of the plaintiff: “A modification of an existing contract requires additional consideration in order for the modification to be binding.” Id. at 1148 (citations omitted).

Pennsylvania:

There appears to be no state high court authority on the enforceability of handbooks. In Lutheran v. Loral Fairchild Corp., 688 A.2d 211 (Pa. Super. Ct. 1997), the intermediate court was faced with the question of whether an employee handbook created an implied contract for discharge for just cause only. The court ruled for the employer but seemingly recognized in principle the unilateral contract theory. See id. at 213-14.
Appendix B: Enforceability of Employee Handbooks/Personnel Manuals

Rhode Island:

Enforceability: In Neri v. Ross-Simmons, Inc., 897 A.2d 42 (R.I. 2006), the Rhode Island high court affirmed the lower court’s entry of summary judgment in favor of the employer, dismissing plaintiff’s claim for breach of an employment contract. Plaintiff argued that the employer violated its employee handbook that provided for a specific protocol to be followed in the event of a staff reduction. The court stated: “In this jurisdiction when the duration of a contract is uncertain, the contract is to be considered terminable at will.” Id. at 47. The court further held since there was a disclaimer in the handbook allowing employer to modify its policies, its “employees cannot have a legitimate expectation that a particular policy will remain in effect.” Id. at 48.

Modifiability: The court’s language in Neri suggests that it views handbook commitments as modifiable, at least where the employer reserves the right to make unilateral changes (897 A.2d at 47-48):

[W]e have held that an employer was not required to make a certain severance payment to a terminated employee because the handbook in question reserved the employer's right to revise all its policies. D'Oliveira v. Rare Hospitality Int'l, Inc., 840 A.2d 538, 541 (R.I. 2004). In doing so, we stated “employees cannot have a legitimate expectation that a particular policy will remain in effect when he or she has been notified that the policy is subject to unilateral change.”

The handbook's disclaimer contained both in the letter from the president and in the receipt slip clearly militates against any employee expectation that defendant can be bound by the policies expressed therein. Put differently, because defendant unilaterally could change its policy concerning staff reduction, plaintiff did not have a contractual right to displace less senior employees. Accordingly, plaintiff's breach of contract claim cannot survive summary judgment.

South Carolina:

Enforceability: In Conner v. City Forest Acres, 363 S.C. 460, 611 S.E.2d 905 (2005), the court held that the trial court erred in excluding certain evidence from the jury’s consideration. The court reaffirmed the so-called “handbook claim” as an exception to the default rule of employment at-will. The court also referred to but did not rely upon S.C.Code Ann. §41-1-110 (Supp. 2004), which “provides a handbook shall not create an employment contract if it is conspicuously disclaimed.” 611 S.E.2d at 911. The statute did not apply to handbooks that were issued prior to its enactment.

Modifiability: In Fleming v. Borden, Inc., 316 S.C. 452, 450 S.E.2d 589, 595-96 (1994), the court held that “the implied contract of employment created by an employee handbook may be modified by a subsequent employee handbook….In the employment context, the reasonable notice requirement for modification requires actual notice to the employee.”

South Dakota:

In Aberle v. City of Aberdeen, 2006 S.D. 60, 718 N.W.2d 615 (2006), the South Dakota supreme court dismissed the plaintiff’s claim of wrongful termination based on an allegation that an employee manual created a contract that altered his status of an at-will employee. The court stated: “When no explicit surrender of the statutory at-will power is made by the employer, but policies or handbooks ‘contain[] a detailed list of exclusive grounds for employer discipline or discharge and a mandatory or specific procedure which the employer agrees to follow prior to any employee’s termination[,]’ an implied contract is created that binds the employer to the for-cause termination procedure.” 718 N.W.2d at 621 (citations omitted).

In Hollander v. Douglas County, 620 N.W.2d 181, 186 (S.D. 2000), the court held that the handbook’s grievance procedure did modify plaintiff’s at-will employment to termination for cause only. The court reasoned:

In Osterkamp v. Alkota Mfg., [332 N.W.2d 275 (S.D. 1983),] we recognized a narrow exception [to employment at will]: it applies when an employer's discharge policy provides that termination will occur only for cause. The exception can develop in one of two ways. First, an agreement to discharge for cause arises when an employee handbook “explicitly provides, in the same or
comparable language that discharge can occur for cause only.” Butterfield v. Citibank of South Dakota, 437 N.W.2d 857, 859 (S.D. 1989). Second, a contract providing that termination will not occur absent cause will be implied “where the handbook contains a detailed list of exclusive grounds for employee discipline or discharge and, a mandatory and specific procedure which the employer agrees to follow prior to any employee's termination.” Butterfield, 437 N.W.2d at 859.

Tennessee:

The Tennessee supreme court has not addressed employee handbooks or modification issues. In Lee v. City of LaVergne, No. M2001-02098-COA-R3-CV, 2003 WL 1610831, at*1 ( Tenn. Ct. App. 2003), the plaintiff brought a wrongful termination claim against his employer, arguing that a personnel policy contained grievance procedure which modified his at-will status. In dismissing plaintiff's claim, the court stated:

An employee handbook may become a binding part of an employment contract if it contains specific language showing the employer's agreement to be bound by its provisions. Reed v. Alamo Rent-A-Car, 4 S.W.3d 677 (Tenn. Ct. App. 1999); Rose v. Tipton County Public Works Dept., 953 S.W.2d 690 (Tenn. Ct. App. 1997).

In Reed, the intermediate court noted (at 688): “we could conceive no clearer way for an employer to express its intent not to be bound by an employee handbook's provision than the employer's specific statement that the handbook is not a contract or that the handbook should not be construed as a contract.”

Texas:

Enforceability: In Montgomery Count Hosp. Dist. v. Brown, 965 S.W.2d 501 (Tex. 1998), the plaintiff claimed (and the court assumed for purposes of summary judgment review) that plaintiff was told at time of hire that he would not be fired except for cause. The state supreme court held “that an employer’s oral statements do not modify an employee’s at-will status absent a definite, stated intention to the contrary.” Id. at 501. The court reasoned (id.):

General statements like those made to Brown simply do not justify the conclusion that the speaker intends by them to make a binding contract of employment. For such a contract to exist, the employer must unequivocally indicate a definite intent to be bound not to terminate the employee except under clearly specified circumstances. General comments that an employee will not be discharged as long as his work is satisfactory do not in themselves manifest such an intent. Neither do statements that an employee will be discharged only for “good reason” or “good cause” when there is no agreement on what those terms encompass. Without such an agreement the employee cannot reasonably expect to limit the employer’s right to terminate him. An employee who has no formal agreement with his employer cannot construct one out of indefinite comments, encouragements, or assurances.

Modifiability: There appears to be no high court decision on point. In Gamble v. Gregg County, 932 S.W.2d 253, 256 (Tex. App. 1996), the plaintiff brought suit after he was denied payment for accrued sick leave upon his termination. Under the original personnel manual, the plaintiff had a right to payment for accrued sick leave after he had worked for five years. Subsequently, the manual was changed to no longer provide for sick-leave payment benefits. In denying the plaintiff’s claim for recovery, the court held:

In an employment-at-will relationship, either party may modify the employment terms as a condition of continued employment. When the employer notifies an employee of changes in employment terms, the employee must accept the new terms or quit. If the employee continues working with knowledge of the changes, he accepts the modified terms as a matter of law and gives up any right to claim anything other than that provided by the new terms. Gamble continued working for the county after the personnel manual had been changed to eliminate the right to payment for unused sick leave. He therefore gave up any right to claim benefits under the superseded manual.
Appendix B: Enforceability of Employee Handbooks/Personnel Manuals  

Utah:

In Ryan v. Dan’s Good Stores, Inc., 972 P.2d 39, 401-404 (Utah 1998), the plaintiff received an employee handbook after his employer made statements representing that Dan’s would not discipline employees for following the law. The plaintiff was terminated “for his treatment of customers.” The handbook stated (id. at 401):

You are an “at-will” employee. As such, you have the right to quit at any time for any reason or no reason at all. Similarly, Dan’s has the right to terminate your employment at any time for any reason or no reason at all, without cause and without prior notice.

The court ruled against the plaintiff:

We conclude that even if Gardiner's statement that Dan's would not terminate Ryan for following the law created an express or implied contract, as a matter of contract law, Ryan's receipt of the Dan's employee handbook and his signing of the acknowledgment form modified and superseded any previous conditions of [his employment] contract.…

[In Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991)[,] we stated:

“In the case of unilateral contract for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employment supplies the necessary consideration for the offer.”

Id. at 1002 (quoting Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn.1983)). In many circumstances, a fact question will exist as to whether the parties intended to modify an at-will employment contract. See id. at 1001. However, when an employee admittedly has knowledge of a distributed handbook's provision that modifies the employment contract and continues to work for the employer after gaining such knowledge, the modified contract prevails, and previous, contradictory conditions have no effect.

Vermont:

In Trombley v. Sw. Vermont Med. Ctr., 738 A.2d 103 (Vt. 1999), the plaintiff was terminated as a nurse after several complaints from patients. Id. at 107. A 1981 handbook provided for a “three-reprimands-and-you’re-out” progressive discipline policy whereas a 1992 handbook provided a more flexible “progressive disciplinary procedure.” The plaintiff claimed that the 1981 handbook was controlling and since she had not been given three reprimands, she was wrongfully terminated. The jury found that the 1981 handbook controlled and awarded the plaintiff damages. The state supreme court affirmed (id. at 109-110):

We agree that employee handbooks may be modified or altered subsequent to employment and, if the employee has knowledge of the modifications of the policies and procedures, the modified version governs the terms of employment.

This determination does not mean, however, that the most current employment handbook must, as a matter of law, be the sole basis for employee termination procedures. We begin by noting that employee manuals containing definitive policies, which expressly or impliedly include a promise for specific treatment in specific situations, especially when the employer expects the employee to abide by the same, may be enforceable in contract….The applicable discharge procedures must be evaluated within the context of all the other provisions in the handbooks and any other circumstances pertaining to the status of the employment agreement.
In Progress Printing Co., Inc. v. Nichols, 421 S.E.2d 428 (Va. 1992), the plaintiff brought suit for wrongful termination, arguing that language in his employee handbook made him terminable for cause only. The employer's personnel director had provided the plaintiff with a copy of the company's Employees' Handbook which stated that the company would not discharge or suspend an employee “without just cause and shall give at least one warning notice ... in writing” except under certain circumstances. Id. at 429. Subsequently, the plaintiff signed a form which stated that the employment relationship between Progress Printing and the employee was “at will and may be terminated by either party at any time.” Id.

In holding that the acknowledgement form superseded and replaced the provision in the handbook, making the employment terminable at will, the court reasoned (id. at 431):

Assuming, without deciding, that the Handbook containing the termination for cause provision satisfies the statute of frauds in this case, we nevertheless agree with Progress Printing that the acknowledgment form, executed by both parties on February 2, 1987, specifically superseded and replaced that provision with the agreement that the employment relationship was at will....

We conclude that the termination for cause language of the Handbook and the employment at will relationship agreed to in the subsequent acknowledgment form are in direct conflict and cannot be reconciled in any reasonable way. If the documents are considered a single contract, as the trial court considered them, this conflict, along with the conflicting testimony of the parties as to the nature of the employment relationship, fails to provide sufficient evidence to rebut the presumption of employment at will.

In Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984), the plaintiff brought suit for wrongful termination after he was asked to resign. The plaintiff relied on a statement in an employee manual that stated “terminations will be processed in a manner which will at all times be fair, reasonable and just.” Id. at 1084. The trial court upheld the employer’s motion for summary judgment on the ground that the manual was not part of the employment contract. The state supreme court reversed (id. at 1087-88):

We hold that employers may be obligated to act in accordance with policies announced in handbooks issued to their employees. When the employment relationship is not evidenced by a written contract and is indefinite in duration, the parties have entered into a contract whereby the employer is essentially obligated to only pay the employee for any work performed. In this contractual relationship, the employer exercises substantial control over both the working relationship and his employees by retaining independent control of the work relationship. Thus, the employer can define the work relationship. Once an employer takes action, for whatever reasons, an employee must either accept those changes, quit, or be discharged. Because the employer retains this control over the employment relationship, unilateral acts of the employer are binding on his employees and both parties should understand this rule.

We are persuaded that the principal, though not exclusive reason employers issue such manuals is to create an atmosphere of fair treatment and job security for their employees....It would appear that employers expect, if not demand, that their employees abide by the policies expressed in such manuals. This may create an atmosphere where employees justifiably rely on the expressed policies and, thus, justifiably expect that employers will do the same. Once an employer announces a specific policy or practice, especially in light of the fact that he expects employees to abide by the same, the employer may not treat its promises as illusory. ...

Applying the foregoing to the facts before us, we reverse the trial court. Reviewing the material submitted for and against St. Regis’ motion for summary judgment in the light most favorable to
the employee, we believe material questions of fact are presented…. On this record we are unable
to determine the effect of the manual in relation to the employment relationship; whether any
statements therein amounted to promises of specific treatment in specific situations; if so, whether
the appellant justifiably relied on any of those promises; and finally, whether any promises of
specific treatment were breached. These questions present material issues of fact.

West Virginia:

In Younker v. Easter Associated Coal Corp., 214 W.Va. 696, 591 S.E.2d 254 (2003), the court rejected plaintiff’s claim
for breach of contract on the ground that the discharge violated the employer’s code of business conduct (CBC). The
court reasoned: “This Court has traditionally recognized that an employment which is of an indefinite duration is
rebuttably presumed to be a hiring at will, which is terminable at any time at the pleasure of either the employer or
employee.” 591 S.E.2d at 258. The court also noted that representations made in an employee handbook can alter the
status of an at will employee, but such representations “must be very definite.” Id. In this case, however, the CBC “does
not reach that “very definite” level of specificity required to create a contract.” Id. at 259.

Wisconsin:

There appear to be no high court decisions on point. In Helland v. Kurtis A. Froedtert Mem’l Lutheran Hosp., 601
N.W.2d 318 (Wis. Ct. App. 1999), the plaintiff brought suit for wrongful termination against her employer, arguing that
an earlier employee handbook limited termination to cause only and was binding because she had never read the
subsequent handbook which contained a disclaimer on contractual rights. Id. at 322.

In dismissing plaintiff’s claim based on both handbooks creating no contractual rights, the court explained (Id. at 320-
24):

At the focal point of the dispute are two editions of the Employee Handbook: the 1984 version and
the 1990 updated version. When Helland was hired in 1984, the Handbook provided that once an
employee completed the probationary work period, that employee could only be disciplined
pursuant to the guidelines set forth in the Handbook, including discipline “for cause.” Helland
argues that this provision, in effect, changed the employment relationship from one of “at will”
during the probationary period, to one of a contractual nature after probation was completed. As a
result, she contends that she could only be discharged “for cause,” and then, only after a
progressive disciplinary procedure was followed as outlined in the 1984 Handbook. The 1990
Handbook update, however, contained a specific disclaimer that the Handbook created any
employment contractual rights.…

Because the trial court properly concluded that Helland received the 1990 Handbook update, its
terms are controlling. To demonstrate that the 1990 update provides no support for Helland's first
claim of error, we need not present a detailed analysis because the notification language and other
provisions found within the Handbook clearly accomplish this task.

Wyoming:

In Finch v. Farmers Co-Op Oil Company of Sheridan, 109 P.3d 537 (Wyo. 2005), the Wyoming high court affirmed
summary judgment in favor of the employer, dismissing plaintiff’s claim for breach of contract, breach of implied
covenant of good faith and fair dealing, and promissory estoppel. The court stated: “In Wyoming, employment is
presumed to be at will. In an at-will employment relationship, either the employer or the employee may terminate the
relationship at any time, for any reason or for no reason at all”. Id. at 541 (citations omitted). The court held that the at-
will disclaimer in the employee manual defeated the plaintiff’s claim for breach of contract and promissory estoppel.
Further, the plaintiff could not succeed on the theory of breach of covenant of good faith and fair dealing since the
plaintiff did not have a “special relationship of trust and reliance that would support [such] a claim.…” Id. at 544.

In Brodie v. Gen. Chem. Corp. 934 P.2d 1263 (Wyo. 1997), plaintiffs brought in federal court a wrongful discharge
action against their employer, alleging that termination of their employment breached an implied contract formed by the employee handbook and standard operating procedures manual. The federal trial court entered judgment for the employer. On appeal, the Tenth Circuit reversed and certified questions to the Wyoming high court on whether an employer could unilaterally modify an employee handbook and what degree of consideration was required.

The state supreme court answered that an employer must give additional consideration for a manual modification to be binding and that continued employment is not sufficient consideration for this modification:

In Wyoming, an employer may, under certain conditions, amend an employee handbook promising job security if it had previously included language in its handbook reserving the right to unilaterally modify. Lincoln v. Wackenhut, 867 P.2d 701, 705 (Wyo. 1994). The certified question presented in this case asks whether an employer may unilaterally modify when its employee handbook does not contain such a reservation. Employer contends that we have already implicitly answered this question in the affirmative but, should we disagree that is the case, Employer requests that we adopt the rule that an employer may unilaterally modify a handbook without additional consideration to the employee. As explained below, we have not implicitly recognized the rule advocated by Employer and today we decline to adopt such a rule.

Our handbook decisions hold that an implied employment contract does arise from established contract law principles and our contract law concerning modification is well settled that an agreement altering a written contract, to be binding, must be based on consideration. Harvard v. Anderson, 524 P.2d 880, 883 (Wyo. 1974). In Wilder, we explained that established contract law principles apply to the employment contract whether express or implied. Wilder v. Cody Country Chamber of Commerce, 868 P.2d 211, 219 (Wyo. 1994). Employer contends that these principles should not be extended to an implied contract based upon an employment handbook because it will result in an employer's potentially facing the great difficulty and confusion of having to negotiate employment contracts on an individual basis if it is not permitted to unilaterally modify.

We perceive the second certified question as asking whether continued employment will suffice as consideration for a modification which restores at-will status. As just explained, the answer is no, separate consideration must be provided. A valid modification requires an offer, acceptance, and consideration. Robinson v. Ada S. McKinley Cmty. Servs., 19 F.3d 359, 364 (7th Cir. 1994).... Consideration to modify an employment contract to restore at-will status would consist of either some benefit to the employee, detriment to the employer, or a bargained for exchange. Robinson, 19 F.3d at 364. The question of what type of consideration is sufficient cannot be answered with specificity because we have long held that absent fraud or unconscionability, we will not look into the adequacy of consideration. Laibly v. Halseth, 345 P.2d 796, 799 (Wyo. 1959). As long as the consideration given meets the definition of legal consideration, it will be considered sufficient consideration. See Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 541 (Wyo. 1993) (listing examples of separate consideration sufficient to support a covenant not to compete).

Brodie, 934 P.2d at 1266-1269.
CHAPTER 4

THE TORT OF WRONGFUL DISCIPLINE IN VIOLATION OF PUBLIC POLICY

§ 4.01 Employer Discipline in Violation of Public Policy

(a) An employer that discharges or takes other material adverse action against an employee because the employee has or will engage in protected activity under § 4.02 is subject to liability in tort for wrongful discipline in violation of public policy, unless the statute or other law that forms the basis of the applicable public policy precludes tort liability or otherwise makes inappropriate judicial recognition of a tort claim.

(b) “Other material adverse action” in this Section means an action short of discharge that is reasonably likely to deter a similarly situated employee from engaging in protected activity, including an action that significantly affects employee compensation or working conditions.

Comment:

a. Scope. A consensus has emerged in recent decades that recognizes a cause of action in tort for wrongful discharge in violation of public policy. The primary justification for this tort is that, regardless of the terms of the employment, certain discharges harm not only the specific employee but also third parties and society as a whole in ways contrary to established norms of public policy. The requirements of public policy are nonwaivable and cannot be modified by contract. Recognition of the wrongful-discharge tort forces employers to internalize the costs of the harm they cause, and
§ 4.01

thereby encourages behavior consistent with those norms. As with most torts, a successful plaintiff may recover full compensatory damages and, in appropriate circumstances, punitive damages. Where states do not recognize the tort of discharge or other employer discipline in violation of public policy, such conduct may be considered violative of express or implied terms of the employment contract. See § 2.06, Comment e. Remedies in the employment context are treated in Chapter 9 of this Restatement.

b. Constructive discharge and other employer discipline. Most tort claims of employer discipline in violation of public policy involve actual discharge. However, § 4.01 also covers claims for constructive discharge. An employer constructively discharges an employee if the employer creates working conditions so intolerable that a reasonable employee in the circumstances would quit, and the employee in fact quits.

Additionally, § 4.01 includes appropriate claims for other forms of wrongful employer conduct violative of public policy, including discipline short of discharge or constructive discharge, or other substantial adverse action not generally regarded as “discipline.” In part because employees are reluctant to sue their current employer, few reported cases involve employees who have not been discharged, or quit and alleged constructive discharge. The benefit of recognizing a broader cause of action is that it protects employees engaged in protected activity from a broader range of retaliatory conduct by employers. The countervailing concern is that courts will be asked to scrutinize routine employer decisions on pay, promotions, and the like. This Restatement recognizes that the better approach is to permit appropriate tort claims of wrongful discipline short of constructive discharge to go forward, where such discipline is likely to deter that or another employee from engaging in certain activities, protected under § 4.02, that benefit third parties and society as a whole. This approach is
consistent with protections against retaliation under federal and state antidiscrimination laws, as well as many other statutory employment rights, which generally protect employees against employer discipline in addition to discharge. The standard for such claims is whether the retaliatory action affects the employee’s compensation or working conditions in ways that are reasonably likely to deter a similarly situated employee from engaging in protected activity.

Illustrations:

1. After employee E experiences a work-related injury, a supervisor of X urges E not to pursue a workers’ compensation claim. When E nevertheless does so, the supervisor demotes E for filing the claim; the demotion involves a loss of significant duties. Because E continues to work for X, E cannot allege constructive discharge. Nevertheless, because the demotion is reasonably likely to deter a similarly situated employee from pursuing workers' compensation claims, E has a claim of employer discipline in violation of public policy.

2. Same facts as Illustration 1, except that instead of demoting E, the supervisor no longer invites E for drinks after work as had been the supervisor’s regular practice. Because E’s exclusion from drinks after work is not reasonably likely to deter another employee from pursuing a workers’ compensation claim, E has no tort claim of employer discipline in violation of public policy.

c. Express statutory preclusion of a common-law public-policy tort. When enacting a statute protecting employees from wrongful discipline, a legislature will sometimes expressly provide that the statutory remedy is exclusive. Such a provision precludes a common-law tort claim premised on
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the public policy embodied in that statute. Examples of an exclusive statutory remedy are those provided in Montana’s Wrongful Discharge from Employment Act and the federal Employee Retirement Income Security Act (ERISA). In situations covered by those statutes, the employee has no common-law claim for wrongful discipline in violation of public policy.

d. Implied statutory preclusion or otherwise inappropriate judicial recognition of a tort action. Where a statute does not expressly preclude common-law actions, the court undertakes a second inquiry. Some courts declare that this second inquiry examines the implied intent of the legislature. Often, it is more realistic to acknowledge that the inquiry does not turn so much on an elusive search for implied legislative intent, but on the aptness of an incremental development of the common law given the presence of relevant statutes.

However this second inquiry is framed, it turns on whether it is appropriate, in the context of the particular statute embodying the public policy in question, to recognize a parallel tort action. Judicial reluctance to recognize a claim stems from two principal concerns. One is that the legislature, in addition to identifying the public policy at issue in the statutory enactment, may have also chosen the appropriate remedy to protect that public policy. The statutory remedy may reflect compromises between competing interests that are better handled in a legislative, as opposed to a judicial, forum. A second consideration is that a public-policy tort is not needed, and therefore not worth the costs, when the statutory remedy adequately addresses the interests of the injured employee and thereby the relevant public policy. Accordingly, if a statute provides an adequate alternative remedy, courts often decline to recognize a common-law tort claim premised on violations of that statute.

In assessing whether the statute impliedly precludes a statutory remedy, or whether it is
otherwise appropriate to recognize a tort action, courts look at a variety of factors. These include, but
are not limited to, whether the employee has a private cause of action under the statute, and if not
whether the employee can appeal the decision of an administrative body to court, whether the statute
establishes a comprehensive regulatory scheme, the importance of the relevant public policy and
whether it is expressed in other sources than the statute providing a remedy, as well as the procedural
restrictions placed on pursuing the statutory claim.

Comprehensive antidiscrimination statutes present a clear example of the reluctance of courts
to recognize a supplementary tort for wrongful discipline in violation of public policy even where the
statute does not expressly preclude judicial recognition of additional remedies. Many state statutes,
as well as Title VII of the federal Civil Rights Act of 1964, prohibit discrimination by employers on
the basis of race, color, sex, religion, national origin, or other characteristics—articulating a public
policy of the highest order. These statutes often do not expressly preclude common-law or other
claims, and in some cases expressly disclaim such preclusion. Nevertheless, because the statutory
scheme is considered comprehensive in scope and the statutory remedies are considered adequate,
courts generally decline to recognize a common-law action for employer discipline in violation of
public policy when employer discipline occurs on a ground prohibited by antidiscrimination statutes.

The civil-service system of many states presents another example of statutes courts have
found to create a comprehensive regulatory scheme with adequate remedies, and thus preclude
common-law claims. Civil-service employees typically cannot recover in tort for employer discipline
in violation of public policy because the civil-service system provides a comprehensive
administrative process and an extensive set of remedies to protect against wrongful employer
discipline. Courts are reluctant to recognize a supplementary tort remedy for civil-service employees
that might undermine the balance between employee and employer interests underlying the established civil-service system.

In contrast, courts are more willing to recognize supplementary tort remedies in the case of statutes, such as the federal Occupational Safety and Health Act of 1970 (OSHA), that do not themselves provide for a private cause of action or otherwise give individual relief.

Illustrations:

3. Employee E is employed by state X and is covered by X’s civil-service system, which provides employees with elaborate procedures to challenge wrongful employer discipline and awards the remedy of reinstatement with back pay for violations. Promptly upon being summoned for jury duty, E notifies X that E will miss work to report for jury service. X discharges E for absenteeism while on jury duty. E may not pursue a common-law tort claim of employer discipline in violation of public policy under this Section because the civil-service system is a comprehensive regulation and provides E with an adequate alternative remedy.

4. Employer X discharges employee E for filing a complaint under the Occupational Safety and Health Act (OSHA) about unsafe working conditions at X. Under OSHA, E has no private right of action, the Secretary of Labor has sole discretion whether to bring suit to redress an OSHA violation, and E cannot appeal the Secretary’s decision not to bring suit. E may pursue a common-law tort claim of employer discipline in violation of public policy that is based on OSHA, because Congress did not provide for an exclusive federal remedy, did not establish a comprehensive regulation of all workplace safety laws, and did not provide a
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private civil remedy for individuals in E’s position.

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e. Statutes applying to some employees and not others. Courts are sometimes tasked with deciding whether to recognize a common-law claim where a comprehensive statutory scheme providing remedies for violations of public policy exists but provides only partial coverage. For example, sometimes a statute provides an adequate remedy for a defined set of employees (say, employees of large firms) but not for other employees (say, employees of firms hiring less than 15 people). Even in such cases, the same basic two-part inquiry addressed in Comments c and d applies: (1) Does the statute expressly preclude a common-law tort claim? If not, (2) does the statute impliedly preclude a tort claim, or is judicial recognition of a tort claim otherwise inappropriate in the circumstances?

In the initial inquiry, a court considers why the legislature chose to reach only large employers, and not the plaintiff’s small employer: Was it for the substantive purpose of shielding small business from the burdens of regulation or, perhaps, respecting the associational interests of small employers who often personally work alongside their employees (akin to the “Mrs. Murphy boardinghouse” exception in Title VIII of the Civil Rights Act of 1968 that excluded from coverage buildings with four apartments or fewer where the owner occupies one as a residence); or was it for the largely procedural purpose of relieving small employers, not from regulation as such, but from the special recordkeeping or other administrative burdens of the statute? If the former, the legislature likely intended to preclude common-law claims, because the exclusion of small employers reflects a substantive determination that this class of employers should not be subject to the policies of the statutory regime. If the latter, the legislature likely did not intend to preclude common-law claims
against small employers, because the common-law action does not involve the special statutory
recordkeeping or reporting requirements that concerned the legislature.

If the court determines that the legislature did not intend to preclude common-law claims, but
rather intended only to relieve small employers of the administrative burdens of the act, the court
then turns to the second inquiry: whether judicial recognition of a tort action for violation of a public
policy based on the statute is appropriate. Here, the adequacy of the statutory remedy is likely to be a
dominant factor. Almost by definition, the employee of the small employer does not have an
adequate remedy for the employer’s violation of the public policy enunciated by the statute. Also, if
sources for the public-policy claim exist outside of the statute, say, in the constitution or other laws,
this would supply an additional reason for recognizing the common-law wrongful-discipline claim.

The adequacy of the remedy should be considered at the time of the underlying events of the
dispute. For example, if the employer is covered by the statute, and the employee could have
obtained relief under the statute but failed to comply with the limitations period set out in the statute,
courts generally do not recognize a common-law wrongful-discipline claim so as not to encourage
noncompliance with statutory requirements.

Illustrations:

5. E1, an employee in a 12-person real-estate office, is discharged for accusing his
employer of violating a wage-hour statute. E2, an employee in a three-person real-estate
office in the same state in which the owner works alongside the employees, is discharged for
accusing his employer of violating the same law. The statute provides an adequate remedy,
but reaches only employers with 10 or more employees; it thus covers E1’s claim but not E2’s
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claim. E1 cannot bring a claim under this Section because the statute provides E1 with an adequate alternative remedy. E2 can bring a claim of employer discipline in violation of public policy under this Section, unless the court determines that the exclusion of small employers reflects a substantive legislative judgment to allow small, generally family-owned businesses to operate free of state regulation of the relationship between employer and employee.

6. Employer X discharges employee E for reporting the criminal conduct of a co-worker to the police. X’s actions violate the substantive standards of the state’s whistleblowing statute, which provides an adequate remedy but requires that any action be brought within 180 days of discharge. One year after X discharged E, E brings a common-law tort action against X for employer discipline in violation of public policy. E’s action should be dismissed by the court because E would have had an adequate alternative remedy but for E’s failure to meet the statute’s filing deadline.

f. Irrelevance of available contractual remedy. Contractual remedies do not affect the availability of the tort of employer discipline in violation of public policy, because the purpose of the tort is to protect and vindicate public policy rather than privately negotiated rights. The issue of whether a legislature has provided an alternative remedy to bar a common-law claim of employer discipline in violation of public policy, discussed in Comment d, is distinct from the issue of whether a private contract has provided an alternative remedy. With respect to the former issue, the legislature has presumably weighed the competing public-policy factors in crafting a procedural and remedial scheme. With respect to the latter issue, the procedural and remedial scheme is the product
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of private bargaining, rather than the product of deliberation by a public body that considers third-party and public interests. Issues concerning the role of private arbitration are discussed in Chapter 10 of the Restatement.

Illustrations:

7. Employer X and employee E have entered into an agreement whereby X can discharge E only for “good cause.” X discharges E for missing three weeks of work to perform jury duty (which violates a state jury service law that provides for fines but no personal recovery). Even though E has a breach-of-contract claim for being discharged without good cause, E is not precluded from pursuing a tort claim of employer discipline in violation of public policy.

8. Employer X and employee E have entered into an indefinite-term employment agreement giving X the right to discharge E “with or without cause.” X discharges E for missing three weeks of work to perform jury duty (which violates a state jury-service law that provides for fines but no personal recovery). Even though the discharge did not violate the employment agreement, E is not precluded from pursuing a tort claim of employer discipline in violation of public policy.

REPORTERS’ NOTES

Comment a. The vast majority of jurisdictions recognize some form of the tort of employer discipline in violation of public policy, usually in discharge cases. See Knight v. Am. Guard & Alert, 714 P.2d 788 (Alaska 1986) (recognizing wrongful-discharge claim of employee discharged for reporting that other employees were abusing alcohol and drugs on the job); Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025 (Ariz. 1985) (recognizing claim of employee discharged for refusing to
violate state indecent exposure statute); MBM Co. v. Counce, 596 S.W.2d 681 (Ark. 1980) (stating
that Arkansas would recognize employer-discipline claims if the employee was allegedly discharged
for exercising a statutory right, performing a duty required by law, or the discharge otherwise
violated a well-established public policy); Petermann v. Int'l Bhd. of Teamsters, 344 P.2d 25 (Cal.
 Ct. App. 1959) (recognizing claim of employee discharged for refusing to commit perjury); Winther
v. DEC Int'l Inc., 625 F. Supp. 100 (D. Colo. 1985) (applying Colorado law) (recognizing claim of
employee discharged for refusing to violate federal antitrust law); Sheets v. Teddy's Frosted Foods,
427 A.2d 385 (Conn. 1980) (recognizing claim of employee discharged for internally reporting
company violations of a state food-safety statute); Henze v. Alloy Surfaces, No. 91C-06-20, 1992
for refusing to set prices on government contracts in violation of federal regulations); Parnar v. Am.
Hotels, 652 P.2d 625 (Haw. 1982) (holding that employers are subject to liability in tort for employer
discipline if they discharge an employee in violation of a clear mandate of public policy); Jackson v.
Minidoka Irrigation Dist., 563 P.2d 54 (Idaho 1977) (holding that an employee may bring an
employer-discipline claim if the motivation for the discharge contravenes public policy); Kelsay v.
Motorola, 384 N.E.2d 353 (Ill. 1978) (affirming trial court award of compensatory damages where
employee was discharged for filing workers' compensation claim); Frampton v. Central Indiana Gas
Co., 297 N.E.2d 425 (Ind. 1973) (recognizing claim of employee discharged for filing workers'
compensation claim); Northrup v. Farmland Inds., Inc., 372 N.W.2d 193, 196 (Iowa 1985) (“[W]e
hinted in Abrisz that, under proper circumstances, we would recognize a common-law claim for a
discharge violating public policy . . . [and] observed . . . that ‘courts should not declare such conduct
violate of public policy unless it is clearly so.’”) (quoting Abrisz v. Pulley Freight Lines, Inc., 270
N.W.2d 454, 456 (Iowa 1978)); Murphy v. Topeka-Shawnee County Dep't of Labor Servs., 630 P.2d
186 (Kan. Ct. App. 1981) (recognizing claim of employee discharged for refusing to withdraw a
workers' compensation claim); Firestone Textile Co. v. Meadows, 666 S.W.2d 730 (Ky. 1983)
(affirming judgment in favor of employee where employee claimed he was discharged for seeking
(recognizing employer-discipline claims if the discharge of the employee “contravenes some clear
(applying Massachusetts law) (holding that employee could sustain an age-discrimination employer-
discipline suit, given that Massachusetts and federal law enunciated a clear public policy against age
(recognizing claim of employee discharged for filing a workers’ compensation claim); Phipps v.
Clark Oil & Ref. Co., 396 N.W.2d 588 (Minn. App. 1986), aff'd, 408 N.W.2d 569 (Minn. 1987)
(recognizing claim of employee discharged for refusing employer demands to commit an illegal act);
McArn v. Allied Bruce-Terminix Co., 626 So.2d 603 (Miss. 1993) (recognizing claim of employee
discharged for reporting illegal employer conduct); Boyle v. Vista Eyewear, 700 S.W.2d 859, 878
(Mo. Ct. App. 1985) (“[W]here an employer has discharged an at-will employee because that
employee refused to violate the law or any well established and clear mandate of public policy . . . or
because the employee reported . . . violations of the law . . . the employee has a cause of action in tort
. . . .”); Ambroz v. Cornhusker Square, 416 N.W.2d 510 (Neb. 1987) (recognizing tort claim of
employee discharged for refusing to take a polygraph examination, and where the state legislature
prohibited an employer from using a polygraph examination to deny employment); Hansen v.
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employee that was discharged for claiming workers' compensation benefits).  

A minority of states do not recognize the tort of employer discipline in violation of public policy in any form. See Reich v. Holiday Inn, 454 So. 2d 982 (Ala. 1984) (dismissing a claim of employer discipline in violation of public policy, where employee was discharged for refusing to commit tax fraud); DeMarco v. Publix Super Mkts., Inc., 384 So. 2d 1253 (Fla. 1980) (affirming dismissal of employer-discipline claim, where grocery-store employee was discharged for refusing to withdraw products-liability suit against employer arising from an exploding soda bottle that permanently injured employee's two-year-old child); Troy v. Interfinancial, Inc., 320 S.E.2d 872 (Ga. Ct. App. 1984) (affirming dismissal of employee's tort claim for discharge for refusing to commit perjury); Gil v. Metal Serv. Corp., 412 So. 2d 706 (La. Ct. App. 1982) (affirming dismissal of employee's tort claim for discharge for refusing to unlawfully misrepresent steel products to customers); Bard v. Bath Iron Works, 590 A.2d 152 (Me. 1991) (holding that Maine does not recognize common-law employer-discipline claims); Weider v. Skala, 609 N.E.2d 105 (N.Y. 1992) (reaffirming that New York does not recognize employer discipline in violation of public policy, while recognizing claim of breach of contract based on an implied-in-law obligation of good faith and fair dealing, where law firm discharged attorney for insisting that the firm comply with the code of professional ethics governing lawyers); Pacheo v. Raytheon Co., 623 A.2d 464 (R.I. 1993) (holding “unequivocally” that Rhode Island does not recognize tort of employer discipline); cf. Mont. Code Ann. §§39-2-901 to -915 (preempting common-law claims of employer discipline in violation of public policy while creating statutory action for dismissal without good cause).  

Most states that recognize a cause of action for employer discipline in violation of public policy allow full tort damages. A few states limit the remedies to contract damages, thus excluding emotional and punitive damages. See Knight v. Am. Guard & Alert, Inc., 714 P.2d 788 (Alaska 1986) (recognizing employer discipline as a breach of contract theory); Johnson v. Kreiser's, Inc., 433 N.W.2d 225 (S.D. 1988) (holding that employer discipline is a contract action predicated upon an implied provision that employers will not discharge employees for refusing to commit illegal acts); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834 (Wis. 1983) (arguing that employer discipline should be considered a contract theory because the primary concern is to make the wronged employee “whole,” rather than to protect third-party and public interests); see also Cantrell v. Morris, 849 N.E.2d 488 (Ind. 2006) (holding that because punitive damages are a common-law creation, the legislature can limit punitive damages freely, and thus ruling that if a common-law claim supplemented statutory remedies, the common-law claim would adopt the statutory limits on punitive damages).  

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FSB, 794 A.2d 763, 774-75 (N.H. 2002) (“We hold that properly alleging constructive discharge satisfies the termination component of a wrongful discharge claim [so long as] the employer's actions, which render working conditions so difficult and intolerable that a reasonable person would feel forced to resign, [are] motivated by bad faith, retaliation or malice.”); Sheets v. Knight, 779 P.2d 1000 (Or. 1989) (holding that employee who resigned could bring claim of employer discipline in violation of public policy); cf. Pa. State Police v. Suders, 542 U.S. 129, 142 (2004) (holding that under Title VII hostile-environment law, a plaintiff claiming constructive discharge must show “working conditions so intolerable that a reasonable person would have felt compelled to resign”); Krohn v. City of Seattle, No. 42244-8-I, 2000 Wash. App. LEXIS 320 (Wash. Ct. App. Feb. 22, 2000) (holding that employee was not constructively discharged because he did not quit after retaliatory discipline).

Only a few states have addressed whether or not to recognize claims of wrongful discipline in violation of public policy not amounting to discharge or constructive discharge. Such claims are likely to be infrequently litigated, because they involve an employee suing her current employer. Moreover, some states have not reached the issue because the particular statutes provided a cause of action for discipline short of discharge, thus obviating the need for a common-law claim. See, e.g., Maimone v. City of Atlantic City, 903 A.2d 1055, 1063 (N.J. 2006) (holding that the N.J. Conscientious Employee Protection Act provided cause of action for “other adverse employment action”); Johnson v. Trs. of Durham Technical Cmty. Coll., 535 S.E.2d 357, 361 (N.C. Ct. App. 2000) (holding that the N.C. Retaliatory Employment Discrimination Act defined actionable employer discipline as including “other adverse employment action”).


Employment-discrimination statutes protect employees from many discriminatory acts in addition to discharge, and many employment statutes prohibit employers from retaliating—whether by discharge or other means—against employees seeking protection under the statute. In Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53 (2006), the Supreme Court determined how severe the employer’s action must be to be actionable under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964. Recognizing the need to “separate significant from trivial harms,” id. at 53, and noting that the “decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience,” id. at 68, the Court held that an employer’s action must be “materially adverse,” meaning that “it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Id. (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). See also Montgomery County v. Park, 246 S.W.3d 610, 612 (Tex. 2007) (holding that “for a personnel action to be adverse within the meaning of the [Texas Whistleblower] Act, it must be material, and thus likely to deter a reasonable, similarly situated employee from reporting a violation of the law.”).


Illustration 2 is based on Munday v. Waste Mgmt. of N. Am., 126 F.3d 239 (4th Cir. 1997).

Comment c. If a legislature expressly provides states that statutory remedies are exclusive, judicial recognition of a public-policy tort is precluded, and an employee may not bring a claim of employer discipline in violation of a public policy based on that statute. A classic example of express preclusion is section 514(a) of ERISA, 29 U.S.C. § 1144(a), which broadly declares that “the provisions of this subchapter . . . shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . ”. In Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990), the Supreme Court held that ERISA precluded judicial recognition of state-law claims of employer discipline in violation of public policy when an employee alleged his employer discharged him so that his pension would not vest. See also Andrews v. Alaska Operating Engineers-Employers Training Trust Fund, 871 P.2d 1142 (Alaska 1994) (holding that ERISA precludes judicial recognition of claim for employer discipline in violation of public policy when an employee was allegedly discharged to prevent him from reporting trustee’s misuse of trust funds). Another example of express preclusion comes from Montana’s Wrongful Discharge from Employment Act of 1987, Mont. Code Ann. §§39-2-901 to -915, which precludes common-law claims of employer discipline.
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in violation of public policy while creating a statutory action for dismissal without good cause. See also Stehney v. Perry, 101 F.3d 925 (3d Cir. 1996) (holding that federal Employee Polygraph Protection Act’s express prohibition of state regulation of polygraph use by the National Security Administration precluded a claim of employer discipline in violation of public policy based on New Jersey’s anti-polygraph statute); Johnson v. Baxter Healthcare Corp., 907 F. Supp. 271 (N.D. Ill. 1995) (applying Illinois law) (holding that by its terms, the Illinois Human Rights Act is the exclusive remedy for discrimination claims, thus precluding a common law cause of action for employer discipline in violation of the public policy against race discrimination).

Comment d. If the statute does not expressly preclude a common-law wrongful-discharge claim, the court must inquire whether it is appropriate to recognize a tort remedy in light of the statute.

Often courts frame this inquiry as searching for the implied intent of the legislature. Courts generally find statutory remedies exclusive and decline to create common-law claims where a statutory scheme creates a right not previously recognized in common law. See Brewer v. Premier Golf Props., 86 Cal. Rptr.3d 225 (Cal. Ct. App. 2008) (holding under California’s so-called “new right-exclusive remedy” doctrine that a remedy provided by a statute that creates new rights not previously existing in the common law is deemed to preclude common-law public policy tort claims, unless inadequate); Bricker v. Ausable Valley Cmty. Mental Health Servs., No. 06-003116-CK, 2009 WL 211883, at *4 (Mich. Ct. App. Jan. 29, 2009) (holding that where no common-law remedy existed, the remedy provided by the statute was the sole remedy (citing Pompey v. General Motors Corp., 385 Mich. 537, 552 (1971)); West v. Roadway Express, Inc., No. 10263, 1982 WL 4875, at *9 (Ohio Ct. App. Apr. 21 1982) (recognizing that the statutory remedy for workplace sexual harassment is likely not exclusive, but refusing to recognize a new common-law remedy when the statutory remedy is adequate). If, however, the statute creates a cause of action that has a preexisting common-law analogue, many states find common-law remedies are presumptively available unless contrary legislative intent appears. See Hentzel v. Singer Co., 188 Cal. Rptr. 159 (Cal. Ct. App. 1982) (holding that where a statutory remedy is created for the enforcement of the extant common-law claim against retaliatory dismissal, the statutory remedy is considered only cumulative, not exclusive); Jancey v. School Comm. of Everett, 421 Mass. 482, 501 (1995) (noting that despite the historical connection a statute prohibiting discrimination may have with common-law tort claims, “acts of discrimination—whether intentional or unintentional—do not thereby become torts….”).

Some states will find a legislative intent to preclude common-law claims where the statutory scheme is comprehensive in scope and the remedy adequately addresses the public interest implicated by the statute. See Brown v. Transcon Lines, 284 Or. 597 (1978) (suggesting that the creation of an adequate statutory remedy demonstrates, by implication, the legislative intent to preclude common-law remedies); Ourfalin v. Aro Mfg. Co., 577 N.E.2d 6, 8 (Mass. App. Ct. 1991) (refusing to create a common-law remedy based on a public policy created by a comprehensive legislative scheme); cf. Rojo v. Kliger, 801 P.2d 373 (Cal. 1990) (rejecting defendant’s argument that the California Fair Employment and Housing Act is such a general and comprehensive legislation as to imply legislative intent to preclude common-law claims); Brooke v. Rest. Servs.,
Inc., 906 P.2d 66 (Colo. 1995) (holding that the Colorado Antidiscrimination Act does not provide the exclusive remedy for sex discrimination in workplace claims because it neither expressly precludes those claims nor provide a comprehensive scheme that would indicate legislative intent to preclude common-law claims).

Often, though, courts are reluctant to hold that a federal statute protecting workers impliedly preempts state common-law actions. See Parten v. Consol. Freightways Corp., 923 F.2d 580 (8th Cir. 1991) (applying Minnesota law) (rejecting argument that federal Surface Transportation Assistance Act of 1983, which includes antiretaliations provisions, preempts wrongful-discipline action of employee who refused to violate state and federal statutes regulating truck safety); Schweiss v. Chrysler Motors Corp., 922 F.2d 473 (8th Cir. 1990) (applying Missouri law) (rejecting argument that OSHA’s remedial scheme preempted state-law wrongful-discipline claim of employee dismissed for complaining about unsafe working conditions). See generally English v. General Elec. Co., 496 U.S. 72, 80 (1990). In English, holding that the anti-retaliation provisions of the Energy Reorganization Act of 1974 did not preempt a state-law intentional-infliction-of-emotional-distress claim by an employee discharged for reporting violations of nuclear-safety standards, the Court declared that “[o]rdinarily, the mere existence of a federal regulatory or enforcement scheme, even one as detailed as § 210, does not by itself imply pre-emption of state remedies.” Id. at 87. See also Tate v. Browning-Ferris, Inc., 833 P.2d 1218 (Okla. 1992) (holding that the Oklahoma antidiscrimination statute is not exclusive, reasoning that “[w]here the common law gives a remedy, and another is provided by statute, the latter is merely cumulative, unless the statute declares it to be exclusive.”); cf. Abraham v. County of Hennepin, 639 N.W.2d 342 (Minn. 2002) (finding no legislative intent to exclude common-law remedies where the legislature removed language in the statute expressly providing for other remedies but did not include an exclusivity provision).

Rather than phrase the inquiry as whether the legislature impliedly intended to preclude common-law claims, some courts take the sometimes more straightforward route of asking whether the common law should recognize a tort claim given the statutory remedies and scheme. The clear trend among courts is to declare that an employee has no common-law wrongful-discipline claim if the employee has adequate statutory remedies. See McHugh v. Bd. of Educ., 100 F. Supp. 2d 231 (D. Del. 2000) (applying Delaware law) (refusing to recognize a common-law wrongful-discharge action because remedy existed under state whistleblower law); Ellison v. Nw. Airlines, Inc., 938 F. Supp. 1503 (D. Haw. 1996) (applying Hawaii law) (holding that employee could not assert a claim of employer discipline in violation of public policy for exercising his right to medical leave for an occupational injury because state statute provided sufficient remedy for violation of policy); Ross v. Stouffer Hotel Co., 879 P.2d 1037, 1047 (Haw. 1994) (finding it “both unnecessary and unwise” to recognize a common-law wrongful-discharge claim for a person terminated because he was married to a co-worker “where the policy sought to be vindicated is already embodied in a statute providing its own remedy for its violation,” even though the statute offered merely equitable relief and provided that nothing in the act shall be deemed to “repeal or affect any law, ordinance, or government rule having the force and effect of law….” [Haw. Rev. Stat. § 378-3 (2008)]); Gaskins v. Marshall Craft Assoc., Inc., 678 A.2d 615 (Md. Ct. Spec. App. 1996) (recognizing that FLSA and title VII did not preempt state statutory equal-pay claims, but holding that common-law claim was
properly dismissed because of availability of civil statutory remedies); Kelley Prop. Dev., Inc. v. Town of Lebanon, 627 A.2d 909 (Conn. 1993) (holding that courts should not construe the Connecticut Constitution to provide a basis for private claims for which the legislature has provided a reasonably adequate statutory remedy).

Courts look at a variety of factors in determining whether a statutory remedy is adequate:

We are influenced by differences in process, differences in claimant control, and differences in damages available. It may be that additional factors will also be influential in a future case. Here, all of these differences are enough to dictate that [for the Railway Labor Act, the adequate statutory remedy] question be answered: “No.”

Hysten v. Burlington N. Santa Fe Ry. Co., 108 P.3d 437, 445 (Kan. 2004). Perhaps the most important factor is whether the statutory remedy provides the injured employee a private cause of action. See Flenker v. Willamette Indus., Inc., 967 P.2d 295 (Kan. 1998) (holding that OSHA, which does not include a private right of action, does not preclude judicial recognition of a state claim of employer discipline in violation of public policy); Grubba v. Bay State Abrasives, Div. of Dresser Indus., Inc., 803 F.2d 746 (1st Cir. 1986) (applying Massachusetts law) (expressing doubt in district court determination that federal Rehabilitation Act of 1973 provided plaintiff an adequate remedy for handicap discrimination, because that act provided for enforcement by labor department rather than a private cause of action, but ultimately agreeing with district court that plaintiff's claim was barred because Massachusetts law provided the plaintiff with an adequate private remedy); Deneau v. Manor Care, Inc., 219 F. Supp. 2d 855 (E.D. Mich. 2002) (applying Michigan law) (noting that common-law wrongful-discharge claim would be barred if plaintiff had private cause of action under state Whistleblower Protection Act, but that if plaintiff had no private cause of action, a common-law claim would then be recognized); Fleshner v. Pepose Vision Institute, No. ED90853 (Mo. Ct. App. Jan. 20, 2009) (holding that employee fired for cooperating with investigation into employer’s violations of the federal Fair Labor Standards Act can maintain action for wrongful discharge in violation of public policy because the statutory remedy does not “comprehend and envelop the common law” because it does not allow punitive damages and the corresponding common law action does allow punitive damages).

Wrongful-discipline claims in the civil-service context are often barred by statutory remedies deemed to be comprehensive procedural and substantive provisions. See Walt v. Alaska, 751 P.2d 1345 (Alaska 1988) (holding that the availability of civil-service administrative procedures precluded an implied or independent cause of action based on wrongful discipline in violation of public policy); Guertin v. Pinal County, 875 P.2d 843 (Ariz. Ct. App. 1994) (holding that the civil-service grievance system was the exclusive remedy for an employee discharged in violation of public policy); Connelly v. Kansas, 26 P.3d 1246 (Kan. 2001) (denying wrongful-discipline claim based on Kansas civil-service statute because the statute provides administrative remedies that can be appealed in court); Provens v. Stark Cty. Bd. Of Mental Retardation & Developmental Disabilities, 594
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N.E.2d 959 (Ohio 1992) (holding that public employees have no common-law claim for alleged violations of policies embedded in the Ohio Constitution when adequate statutory remedies are available); cf. Bush v. Lucas, 462 U.S. 367 (1983) (holding that it is inappropriate to supplement the civil service system with a common-law tort claim, where a government employee was demoted for exercising free-speech rights, even though the back pay and reinstatement remedies were not as effective as an individual damages remedy).

Comprehensive antidiscrimination statutes are another common example of courts declining to recognize common-law actions because of adequate statutory remedies (which are often only equitable, such as reinstatement with back pay), even though such legislation does not expressly or impliedly provide for an exclusive remedy, and may even expressly declare the statutory action is not exclusive. See Gamble v. Levitz Furniture Co., 759 P.2d 761, 766 (Colo. App. 1988) (rejecting applicability of public-policy exception to the at-will rule in disability discrimination claim when the state “statute in question provides the employee with a wrongful discharge remedy.”); Lui v. Intercontinental Hotels Corp., 634 F. Supp. 684 (D. Haw. 1986) (applying Hawaii law) (noting that state and federal statutory remedies for sex discrimination were not exclusive, but holding that public-policy exception did not apply if the statute creating that policy also provided a remedy); Makovi v. Sherwin-Williams Co., 561 A.2d 179 (Md. 1989) (holding that tort of abusive discharge is not available where the civil remedy consists of reinstatement and back pay, and thus dismissing claim of woman allegedly discharged because of her pregnancy); Rosamond v. Pennaco Hosiery, Inc., 942 F. Supp. 279, 287 n.5 (N.D. Miss. 1996) (applying Mississippi law) (holding that tort of abusive discharge is not available where the civil remedy consists of reinstatement and back pay, and thus dismissing claim of woman allegedly discharged because of her pregnancy); Lawrence v. Nat'l Westminster Bank, 98 F.3d 61, 73 (3d Cir. 1996) (applying New Jersey law) (“Because the sources of public policy [plaintiff] relies on are coterminous with his [state and federal] statutory [age and handicap] claims, he cannot advance a separate common law public policy claim,” even though the language of the relevant statute provided that the Legislature intends that [common-law] damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.” [N.J. Stat. Ann. § 10:5-3 (2009)]); Salazar v. Furr's, Inc., 629 F. Supp. 1403, 1408 (D.N.M. 1986) (applying New Mexico law) (reasoning that if the plaintiff has state and federal remedies to redress a wrongful discharge, the state no longer needs to recognize a wrongful-discharge tort to soften the at-will doctrine); Clinton v. State ex rel. Logan County Election Bd., 29 P.3d 543 (Okla. 2001) (holding that employee discharged for her pregnancy has no common-law wrongful-discharge claim even though Oklahoma has a clear policy against pregnancy discrimination, because employee has adequate federal statutory remedy under title VII); Krushinski v. Roadway Express, Inc., 627 F. Supp. 934, 937 (M.D. Pa. 1985) (applying Pennsylvania law) (holding that although a discharge based upon the employee’s religious beliefs would violate public policy, a common-law remedy
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would be inappropriate if a statutory remedy is available to vindicate the protected interest); Allen v. Safeway Stores, Inc., 699 P.2d 277, 284 (Wyo. 1985) (rejecting claim of wrongful discharge in violation of the public policies against sex discrimination and favoring marriage when the discharge violated the state fair employment practices act, reasoning that “[i]f there exists another remedy for violation of the social policy which resulted in the [wrongful] discharge of the employee, there is no need for a court-imposed separate tort action premised on public policy.”); Kruchowski v. Weyerhaeuser Co., No. 104872, 2008 WL 5238495, at *7 (Okla. Dec. 16, 2008) (recognizing common-law claims only where the plaintiff can show that a breach of public policy occurred for which no statutorily-crafted remedy exists or the available statutory remedy is incommensurate with the common-law remedy for similar work-related discrimination); Felts v. Ford Motor Co., 916 S.W.2d 798 (Mo. Ct. App. 1995) (holding that if an act provides remedies for employment discrimination, a court is without jurisdiction to hear such a claim because the act replaces traditional civil tort liability); Wehling v. Bayex, Inc., 248 A.D.2d (N.Y. App. Div. 1998) (finding that the alleged employment discrimination falls under the Workers’ Compensation Law, and is therefore barred); Sutherland v. Norfolk Southern Ry. Co., 826 N.E.2d 1021 (Ill. App. Ct. 2005) (declining to recognize a common-law claim on the grounds that a statutory remedy for the alleged retaliatory discharge was available); Dallas County v. Gonzales, 183 S.W.3d 94 (Tex. App. 2006) (holding that the statutory remedy provided for in the Workers’ Compensation Act was the exclusive remedy for discrimination, despite the act’s silence on the preclusion of common-law claims); Barlowe v. AAAA Intern. Driving School, Inc., No. 19794, 2003 WL 22429543, at *8 (Ohio Ct. App. Oct. 24, 2003) (refusing to allow a common-law claim where the plaintiff had a statutory alternative that adequately protected public policy interests); cf. Messer v. Huntington Anesthesia Group, Inc., 218 W.Va. 4 (2005) (finding inadequate a statutory scheme whereby workers who are discriminated against because of work-related injuries would not receive as those disabled by non-work-related injuries); Rood v. Canteen Corp., No. CV950058263S, 1996 WL 548174, at *3 (Conn. Super. Ct. Sept. 19, 1996) (finding inadequate a statutory scheme in which an employee could recover damages for certain practices of employment discrimination, but not sexual discrimination).

Not all states, however, bar claims of employer discipline in violation of public policy when the legislature has provided an adequate alternative remedy. See City of Moorpark v. Super. Ct., 959 P.2d 752 (Cal. 1998) (holding that employee discharged for knee disability caused by workplace injury could bring common-law wrongful-discharge claim despite statutory protections from workers’ compensation law and state’s Fair Employment and Housing Act); Nelson v. United Techs., 88 Cal. Rptr. 2d 239 (Cal. Ct. App. 1999) (upholding a wrongful-discharge claim based on public policy embodied in California family and medical leave statute notwithstanding statutory remedies); Gandy v. Wal-Mart Stores, Inc., 872 P.2d 859 (N.M. 1994) (upholding a wrongful-discharge claim based on public policy embodied in New Mexico’s civil rights law despite the existence of statutory remedies); Amos v. Oakdale Knitting Co., 416 S.E.2d 166 (N.C. 1992) (allowing claim of wrongful discharge in violation of public policy when employee was discharged for refusing to work for less than minimum wage, notwithstanding remedies available under federal and state wage and hour laws); Tate v. Browning-Ferris, Inc., 833 P.2d 1218 (Okla. 1992) (holding that state statutory anti-discrimination remedies do not bar common-law tort claim for employment discrimination); Cantley v. DSMF, Inc., 422 F. Supp. 2d 1214 (D. Or. 2006) (applying Oregon law).
(allowing wrongful-discharge tort claim brought by worker discharged for complaining about workplace safety, because state occupational safety statute allowed only equitable remedies).

A number of state courts have addressed the question of whether a worker complaining about inadequate workplace safety can bring a common-law wrongful-discipline claim or is relegated to the processes of OSHA. Usually, workers may bring a common-law claim. See, e.g., Flenker v. Willamette Indus., Inc., 967 P.2d 295 (Kan. 1998) (holding that OSHA’s remedies, which do not include a private right of action, do not preclude a state claim of wrongful discharge in violation of public policy); Kulch v. Structural Fibers, Inc., 677 N.E.2d 308 (Ohio 1997) (declaring that employee fired for filing OSHA complaint can maintain common-law tort action for wrongful discipline in violation of public policy), Sorge v. Wright's Knitwear Corp., 832 F. Supp. 118 (E.D. Pa. 1993) (applying Pennsylvania law) (same). But see Burnham v. Karl & Gelb, P.C., 745 A.2d 178 (Conn. 2000) (holding that OSHA’s remedial scheme obviates need for wrongful-discipline action for employee complaining of safety violations); Walsh v. Consol. Freightways, Inc., 563 P.2d 1205 (Or. 1977) (holding that employee has no tort action for wrongful discharge when fired for reporting safety violations when he knew he could file a complaint with the Department of Labor).


Illustration 4 is based on Flenker v. Willamette Indus., Inc., 967 P.2d 295 (Kan. 1998).

Comment e. States are split on whether statutes that cover only large employers preclude tort claims brought against small employers excluded from the statute. Some states allow the claim if the employer has violated a clearly mandated or defined public policy, reasoning that small employers would otherwise not be deterred from violating the public policy and that the legislature intended only to relieve small employers of the burden of required recordkeeping, not litigation. See Molesworth v. Brandon, 672 A.2d 608 (Md. 1996) (allowing wrongful-discipline claim for sex discrimination against employer with too few employees to be covered by state antidiscrimination statute, reasoning that small employers are excluded from the administrative process of the act but not the policy behind it); Collins v. Rizkana, 652 N.E.2d 653 (Ohio 1995) (upholding common-law wrongful-discharge claim, where employee was discharged after protesting sexual harassment, even though employer was too small to be covered by state anti-discrimination statute); Roberts v. Dudley, 993 P.2d 901 (Wash. 2000) (allowing wrongful-discipline claim for sex discrimination against employer with too few employees to be covered by state antidiscrimination statute, reasoning that small employers are excluded from the administrative process of the act but not the policy behind it); Williamson v. Greene, 490 S.E.2d 23 (W. Va. 1997) (same).

Other states, however, refuse to recognize a wrongful-discipline claim when the legislature exempts employers from the statute, deferring to the legislature’s intent not to burden small employers with liability. See Jennings v. Marralle, 876 P.2d 1074 (Cal. 1994) (holding that common-law wrongful-discipline claims against small employers were barred in age-discrimination cases, because the intent of the state antidiscrimination statute was to exclude small employers, and age discrimination does not implicate a “fundamental public policy”); Thibodeau v. Design Group One
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Architects, 802 A.2d 731 (Conn. 2002) (rejecting a wrongful-discharge claim by employee discharged for her pregnancy because the legislature, by excluding small employers from a state antidiscrimination statute, intended to relieve small employers of the demands of defending employment discrimination claims); Brown v. Ford, 905 P.2d 223, 227 (Okla. 1995) (barring sexual-harassment wrongful-discipline action against employer too small to be covered by state antidiscrimination statute, because “the legislature doubtless sought to avoid imposing upon small shops the potentially disastrous expense of defending against a state-law claim for workplace discrimination”) (emphasis in original); Chavez v. Sievers, 43 P.3d 1022 (Nev. 2002) (refusing to recognize an employee’s common-law claim of employment discrimination where the statute regulated employers with fifteen employees or more); Burton v. Exam Center Indus. & General Med., 994 P.2d 1261 (Utah 2000) (refusing to recognize an employee’s discrimination claim on the grounds that the Utah legislature intended to exclude small employers from the scope of the antidiscrimination statute).

If the action was filed beyond the limitations period of the underlying statute, the wrongful-discipline claim may be barred even if filed within the general statute of limitations for tort actions. See Campbell v. Town of Plymouth, 811 A.2d 243 (Conn. 2002) (holding that employee was unable to use state whistleblower protection act as source of public policy for wrongful-discipline claim where statute of limitations for statutory claim had lapsed); Masters v. Daniel Int'l Corp., 917 F.2d 455 (10th Cir. 1990) (applying Kansas law) (concluding that remedies in federal Energy Reorganization Act provided an adequate remedy that precluded judicial recognition of a common-law wrongful-discipline claim, even though the act had a 30-day statute of limitations that barred plaintiff's claim).


Illustration 6 is based on Campbell v. Town of Plymouth, 811 A.2d 342 (Conn. 2002).

Comment f. A good-cause employment relationship contractually modifies the at-will relationship by requiring the employer to have a good cause before discharging an employer. Similarly, a definite-term relationship contractually modifies the at-will relationship, preventing arbitrary discharge during the definite term. Despite these contractual protections against discharge, a good-cause or definite-term employee may bring an action under § 4.01 on the same terms as an at-will employee. Contractual modifications of the basic at-will presumption do not affect the availability of the tort of employer discipline in violation of public policy, because the purpose of the tort is to protect and vindicate public policy rather than privately negotiated rights. See Ewing v. Koppers Co., 537 A.2d 1173 (Md. 1988) (holding that availability of contractual remedies were irrelevant, and that common-law wrongful-discharge claims should be available equally to at-will and employees with contractual protections); see also Dunwoody v. Handskill Corp., 60 P.3d 1135 (Or. Ct. App. 2003) (holding that plaintiff’s contractual remedies were inadequate to vindicate the public interest, and thus recognizing plaintiff’s common-law wrongful-discharge claim, where
plaintiff was allegedly discharged for missing work to assist the State prosecution of her husband's murderers). Employer discipline in violation of public policy still harms third parties and the public, even if the employee is under a good-cause or definite-term contract with an alternative remedy. An alternate rule that bars wrongful-discipline claims by employees with contractual remedies may insufficiently deter employers from disciplining such employees who engage in protected activities, because by definition such discipline imposes costs that go beyond the particular employee extending to the public at large.

Many of the reported cases that address the relationship between breach-of-contract dismissal claims and tort claims of wrongful discharge in violation of public policy involve employees under a collective-bargaining contract. Section 301 of the Labor Management Relations Act provides a federal cause of action to enforce claims of breach of a collective-bargaining agreement. As with other statutes, a two-part inquiry is used to assess whether the employee can state a tort claim for employer discipline in violation of public policy. First, does § 301 expressly or impliedly preclude judicial recognition of the tort claim? And if not, does the statute provide adequate remedies that make judicial recognition of the tort claim unnecessary? The general test for § 301 preemption is whether resolution of the state-law tort claim requires interpretation of the collective-bargaining agreement. If so, the tort claim is preempted; if not, the tort claim is not preempted.

Section 301 preemption should be unlikely in this context. Few claims of employer discipline in violation of public policy require interpretation of the collective-bargaining agreement—precisely because the tort claim applies regardless of contractual terms. See Lingle v. Norge Div. of Magic Chef, 486 U.S. 399 (1988) (holding that § 301 did not preempt wrongful-discharge tort claim of employee discharged for filing a worker’s compensation claim, even though employee was covered by a collective-bargaining agreement providing her with a contractual remedy for discharge without just cause); Ewing v. Koppers Co., 537 A.2d 1173, 1175 (Md. 1988) (holding that “a cause of action for abusive discharge exists in favor of employees who serve under [a collective-bargaining] contract as well as those who serve at will” because “it would be illogical to deny the contract employee access to the courts equal to that afforded the at will employee,” but ultimately denying claim because arbitrator found just cause for the discharge).

Even when federal law allows claims of employer discipline in violation of public policy, some courts have interpreted the scope of the common-law action as not including employees protected by just-cause provisions of collective-bargaining agreements, on the theory that a tort action is unnecessary to protect these employees. See Laramee v. French & Bean Co., 830 F. Supp. 803, 806 (D. Vt. 1993) (holding that § 301 preempted wrongful-discharge tort claim of union worker discharged for writing a letter to the editor that was critical of management, even though employee was covered by a collective-bargaining agreement providing her with a contractual remedy for discharge without just cause); Cullen v. E.H. Friedrich Co., 910 F. Supp. 815 (D. Mass. 1995) (applying Massachusetts law) (holding that employee could not assert a claim for employer discipline in violation of public policy because he was an employee covered by a collective-bargaining agreement); Adecok v. Newtec, Inc., 939 S.W.2d 426 (Mo. Ct. App. 1996) (holding that an employee for a definite term could not bring a wrongful-discharge tort claim because
he was not an at-will employee); Silva v. Albuquerque Assembly & Distribution, 738 P.2d 513, 515 (N.M. 1987) (holding that a common-law action is “unnecessary and inapplicable” to protect complaints about unhealthy working conditions and fraudulent charging practices if an employment contract protects the employee’); Klepsky v. United Parcel Serv., Inc., 489 F.3d 264 (6th Cir. 2007) (applying Ohio law), enforcing Haynes v. Zoological Soc’y, 652 N.E.2d 948 (Ohio 1995) (holding that tort of employer discipline in violation of public policy is an exception to at-will doctrine and therefore available only to at-will employees and not those covered by a collective-bargaining contract).

The Restatement rejects the approach of these courts, however, because employees protected by a collective-bargaining agreement should not have less protection than at-will employees on an issue of public policy. The rule adopted by § 4.01 is that claims of employer discipline in violation of public policy can proceed notwithstanding alternative remedies available to the employee under a collective-bargaining agreement or other private contract. See Coleman v. Safeway Stores, 752 P.2d 645 (Kan. 1988) (holding that employee covered by just-cause provisions of collective-bargaining agreement could maintain tort action for wrongful discharge based on a violation of state public policy embodied in workers’ compensation laws); Midgett v. Sackett-Chicago, Inc., 473 N.E.2d 1280, 1283–84 (Ill. 1984) (holding that employee covered by just-cause provisions of a collective-bargaining agreement could maintain an action for filing a workers’ compensation claim); Davies v. Am. Airlines, Inc., 971 F.2d 463 (10th Cir. 1992) (applying Oklahoma law) (holding that Oklahoma recognizes claims for wrongful discharge in violation of public policy by union employees protected by just-cause contracts); Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) (applying Oklahoma law) (holding that employees discharged for filing workers’ compensation claims are not precluded from bringing a state tort claim despite remedies under a the collective bargaining agreement); Carnation Co. v. Borner, 610 S.W.2d 450 (Tex. 1980) (holding that employee’s wrongful discharge claim is not limited to collective-bargaining remedies of reinstatement with back pay); Smith v. Bates Technical Coll., 991 P.2d 1135 (Wash. 2000) (holding that tenured employees can state a claim for wrongful discharge in violation of public policy). Similar results obtain under the Railway Labor Act (RLA) which regulates collective bargaining in the railroad and airline industries. See, e.g., Hysten v. Burlington N. Santa Fe. Ry. Co., 108 P.3d 437, 443 (Kan. 2004); Saridakis v. United Airlines, 166 F.3d 1272 (9th Cir. 1999); Puchert v. Agsalud, 677 P.2d 449, 456 (Hawaii 1984).

Illustration 7 is based on Ewing v. Koppers Co., 537 A.2d 1173 (Md. 1988).

Illustration 8 is suggested by Ewing v. Koppers Co., 537 A.2d 1173 (Md. 1988).
§ 4.02 Employer Discipline in Violation of Public Policy: Protected Activities

An employer is subject to liability in tort under § 4.01 for disciplining an employee who acting in an reasonable manner

(a) refuses to commit an act that the employee reasonably and in good faith believes violates a law or established principle of a code of professional conduct or an occupational code protective of the public interest;

(b) performs a public duty or obligation that the employee reasonably and in good faith believes is imposed by law;

(c) files a charge or claims a benefit in good faith under the procedures of an employment statute or law (irrespective of whether the charge or claim is meritorious);

(d) refuses to waive a nonnegotiable or nonwaivable right or agree to a condition of employment whose enforcement would violate public policy;

(e) reports or inquires about employer conduct that the employee reasonably and in good faith believes violates a law or established principle of professional conduct or an occupational code protective of the public interest; or

(f) engages in other activity directly furthering a substantial public policy.

Comment:

a. Protected activities. The tort of employer discipline in violation of public policy is not available to challenge employer actions generally but only to challenge employer discipline against employees who are engaged or plan to engage in conduct directly furthering a substantial public policy. The categories listed in § 4.02 highlight the kinds of activities by employees that are likely to
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have a sufficiently close relationship to public policy to support a public-policy tort claim. The same
public-policy considerations can support claims involving anticipatory discipline or discipline
against an employee who is in a close personal or working relationship with the employee who
engages in protected activity. The threshold inquiry is whether the employer discipline punishes
employees because they (or their close associates) are engaged or plan to engage in the protected
activities described in this Section. The sources for ascertaining whether a substantial public policy is
implicated in a given case are described in § 4.03. This Section does not address whether employers
engage in tortious behavior if they discipline employees for certain off-duty conduct implicating the
right to privacy. Such privacy issues are covered in Chapter __ of this Restatement.

Illustrations:

1. Employer X instructs employee E to work overtime one evening. Such an overtime
assignment does not violate any applicable law. X discharges E for refusing to work
overtime. E has no claim against X under this Chapter.

2. Same facts as Illustration 1, except that an applicable law prohibits mandatory
overtime. X’s discharge constitutes discipline against E in violation of public policy; whether
the remedies of the overtime law preclude judicial recognition of a tort claim under this
Chapter is discussed in § 4.01, Comment d.

3. Same facts as Illustration 2, except that X fires E because E says he will not work
overtime next month. Same result as Illustration 2: employer discipline against an employee
planning to engage in a protected activity is in violation of public policy.

4. Employee E1 is the adult child of employee E2, both of whom work for employer
X. After E1 experiences a work-related injury, E1 reports the injury to X and files a workers' compensation claim. X discharges E1 and E2. X has retaliated against E1 both by discharging him for filing the claim, i.e., engaging in a protected activity under §4.02(c); and also by discharging E2, an employee with whom E1 had a close personal association. X also has retaliated against E2 by discharging E2 because of his close association with E1. Thus, both E1 and E2 may state a claim of employer discipline under this Chapter.

b. Comment on subsection (a). Employer discipline against an employee who refuses to commit an illegal act is a core violation of the public-policy tort. This is a compelling situation for recognition of the public-policy tort because the employee is being subjected to two conflicting duties: the duty to the employer to obey the employer’s instructions and the duty to the public not to commit illegal acts. The latter duty should prevail but, in the absence of tort law protection, the employee may choose otherwise. Common examples of judicial recognition of the tort of employer discipline include discharge of employees for refusing to commit perjury at the employer’s behest or for refusing to violate government health and safety regulations. As developed more fully in § 4.03, the sources of the public policies protected under subsection (a) include federal and state criminal laws, civil statutes, administrative regulations, the common law, and certain professional codes of ethics and occupational codes. It is not sufficient, however, for the complained-of action merely to violate the company’s own regulations or its contractual commitments to employees. Nor is it sufficient that the employee has professional objections to an employer’s directive unless those objections raise a question of unlawful conduct or a violation of established principles of professional conduct protective of the public interest. For further discussion of the sources of public
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policy, see § 4.03.

Illustrations:

5. Employer X requests employee E to lie under oath in a court proceeding. X discharges E for refusing to comply with the request. X has retaliated against E in violation of public policy.

6. Employee E works for employer X as a salesperson. E expresses concern that a product sold by X may be dangerous. A legitimate dispute exists within the company over whether the product actually poses danger to consumers, but E has no reasonable basis for believing the product violates any safety statute or regulation. X tells E to stop complaining about the product, and then discharges E for continuing to complain. E has no claim against X under this Chapter.

7. Employee E works as in-house counsel for employer X. E complains to E’s supervisor S about an associate lawyer’s misconduct, which included making several false and fraudulent material representations in a court filing. Reporting such misconduct is required by the code of professional ethics duly promulgated and applicable to lawyers like E. S instructs E not to report the misconduct, and terminates E’s employment for refusing to do so. X has retaliated against E in violation of public policy.

c. Comment on subsection (b). In this context, the conflict confronting the employee is a bit less sharp than in subsection (a), because the employer’s directive clashes with a public duty of cooperation which, if violated, may or may not itself be regarded as an illegal act. In other words, the
employee here does not face quite the same Hobson’s choice of whether to obey the employer or violate the law. Nevertheless, many public functions depend on the active cooperation of members of the public. A prominent example is the jury system, which depends on public readiness to serve. If employees become reluctant to perform, or misrepresent their availability for, jury service because of fear of discharge, the jury system would be undermined. To be protected under subsection (b), an employee must be retaliated against for performing a public legal obligation, not merely a personal, familial, or moral obligation.

Illustrations:

8. Employee E is called to serve jury duty. E's employer, X, discharges E for indicating to the public authorities that she is available for jury duty. X has retaliated against E for performing a public duty of cooperation with the jury system.

9. Employee E is repeatedly absent from work to care for E's child. E’s absences exceed allowances under both employer policies and family and medical leave laws. E’s employer, X, discharges E for excessive absenteeism. E has no claim against X under this Chapter.

10. Employee E witnesses a car accident on the way to work. E is late to work because the police require E to fill out a witness report. E’s employer, X, discharges E for being late. X has retaliated against E for performing a public duty of cooperation with police investigations.
d. Comment on subsection (c). The rationale for recognizing the protected activities in subsection (c) differs somewhat from the rationale for recognizing the protected activities in subsections (a) and (b). For subsections (a) and (b), a cause of action for wrongful employer discipline serves to prevent employers from undermining public policy by requiring their employees to commit illegal acts or not comply with their legal (and certain civil) obligations. In essence, employees are protected from employer discipline to prevent both employees and employers from ignoring the costs that their behavior imposes on third parties and the public. In contrast, the rationale behind subsection (c) is to protect the public interest embodied in the employment laws by blunting the ability of employers to use economic pressure to undermine the willingness of employees to claim employment benefits or rights to which they are entitled.

Some employment laws directly regulate employer retaliation for claiming benefits or asserting rights. If the employment law in question specifically addresses employer retaliation, the legislature may have intended the statutory remedy to be exclusive or that remedy is considered to adequately address the public policy expressed in the statute, thus rendering inappropriate judicial recognition of a tort claim. In other cases, the employment law may be silent on employer retaliation or may provide a criminal penalty only, and judicial recognition of a tort claim may be appropriate. These matters are discussed further in § 4.01, Comment d.

Public policy favors the filing of charges, claiming of benefits, or other participation in the formal administrative and judicial processes of the employment laws. Accordingly, employees are protected whether or not the charge filed or benefit claimed has merit or even a reasonable basis, so long as the employee invoked the procedures of the law in question in good faith.
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Illustrations:

11. After employee E experiences a work-related injury, E reports the injury to employer X and files a state workers’ compensation claim. X discharges E for filing the claim. X has retaliated against E for filing in good faith a benefit under an employment statute; E’s filing is protected under this subsection.

12. Same facts as Illustration 11, except that E has not yet filed the claim, and X discharges E in anticipation that E will file the claim. As discussed in § 4.02, Comment a, X has anticipatorily retaliated against E in violation of public policy, and thus E is protected under this subsection.

13. Employee E files a workers’ compensation claim based on an injury that E knows does not exist. After a private investigator hired by employer X informs X that E has fraudulently filed the workers’ compensation claim, X discharges E. E did not claim a benefit under the workers’ compensation law in good faith, and thus E has no claim against X under this subsection.

e. Comment on subsection (d). Employment statutes or other laws as a matter of public policy grant employees certain nonnegotiable or nonwaivable rights or forbid the imposition on employees of certain conditions of employment, such that a contractual clause purporting to modify or override the right or impose the condition would be unenforceable in court as against public policy. An employer that disciplines an employee for refusing to modify or override such a right or for refusing to agree to such a condition is subject to liability under § 4.01. On the other hand, employment statutes or other laws also create other rights or conditions that are subject to being modified or
overridden in the sense that employers may insist on employee agreement to the employer’s position as a condition of obtaining or retaining employment. If the right or condition is negotiable or waivable in this sense and the resulting contract clause would be enforceable in court as consistent with public policy, the employer does not commit a tort under this subsection in insisting as a condition of employment on such enforceable contract clauses. Because such employer insistence on its position with respect to such negotiable or waivable rights or conditions is permitted, employees have a claim under subsection (d) only if they refuse to agree to the modification or overriding of a right that is in fact nonnegotiable or nonwaivable or to agree to a condition whose enforcement would violate public policy. The constitutional or statutory provision that provides the right need not expressly provide that the right is nonnegotiable or nonwaivable; its nonnegotiability or nonwaivability is a question of interpretation of the applicable statute or law for the courts.

Illustrations:

14. Employer X requires employee E to sign a contract that would exculpate X from all liability relating to E’s employment. Such an exculpation clause violates the law of the state in which X operates. Because E refuses to sign the contract, X discharges E. E’s refusal is protected under this subsection.

15. A state statute forbids employers from requiring a polygraph test as a condition of employment or continuing employment. Employer X requires Employee E to submit to a polygraph test in violation of the statute, and discharges E when E refuses to submit to the test. E’s refusal is protected under this subsection.
16. Employer X discharges employee E for refusing to sign a noncompete clause that is enforceable in the state in which it operates. E was not asked to waive a non-waivable right or agree to an unenforceable condition, and thus E has no claim against X under this Chapter.

17. Same facts as Illustration 16, except that the noncompete clause is unenforceable in this jurisdiction. E’s refusal to sign is a protected activity under this subsection.

f. Comment on subsection (e). An employee who reports illegal activity of an employer—commonly called a “whistleblower”—is generally protected from employer discipline by statute and in some jurisdictions by decisional law. Many states have enacted whistleblower statutes that parallel or supplement, and in some cases preempt, common-law protections. Against this background, an employer that disciplines an employee for reporting, in a reasonable manner, employer conduct that the employee reasonably and in good faith believes to be illegal commits a tort of employer discipline in violation of public policy.

An employee must act reasonably in reporting illegal conduct. Often, the employee should first report concerns to appropriate persons in the employer’s system for reporting claims (“internal whistleblowing”) before communicating them to government authorities (“external whistleblowing”). This requirement furthers the employer’s legitimate interest in having an opportunity to remedy the conduct or ameliorate its harm, as well as the public interest in minimizing harm.

The key issues regarding the employee’s conduct are: (1) Did the employee act in good faith in reporting the matter? That is, did the employee believe that the employer’s conduct was illegal? (2) Was the employee reasonable in believing the conduct was illegal? (3) Did the employee make
the report in a reasonable manner? If the belief and manner of reporting are reasonable, and the employee acted in good faith, then the employee has engaged in activity protected under this subsection. But if the employee reports conduct that the employee believes is merely inappropriate, rather than illegal, or the employee believes the conduct is illegal but that belief is either unreasonable or not held in good faith, then the employee is not protected by this tort. On what constitutes reasonable belief on the employee’s part, see § 4.01, Comment f.

Sometimes, however, an external whistleblower acts reasonably by reporting suspected illegal conduct to appropriate government authorities before or instead of reporting it internally. Whether an employee acts reasonably in doing so depends on a number of factors, including whether an immediate external report was required by law, whether the employer was likely to destroy or tamper with evidence, whether the illegal conduct had previously been reported internally to no avail, whether the illegal conduct was widely known internally, whether the wrongdoer occupied a position high up in the chain of command, and whether the whistleblower feared reprisals if he or she proceeded through internal channels. An external report must also be made in a reasonable manner.

**Illustrations:**

18. Employee E delivers meals to customers’ homes for employer X. E complains to her supervisor that the company is violating public health laws by leaving the meals unrefrigerated on hot summer days for long periods of time. X discharges E for reporting this information to E's supervisor. X has retaliated against E in violation of public policy, even though E did not report the violation to external authorities.
19. Employee E is a police officer employed by X, a municipal police department. X discharges E for truthfully testifying in court that an illegal arrest was made by another officer working for X. X has discharged E in violation of public policy.

20. Employee E believes that employer X is making exorbitant profits by charging too much for its product, but E has no reasonable belief that the high price violates any law. X discharges E for complaining to E’s supervisor about X's pricing policy. E has no claim against X under this subsection.

21. Employee E learns that employer X’s product does not comply with federal product-safety regulations. E reports this information to E’s supervisor. The next day, before waiting for the supervisor’s response, E reports the information to the federal agency that monitors product safety. E’s report was not required by any federal law or rules of the agency. X has no history of destroying or tampering with evidence or being deceptive with the federal agency. X discharges E for reporting the information to the federal agency without giving the supervisor an opportunity to timely respond. E did not report reasonably, and thus has no claim against X under this subsection.

22. Employee E works for nuclear power plant X. E has reported nuclear-safety violations to X numerous times to no avail, and the safety violations are widely known within X. X discharges E because E's spouse reports the safety violations to the federal agency charged with regulating nuclear-plant safety. An external report was reasonable in light of X's previous conduct. E's spouse engaged in protected activity in making the report, and X has retaliated against E in violation of public policy, as discussed in § 4.02, Comment a.
g. Employee’s reasonable, good-faith belief in the illegality of employer’s actions. In some situations, this section protects employee conduct even if the employee is mistaken about the law. As long as the employee reasonably and in good faith believes that the requested act is illegal or the reported conduct is illegal, the employer cannot discipline the mistaken employee. Requiring employees to be correct in their assessment of illegality would unduly chill them from acting in the public interest, because employees typically are not legally trained and do not always have access to all of the relevant facts. Extending protection to reasonable, good-faith although erroneous employee belief of illegality furthers the tort law’s purpose of encouraging employees to refuse to commit unlawful acts and to report their employer’s illegal conduct.

Illustrations:

23. Employee E is a shipping clerk for employer X. X instructs E to mislabel a firearm as a fishing rod and ship it by private delivery to another town in the state. E telephones the state firearms agency to inquire, without identifying X, whether such mislabeling is illegal. X learns of the phone call and X discharges E for contacting the agency. X's instruction was sufficiently suspicious, suggesting possible illegality, that E's inquiry was reasonable and in good faith. E’s inquiry is protected activity under this subsection whether or not X’s instruction was in fact illegal.

24. Employer X manufactures airplane parts. A Federal Aviation Administration (FAA) regulation establishes inspection requirements for aircraft manufacturers but is silent on the obligations of aircraft-parts manufacturers like X. X discharges employee E for complaining internally that X is shipping parts that E reasonably and in good faith believes is
in violation of FAA inspection requirements. E’s complaint is protected under this Section whether or not the FAA regulations actually apply to X.

h. Comment on subsection (f). While most successful claims of employer discipline in violation of public policy should fit into subsections (a)-(e), the list of protected activities in those five subsections is not exhaustive. Some employer discipline does not easily fit into subsections (a)-(e) and yet substantially harms third parties and the public generally and may therefore be actionable.

Illustration:

25. Employee E drives an armored truck with up to $50,000 in cash for money-delivery company X. X has a company rule that if any driver leaves the company truck unattended during a delivery, that driver will be discharged immediately. During a delivery, E leaves the truck to rescue a hostage during a bank robbery. X discharges E for leaving the truck. Even though E has violated a generally reasonable internal company policy, the policy is not being reasonably applied to E, because E’s conduct makes a significant contribution to the larger public interest. Notwithstanding that E is not protected under subsections (a)-(d), X has retaliated against E in violation of public policy.

REPORTERS’ NOTES

Comment a. Illustration 4 is loosely based on Rothrock v. Rothrock Motor Sales, Inc., 883 A.2d 511 (Pa. 2005). In Rothrock, an employer fired an employee in retaliation for filing a workers’ compensation claim and then fired the employee’s supervisor, who was also the employee’s father. The court recognized a father-supervisor’s claim for wrongful discharge in violation of public policy where he was fired for refusing to dissuade is son from filing a workers’ compensation claim. The court noted that although the close personal relationship between the two “makes the case more
compelling, it does not limit its holding. The precedent established herein is obviously applicable whenever an employer seeks to compel a supervisory employee to thwart a subordinate employee's unquestioned right to WC benefits.” Id. at 515 n.9.

**Comment b.** Most jurisdictions agree that discharging an employee for refusing to commit an illegal act violates the public-policy tort. See, e.g., Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985) (recognizing tort claim of employee discharged for refusing to engage in conduct that might violate the indecent-exposure criminal statute); Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984) (applying Arkansas law) (treating discharged employee’s refusing supervisor’s sexual demands as refusing to engage in illegal act of prostitution); Hobson v. Mclean Hosp. Corp., 522 N.E.2d 975 (Mass. 1988) (recognizing tort claim where head nurse discharged for requiring strict compliance with state law mandating nurse supervision of patients engaged in certain activities); Phipps v. Clark Oil & Refining Corp., 408 N.W.2d 569 (Minn. 1987) (recognizing tort claim where employee discharged for refusing to pump leaded gas into a car built for unleaded gas, which would have violated the federal Clean Air Act); Kalman v. Grand Union Co., 443 A.2d 728 (N.J. Super. Ct. App. Div. 1982) (recognizing tort claim where pharmacist discharged for refusing to close pharmacy when state law required it to be open); O’Sullivan v. Mallon, 390 A.2d 149 (N.J. Super. Ct. Law Div. 1978) (holding that a tort claim may exist where X-ray technician discharged for refusing to perform procedure that he was not legally authorized to perform).


Illustration 7 is based on Weider v. Skala, 609 N.E.2d 105 (N.Y. 1992). Reaffirming its refusal to recognize the tort of wrongful discharge in violation of public policy, the New York high court nevertheless found for the employee under an implied-in-law contract theory. See also General Dynamics Corp. v. Superior Court, 32 Cal. Rptr. 2d 1, (Cal. 1994) (recognizing a claim of wrongful discharge in violation of public policy where corporate counsel is discharged for refusing to perform tasks that violate the rules of professional conduct); Restatement Third of The Law Governing Lawyers § 32, Comment b (stating that a lawyer-employee also has the same rights as other employees under applicable law to recover for retaliatory discharge, and that because of the importance of such a lawyer’s role in promoting law compliance, the public policy that supports a remedy for such discharges is at least as strong in the case of lawyers as it is for other employees). While the Restatement Third of Employment Law accepts the position of the Restatement Third of the Law Governing Lawyers, some courts do not extend the public policy exception to in-house counsel in this position. See Herbster v. North American Company for Life and Health Insurance, 501 N.E.2d 343 (Ill. App. Ct. 1986) (refusing to extend the public policy exception to in-house counsel on the ground that such an expansion would threaten the “mutual trust” and confidential nature of attorney-client relations); see also Wright v. Shriners Hosp. for Crippled Children, 412 Mass. 469, 473 (1992) (“We would hesitate to declare that an ethical code of a private professional organization [for nurses] can be a source of recognized public policy.”); Suchodolski v. Michigan

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Comment c. Most cases in which courts recognize wrongful-discipline claims for performing a public obligation involve employees discharged for serving jury duty. See, e.g., Nees v. Hocks, 536 P.2d 512 (Or. 1975). Other cases in which courts recognize such claims involve discipline for responding to a subpoena, testifying truthfully, or enforcing a law. See, e.g., Parada v. City of Colton, 29 Cal. Rptr. 2d 309 (Cal. Ct. App. 1994) (employee discharged for fulfilling statutory obligation to issue stop-work orders against construction projects that fail to satisfy permit requirements); Trexler v. Norfolk S. Ry., 957 F. Supp. 772 (M.D.N.C. 1997) (applying North Carolina law) (employee discharged for testifying truthfully); Delaney v. Taco Time Int’l, Inc., 681 P.2d 114 (Or. 1984) (employee discharged for refusing to sign false and defamatory statement). This category of protected activities is closely related to the category of refusing to commit an illegal act. The two categories overlap, and the difference between them depends mostly on timing. For example, an employee discharged for refusing to commit perjury is discharged for refusing to commit an illegal act, whereas an employee discharged for testifying truthfully is discharged for performing a public obligation.

Courts have insisted that the employee’s action be a duty be imposed by law, rather than simply being a good deed. See, e.g., Babick v. Oregon Arena Corp., 40 P.3d 1059 (Ore. 2002) (rejecting wrongful-discharge claim of private security guards fired for arresting concertgoers for criminal behavior, because the employee guards had not public duty to make the arrests).

Illustration 8 is based on Nees v. Hocks, 536 P.2d 512 (Or. 1975).

Comment d. The paradigmatic example of wrongful discipline for claiming a benefit arising under the employment laws is the discharge of an employee for filing a workers’ compensation claim. See Cross v. Coffman, 805 S.W.2d 44 (Ark. 1991) (recognizing that an employee discharged for filing a workers’ compensation claim may have a wrongful-discharge cause of action); Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973) (holding that an employed discharged for filing a workmen’s compensation claim can bring a claim for relief). But see Wior v. Anchor Indus., 669 N.E.2d 172 (Ind. 1996) (declining to protect management personnel disciplined for refusing to discharge subordinate employees who filed workers’ compensation claims). Courts similarly recognize claims of employer discipline for filing unemployment claims. See Freas v. Archer Services, Inc., 716 A.2d 998 (D.C. 1998) (recognizing claim where employee discharged for filing class-action lawsuit against employer for making illegal deductions from employee’s pay); Lara v. Thomas, 512 N.W.2d 777 (Iowa 1994) (recognizing claim where employee discharged for filing partial unemployment claim); Highhouse v. Avery Transp., 660 A.2d 1374 (Pa. Super. Ct. 1995) (recognizing claim employee discharged for claiming unemployment benefits during layoff periods). In these cases, the benefits have easily discernible monetary values which employers are required to pay.
§ 4.02 Employment Law


Employees who claim benefits that are not part of the employment relationship often cannot bring claims of employer discipline in violation of public policy. See Selof v. Island Foods, Inc., 623 N.E.2d 386, 389 (Ill. App. Ct. 1993) (affirming dismissal of wrongful-discharge claim of employee discharged for attending alcoholism rehabilitation program, because the discharge did not deprive the employee “of any right, benefit or privilege guaranteed by law”) (emphasis in original); McCluskey v. Clark Oil & Ref. Co., 498 N.E.2d 559 (Ill. App. Ct. 1986) (holding that employee was not wrongfully discharged for marrying a coworker, because the discharge did not invoke any statutorily based public policy); Boykins v. Hous. Auth., 842 S.W.2d 527 (Ky. 1992) (rejecting wrongful-discharge claim of employee alleging she was discharged for bringing a non-employment-related negligence suit on behalf of her son, because no clearly defined statute provides for the public policy of bringing a negligence suit); Bagwell v. Peninsula Reg’l Med. Ctr., 665 A.2d 297 (Md. Ct. Spec. App. 1995) (claiming a right to self-defense after being discharged for striking a patient); Frechette v. Wal-Mart Stores, Inc., 925 F. Supp. 95 (D.N.H. 1995) (applying New Hampshire law) (rejecting wrongful-discharge claim of employee discharged for purchasing alcohol on her company credit card, because no state policy encourages purchasing alcohol on an employer's credit card); Frankel v. Warwick Hotel, 881 F. Supp. 183 (E.D. Pa. 1995) (applying Pennsylvania law) (dismissing wrongful-discharge claim when an employee was discharged for refusing to divorce his wife, because the discharge did not invoke any statutorily based public policy).

Most courts do not recognize wrongful-discharge claims against private employers premised on the right of free speech, because the federal and most state free speech protections refer to the limits of government power, and thus do not apply to private-sector employers. See TRW, Inc., v. Superior Court, 31 Cal. Rptr. 2d 460 (Cal. Ct. App. 1994) (dismissing wrongful-discharge claim of employee discharged for refusing to attend an internal security interview without an attorney); Edmondson v. Shearer Lumber Prods., 75 P.3d 733 (Idaho 2003) (holding that an employee cannot support a wrongful-discharge claim against a private-sector employer based on the employee's constitutional right of free speech); Johnson v. Mayo Yarns, Inc., 484 S.E.2d 840 (N.C. Ct. App. 1997) (affirming dismissal of wrongful-discharge claim by employee who was discharged for refusing to remove a confederate flag sticker from his toolbox, because the right of free speech under the First Amendment of the U.S. Constitution and state constitution and laws does not extend to a private employer); Waas v. Colonial Penn Group, Inc., No. 91-5311, 1992 WL 277641, 1992 U.S.
A handful of courts have been willing to recognize constitutional rights as a source of public policy even in cases involving private employers not directly subject to constitutional limitations. The leading case here is Novosel v. Nationwide Ins. Co., 721 F.2d 894, 899 (3d Cir. 1983) (applying Pennsylvania law) (concluding that discharge of private-sector employee for refusing to lobby on behalf of employer violated a public policy derived both state and federal constitutions that favors political and associational freedoms derived and is “no less compelling a societal interest than the fulfillment of jury service or the filing of a workers’ compensation claim.”). See also Chavez v. Manville Prods. Corp., 777 P.2d 371 (N.M. 1989) (reversing directed verdict for employer where employee claimed discharge for refusing to participate in a lobbying effort and for protesting the unauthorized use of his name).


Illustration 11 is based on Cross v. Coffman, 805 S.W.2d 44 (Ark. 1991).

Illustration 12 is based on Krein v. Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987).

Comment e. Examining the enforceability of a contractual clause as a test for wrongful discharge was proposed by the California Supreme Court in Foley v. Interactive Data Corp., 765 P.2d 373, 380 n.12 (Cal. 1988). In Foley, the Court rejected the wrongful discharge claim of an employee fired for reporting to company officials that the FBI was investigating his supervisor for...
embezzlement at a prior employer. The Court reasoned that the issue was a private one rather than a matter of public policy, and in footnote 12 declared: “The absence of a distinctly ‘public’ interest in this case is apparent when we consider that if an employer and employee were expressly to agree that the employee has no obligation to, and should not, inform the employer of any adverse information the employee learns about a fellow employee’s background, nothing in the state’s public policy would render such an agreement void. By contrast, in the previous cases asserting a discharge in violation of public policy, the public interest at stake was invariably one which could not properly be circumvented by agreement of the parties.” The enforceable-contract test has been applied in later California decisions and by other courts. See Jersey v. John Muir Medical Center, 118 Cal. Rptr. 2d 807 (Cal. Ct. App. 2002) (rejecting the wrongful-discharge claim of a nursing assistant fired for refusing to drop a lawsuit against a patient, even though access to the courts was undoubtedly a fundamental right, reasoning that “an agreement waiving the plaintiff’s right to bring suit against third parties presumably would be enforceable because [the hypothetical agreement] would not exempt the hospital from the consequences of its own conduct, and plaintiff would be surrendering only a personal right to recover her own damages, with little if any impact on other members of the public.”). See also Lagatree v. Luce, Forward, Hamilton & Scripps, 88 Cal. Rptr. 2d 664 (Cal. Ct. App. 1999) (denying wrongful-discharge claim of employee who refused to sign a valid predispute arbitration agreement, reasoning that “the fact that a duty or right can be modified or waived by agreement suggests that it does not confer a substantial benefit on the public”); TRW, Inc. v. Superior Court, 31 Cal. Rptr. 2d 460 (Cal. Ct. App. 1994) (rejecting wrongful-discharge claim of employee fired for refusing to waive Fifth Amendment right against answering questions during a security investigation); Rowan v. Tractor Supply Co., 559 S.E.2d 709 (Va. 2002) (rejecting wrongful-discharge claim of employee fired for refusing to drop criminal charges of assault and battery by a co-worker); but see Chapman v. Adia Services, Inc. 688 N.E.2d 604 (Ohio Ct. App. 1997) (reversing summary judgment against employee fired for consulting attorney about possible slip-and-fall suit against employer’s customer).

The issue has arisen when employees are fired for refusing to sign noncompete agreements. Jurisdictions where non-compete agreements are enforceable generally do not recognize a wrongful discipline claim if the employer terminates an employee for refusing to sign such an agreement. For example, in Maw v. Advanced Clinical Communications, Inc., 846 A.2d 604 (N.J. 2004), the court held that termination of an employee for refusing to sign a noncompete agreement was a private dispute rather than a public concern cognizable under the state’s whistleblower statute. In jurisdictions that do not enforce noncompete agreements, however, courts may recognize a claim for wrongful discipline where an employer discharges an employee for refusing to sign such an agreement. In Edwards v. Arthur Andersen LLP, 189 P.3d 285 (Cal. 2008), the court unanimously ruled that since noncompete clauses are unenforceable by statute in California, noncompete agreements violate the public policy of open competition underlying California’s statute. In the case, the employee had already signed a noncompete agreement with his employer. After the employer shut down, the employee tried to obtain a job with a subsidiary, but to do so, he needed to be released from the noncompete clause. The employer would release him and accept his resignation only if he signed a waiver of all future claims against the employer. Once he refused to sign, the employer terminated him. The California Supreme Court concluded that the noncompete clause was
invalid but did not pass on whether the discharge was a violation of public policy. But cf. Dymock v. Norwest Safety Protective Equipment for Oregon Industry, Inc., 45 P.3d 114 (Ore. 2002) (holding that employee has no wrongful-discharge claim when fired for refusing to sign a noncompetition clause whose substance would be enforceable but by statute cannot be enforced against employee not newly hired or promoted).

Illustration 15 is based on Perks v. Firestone Rubber & Tire Co., 611 F.2d 1363 (3rd Cir. 1979) (applying Pennsylvania law).


Illustration 17 is based on Edwards v. Arthur Andersen LLP, 189 P.3d 285 (Cal. 2008).

Comment f. In the absence of a whistleblower statute, courts tend to limit whistleblower protection to situations that implicate an established public policy affecting third parties, as opposed to mere internal misconduct affecting principally the company’s shareholders and managers. See Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (declining to protect internal complaint about an employee's past embezzlement from prior employer, because it did not implicate any strong public policy); Shea v. Emmanuel Coll., 682 N.E.2d 1348 (Mass. 1997) (distinguishing between employees discharged for complaining internally about company policies or the violation of company rules, who are not protected, and employees discharged for complaining internally about alleged violations of criminal law, who are protected); Mueller v. Union Pac. R.R., 371 N.W.2d 732 (Neb. 1985) (holding that public policy was too vague to support a wrongful-discharge claim brought by employees discharged after an internal investigation, though declining to reach the issue of whether the public-policy exception could never apply in cases of wrongful discharge); Hayes v. Eateries, Inc., 905 P.2d 778, 785 (Okla. 1995) (declining to protect internal complaint about an employee's past embezzlement from prior employer, because even though the conduct was prohibited by statute [21 Ohio Stat. Ann. § 1456] it did not implicate any strong public policy and the public-policy exception was to be “tightly circumscribed in light of the vague meaning of the term public policy.”); Fox v. MCI Commc’ns. Corp., 931 P.2d 857 (Utah 1997) (holding that although employee may have been protected for reporting business practices, employee was not protected for reporting alleged criminal conduct of co-workers, because discharge for reporting possible criminal conduct of co-workers did not give rise to the clear and substantial public policy of enforcing the criminal law); cf. Obst v. Microtron, Inc., 614 N.W.2d 196 (Minn. 2000) (ruling that threats to report employer contract breaches to consumers did not state a good-faith whistleblowing action).

Other jurisdictions find the distinction between internal and external reporting to be less important, and instead focus on the nature of the complaint. See Murcott v. Best Western Int'l, Inc., 9 P.3d 1088 (Ariz. Ct. App. 2000) (affirming jury verdict for employee on wrongful-discharge claim that he was discharged for reporting concerns that employer was violating antitrust laws internally to chief executive officer and externally to legal counsel); Aviles v. McKenzie, No. C-91-2013-DLJ, 1992 WL 715248, 1992 U.S. Dist. LEXIS 3656 (N.D. Cal. March 17, 1992) (applying California law) (denying employer’s motion for summary judgment where employee was allegedly discharged for reporting illegal practices to superiors); Thomas v. Med. Ctr. Physicians, 61 P.3d 557 (Idaho 2002) (reversing summary judgment for employer where employee was allegedly discharged for reporting wrongful conduct to supervisors); Palmateer v. Int’l Harvester Co., 421 N.E.2d 876 (Ill. 1981) (finding that employee had valid claim of employer discipline in violation of public policy for being discharged for supplying information to local law-enforcement authorities and for assisting law enforcement investigation of co-worker’s possible theft, even though the monetary value of the goods stolen may be small); Connelly v. State Highway Patrol, 26 P.3d 1246 (Kan. 2001), cert. denied 534 U.S. 1081 (2002) (holding that state troopers who internally denounced and protested illegal activity in not enforcing laws designed for public safety may be protected from discharge); Sullivan v. Mass. Mut. Life Ins. Co., 802 F. Supp. 716, 724-725 (D. Conn. 1992) (applying Massachusetts law) (“A rule that would permit the employer to fire a whistleblower with impunity before the employee contacted the authorities would encourage employers promptly to discharge employees who bring complaints to their attention, and would give employees with complaints an incentive to bypass management and go directly to the authorities.”); Porter v. Reardon Mach. Co., 962 S.W.2d 932, 938 (Mo. Ct. App. 1998) (ruling that employer’s “reporting to his superiors that wrongdoing occurred was adequate to meet the ‘whistleblowing’ requirement. He was not required to prove that he had also contacted outside authorities.”); Tartaglia v. UBS PaineWebber Inc., 961 A.2d 1167 (N.J. 2008) (reversing dismissal of common-law wrongful-discharge claim of in-house lawyer fired for complaining to senior lawyers about conflict-of-interest ethical violations, declaring that complaining to an outside agency is usually sufficient to state a claim, but so is complaining “to someone within the corporate structure at a high enough level of authority to demonstrate that her subsequent termination was contrary to public policy”); Crain v. Nat'l Am. Ins. Co., 52 P.3d 1035 (Okla. Civ. App. 2002) (reversing grant of employer’s motion to dismiss wrongful-discharge claim where employee alleged that he was discharged for internally reporting financial irregularity in company records); Kanagy v. Fiesta Salons, Inc., 541 S.E.2d 616 (W. Va. 2000) (upholding wrongful-discharge claim of an employee discharged for reporting unlicensed practice of cosmetology to an external regulating board).

Some statutes and courts support an approach in which employees must internally report before externally reporting, in order to provide the employer with an opportunity to correct the problem. See Wagner v. City of Holyoke, 404 F.3d 504 (1st Cir. 2005) (applying Massachusetts law) (holding that employee was precluded from bringing claim under state statute where he failed to provide written notification to supervisor before externally reporting misconduct); Dirrane v. Brookline Police Dep’t, 315 F.3d 65 (1st Cir. 2002) (applying Massachusetts law) (same); Garrity v. Univ. at Albany, 301 A.D.2d 1015 (N.Y. App. Div. 2003) (dismissing claim under N.Y. public whistleblower statute where employee failed to give superiors reasonable time to investigate and
correct problems). Other statutes and courts may not protect an employee who merely reports internally. See Smith v. Madison Mut. Ins. Co., No. 05CV00142DRH, 2005 WL 1460301, 2005 U.S. Dist. LEXIS 12760 (S.D. Ill. June 21, 2005) (dismissing claim under private whistleblower statute brought by employee who reported information to a company lawyer); Wholey v. Sears, Roebuck & Co., 803 A.2d 482, 496 (Md. 2002) (“To qualify for the public policy exception to at-will employment, the employee must report the suspected criminal activity to the appropriate law enforcement or judicial official, not merely investigate suspected wrong-doing and discuss that investigation with co-employees or supervisors.”).

Illustration 18 is based on Lanning v. Morris Mobile Meals, Inc., 720 N.E.2d 1128 (Ill. Ct. App. 1999) (holding that a “complaint of retaliatory discharge is not precluded based on [employee’s] failure to report an alleged health code violation to a public official,” reasoning that “[r]eports to internal personnel do not transform public issues into private disputes”).


Comment g. Most statutes and courts require that an employee hold a reasonable, good-faith belief in the illegality of the complained-of activity. See Green v. Ralee Eng’g Co., 960 P.2d 1046 (Cal. 1998) (upholding wrongful-discharge claim of employee discharged for complaining to management about aircraft parts quality that the employee reasonably and in good faith believed was illegal); Schriner v. Meginnis Ford Co., 421 N.W.2d 755 (Neb. 1988) (holding that wrongful-discharge claims extend to employees who act in good faith and upon reasonable cause in reporting employers’ suspected criminal acts). But see DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655 (9th Cir. 1992) (applying California law) (rejecting wrongful-discharge claim of employee discharged for refusing to drive truck that he erroneously thought had illegally expired registration papers); Callantine v. Staff Builders, Inc., 271 F.3d 1124 (8th Cir. 2001) (applying Missouri law) (dismissing employee nurse’s wrongful-discharge claim where she was discharged for refusing to sign a legal backdated patient-visit form); Bordell v. General Elec. Co., 88 N.Y.2d 869 (N.Y. 1996) (affirming summary judgment for employer, noting that a cause of action predicated on private whistleblower statute requires proof of an actual violation of law); Green v. Saratoga A.R.C., 233 A.D.2d 821 (N.Y. App. Div. 1996) (same). Similarly, the Sarbanes-Oxley Act protects employees of publicly traded companies who provide information regarding conduct they reasonably and in good faith believe constitutes fraud, even when they are mistaken about whether the company has actually violated the law. See Livingston v. Wyeth, Inc., 520 F.3d 344 (4th Cir. 2008) (holding that an employee’s reasonable belief regarding employer’s violation of law must be about an existing, not expected future, violation where the terminated employee’s complaint speculated only about future misrepresentations to a government agency) Smith v. Corning, Inc., 496 F. Supp. 2d 244 (W.D.N.Y. 2007) (rejecting the defendants’ claim that employee must show actual fraud against shareholders, and noting that employee is required only to reasonably believe that the problem he was complaining of violated a federal law); Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365 (N.D. Ga. 2004) (denying employer’s motion for summary judgment, noting that employees are not required to show an actual violation of law, only that they reasonably believed there was one).
Illustration 23 is based on Johnston v. Del Mar Distrib. Co., 776 S.W.2d 768 (Tex. App. 1989). Johnston has been questioned by another Texas Appeals court in Mayfield v. Lockheed Eng’g & Sci. Co., 970 S.W.2d 185 (Tex. App. 1998), which noted that there are “no other appellate courts which have extended Sabine Pilot” (establishing refusal to do a criminal act as a public policy exception to at-will termination) in the same manner as Johnston—namely, holding that the exception “encompasses a claim by an employee who attempts to determine if certain actions she is required to do are illegal.” Other Texas courts have criticized Johnston’s extension of Sabine Pilot as “an unwarranted expansion” (Camunes v. Frontier Enterprises, Inc., 61 S.W.2d 579, 581 (Tex. App. 2001)) and have declined to follow it (Bowen v. E-Systems, Inc., No. 05-95-00821-CV, 1996 Tex. App. LEXIS 4022, 1996 WL 499814 (Tex. App. Aug. 29, 1996).

Illustration 24 is based on Green v. Ralee Eng’g Co., 960 P.2d 1046 (Cal. 1998).

Comment h. Gardner v. Loomis Armored, Inc., 913 P.2d 377 (Wash. 1996), is one of the few plaintiff victories that cannot fit into one of the categories of § 4.02(a)–(e), and where there are no contrary decisions based on similar facts. Another successful case that cannot easily be put in one of the categories is Cilley v. N.H. Ball Bearings, 514 A.2d 818 (N.H. 1986). In Cilley, the court reversed summary judgment for the employer where the employee was allegedly discharged for refusing to lie to the company president, on another company official’s behalf. The result in Cilley is questionable, however, because the issue apparently concerns a private matter of deployment of employees in a closed corporation, rather than a matter of public policy that has significant third-party effects.


§ 4.03 Wrongful Discipline in Violation of Public Policy: Sources of Public Policy

Sources of public policy for the tort of wrongful discipline in violation of public policy under § 4.01 include:

(a) federal and state constitutions;

(b) federal, state, and local statutes, ordinances, and decisional law;

(c) federal, state, and local administrative regulations, decisions, and orders; and
(d) established principles of professional or occupational conduct protective of the public interest.

Comment:

a. Sources of public policy in general. Courts discern public policy from a variety of sources. Sometimes the employee activity described in § 4.02 is clearly protected by a particular statute. For other activities, there may not be a single statutory source of public policy, thus requiring courts to look to a variety of constitutional, legislative, or administrative sources. As a particular public policy becomes well established, judicial precedent itself may be a useful guide. The key requirement is that the public policy be clearly established, so that employers and employees alike know, or at least should know, the bounds of when employer discipline for employee activity will be judicially scrutinized. Whether the public policy meets this clarity requirement is a matter of law to be decided by the court.

b. Constitutions as sources of public policy. In determining whether an activity is protected from employer discipline, courts sometimes look to federal or state constitutional provisions. Doing so presents two challenges that bear noting. First, constitutional provisions are often framed at a high level of generality and thus need judicial interpretation to be applied to specific cases. Second, almost all of the federal constitution and most state constitutions address only the powers and responsibilities of government, and thus do not apply directly to private-sector employers or employees. If a constitutional provision is limited to state action, courts can look to it only as a general indication of public policy and should be attentive to the distinctions between private and public-sector employees. For example, the privacy protections found in the Fourth and Fourteenth
Amendments of the federal Constitution protect government workers from unreasonable searches, but do not apply directly to private-sector workers. Issues of employee privacy are examined in Chapter __ of this Restatement.

c. Statutes and ordinances. The tort of wrongful discipline in violation of public policy is a state common-law cause of action. The most common sources for ascertaining public policy are legislative enactments, which can be at the federal, state, or local level. For example, criminal statutes against perjury establish a public policy that protect an employee who truthfully testifies under oath in a governmental investigation of the employer; jury-service statutes establish a public policy that protects an employee called for jury service; and workers’ compensation statutes establish a public policy that protects an employee injured at work from retaliation for filing a workers’ compensation claims. In addition to discerning public policy from a single statute, courts can also discern public policy from an overall statutory scheme.

While a statute can preclude the public-policy tort (see § 4.01 comment c), in the absence of such preclusion the issue of whether a particular federal, state, or local enactment evinces a public policy protecting employee activity against employer discipline is a matter of state law as ultimately determined by the state’s highest court.

d. Decisional law. Judicial decisions can be a valid source of public policy under this Chapter. This is the case where the public policy expressed in judicial decisions reflects holdings that have become part of the governing law of the jurisdiction and thus provide clear notice to employers of its applicability to their conduct. Broad, vague, and highly abstract language in judicial decisions, however, do not provide a sufficiently defined source of public policy upon which the wrongful-discipline tort may be based.
Illustrations:

1. Employee E is a salesperson for manufacturer X. X discharges E for complaining internally about a product made by X. E recognizes that the product complies with all applicable safety statutes and regulations, but E nevertheless in good faith believes it is defective and might make X subject to liability in tort. Even though products liability is judicially created law protective of the public interest, X’s product did not clearly violate that law, and E’s report of potential tort liability was not a reasonable report of unlawful employer conduct under § 4.02(d). In these circumstances, X was not put on fair notice that E’s complaint was a protected activity. E has no claim against X under this Chapter.

2. Promptly upon being summoned for jury duty, employee E informs employer X that E will be absent from work to respond to the jury summons. X discharges E for missing work while on jury duty. Although there is no statute directly on point in this jurisdiction protecting employees from discharge for serving on jury duty, many judicial decisions clearly indicate that the jury system is a critically important institution, that jury duty is a central obligation of citizens, and that citizens are expected to report truthfully their availability for such service. X is on fair notice that E’s service on jury duty is a public obligation imposed by law, and that X’s discharge of E violates public policy.

e. Administrative regulations, decisions, and orders. In the modern administrative state, much public policy is determined by administrative agencies that interpret and administer statutes. Administrative regulations, decisions, and orders—which at the federal, state, or local level—as
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well as agency policies that have the force of law, can be appropriate sources of public policy under this Chapter. However, courts should be attentive to whether a particular administrative regulation sufficiently implicates an important public policy to support a wrongful-discipline claim. Regulations focused on interests directly affecting public safety, health, or welfare can support wrongful discipline claims. Other regulations, which may have only a remote connection to public policy or focus on largely administrative issues, do not support wrongful-discipline claims.

Illustrations:

3. Employee E, a truck driver for employer X, reports to E’s supervisor that the truck’s paperwork is missing its original International Registration Plan (IRP) card listing the states in which the truck is licensed to operate. E’s supervisor tells E to use a photocopy instead and assures E that X will pay for any citation E might receive for not having the original. After E refuses to drive the truck under these circumstances, X discharges E. This regulation cannot be the basis of a claim of employer discipline in violation of public policy, because the regulation is not directly related to a substantial issue of public policy.

4. Same facts as Section 4.02, Illustration 24. An employee, E, worked for an employer, X, that manufactured aircraft components. E complained about company inspection practices that he believed compromised aviation safety. X terminated E for making these complaints. Because E’s complaint about inspection practices were based on Federal Aviation Act regulations promoting proper manufacture and inspection of component airline parts, and those regulations implicated important public policies affecting public safety, E may proceed with his public-policy tort action based on these federal
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f. Established principles of professional or occupational conduct. Usually, the state is the source of public policy through its legislature or administrative agencies and, in some cases, its courts. However, employer discipline against an employee who is regulated by established principles of professional or occupational conduct receiving judicial approval or otherwise having the force of law can violate public policy if the employer retaliates against the employee for refusing to violate or otherwise conforming to such principles. The principles of professional conduct governing lawyers are found in state judicial codes or rulings. For other professions or occupations, to provide a source of public policy under this Chapter, the principles should be promulgated by a body charged with supervising the profession and recognized by government authorities as binding on all who practice in the profession. In addition, the purpose of the particular principle or rule should be to serve the public interest, rather than simply the profession or occupation or of the persons working in that field.

Illustrations:

5. Employee E works as in-house counsel for employer X. X discharges E for refusing to destroy discovery evidence. Destroying such evidence would violate the code of lawyer ethics duly promulgated by the jurisdiction’s highest court and applicable to all lawyers in the jurisdiction, including E. X has discharged E in violation of public policy.
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6. Employee E works as a nurse for hospital X. X discharges E for refusing an order to dialyze a terminally ill patient, because E is concerned for the patient's dignity. X does not authorize nurses to make such judgments. The code of ethics for nurses, which applies to E, declares that nurses are justified in refusing to participate in a procedure to which they are personally opposed in the particular case. The particular provision may serve the profession’s interest but not the public interest. Thus, E has no claim against X under this Chapter. Employee claims that employer policies infringe on their right of personal autonomy are treated in Chapter 7.

REPORTERS’ NOTES

Comment a. Courts generally consider a variety of sources to determine whether certain employee conduct is protected as a matter of public policy. Parnar v. Americana Hotels, Inc., 652 P.2d 625, 631 (Haw. 1982) (“Courts should inquire whether the employer’s conduct contravenes the letter of purpose of a constitutional, statutory, or regulatory provision or scheme. Prior decisions may also establish the relevant public policy.”); Palmateer v. Int’l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) (“In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions.” (citing Smith v. Board of Ed., 405 Ill. 143, 147 (1950))); Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 871 (Mo. Ct. App. 1985) (“‘Public policy’ is that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good. It finds its sources in the state constitution; in the letter and purpose of a constitutional, statutory or regulatory provision or scheme; in the judicial decisions of the state and national courts; in ‘the constant practice of the government officials’; and, in certain instances, in professional codes of ethics.”) (citations omitted); Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (holding employer liable for discharging an employee who served on a jury against the employer’s wishes, because public policy expressed in the state constitution, state statutes, and judicial decisions all “clearly indicate that the jury system and jury duty are regarded as high on the scale of American institutions and citizen obligations.”); Gardner v. Loomis Armored, Inc, 913 P.2d 377, 383 (Wash. 1996) (concluding that the discharge of an employee for breaking company policy by leaving his armored truck to rescue a woman being chased by an armed robber violates a public policy in favor of preserving human life that is “clearly evidenced by countless statutes and judicial decisions.”); cf. Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140 (N.H. 1981) (finding a public policy in protecting the safety of fellow employees and holding that “[p]ublic policy exceptions
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giving rise to wrongful discharge actions may also be based on nonstatutory policies."); Payne v. Rozendaal, 520 A.2d 586 (Vt. 1986) (holding that the absence of a statute prohibiting age discrimination was not dispositive of whether public policy had been violated when employee was discharged on the basis of age, noting that “[s]ometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people—in their clear consciousness and conviction of what is naturally and inherently just and right between man and man.”)

Other courts, by contrast, insist that an employee bringing a claim of employer discipline in violation of public policy point to a violation of public policy that is clearly articulated in a specific constitutional, legislative, or administrative authority. While a vague statement of public policy will be met with disapproval by some courts, the Restatement does not support those cases that require an employee point to an unambiguous constitutional or legislative declaration of a specific public policy. See Gantt v. Sentry Ins., 824 P.2d 680 (Cal. 1992) (upholding $1.3 million judgment in favor of employee, but requiring that public policy be carefully tethered to fundamental policies delineated in constitutional or statutory provisions); E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436 (Del. Super. Ct. 1996) (refusing to recognize a public-policy exception where the employee was discharged after raising concerns about a possible conflict of interest created by his supervisor’s relationship with another medical imaging technology firm, noting that “employees who seek protection from firing on the basis that their actions were protected by a public policy, must assert a public interest recognized by some legislative, administrative, or judicial authority, and the employee must occupy a position with responsibility for that particular interest.”) (quoting Shearin v. E.F. Hutton Group, Inc., 652 A.2d 578, 587-89 (Del. Ch. 1994))); Alexander v. Kay Finlay Jewelers, Inc., 506 A.2d 379, 381 (N.J. Super. Ct. App. Div. 1986) (refusing to recognize a cause of action where the employee was discharged for bringing a suit in a salary dispute with the employer, finding that there is “no statutory or regulatory proscription against a firing in retaliation for the institution of a civil action against the employer as a means of resolving a salary dispute.”); Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992) (cautioning against unwarranted judicial exceptions to employment at will, but noting that the court was “prepared to recognize a right to recovery for retaliatory discharge in cases where an employer violates a clear public policy evidenced by an unambiguous statutory provision.”); Tucker v. First Fed. Sav. & Loan, No. 01-A-01-9008CV00279, 1991 WL 2863 (Tenn. Ct. App. 1991) (rejecting claim by employees terminated for reporting questionable banking activities to banking board because employees did not show the employer violated a clear public policy unambiguously expressed in a constitutional, statutory, or regulatory provision); Gaines v. Wilmington Trust Co., No 90C-MR-135, 1991 WL 113613 (Del. Super. Ct. 1991) (“Public policy exceptions to Delaware’s at will employment doctrine are very narrowly drawn and are generally statutory.”).

Comment b. A number of states recognize public policies embedded in federal and state constitutional provisions as a ground for tort claims of wrongful discipline in violation of public policy. A leading early case is Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (applying Pennsylvania law). There, the court concluded that the discharge of a private-sector employee for refusing to lobby on behalf of employer violated a public policy derived from both
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state and federal constitutions that favors political and associational freedoms, noting that “[w]hile no Pennsylvania law directly addresses the public policy question at bar, the protection of an employee’s freedom of political expression would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a workers’ compensation claim.”). Id. at 899. See also Galati v. America West Airlines, Inc., 69 P.3d 1011 (Ariz. App. Ct. 2003) (observing that Arizona legislation enumerates four circumstances under which an employee may bring a wrongful termination action in Arizona, one of which is when the employer terminates an employee in retaliation for refusing to commit an act in violation of the state constitution); Fitzgerald v. Salsbury Chem. Inc., 613 N.W.2d 275 (Iowa 2000) (“In determining whether a clear, well-recognized public policy exists for purposes of a cause of action, we have primarily looked to our statutes but have also indicated our Constitution to be an additional source.”); Whitings v. Wolfson Casing Corp., 173 N.C. App. 218 (Ct. App. 2005) (“The public policy exception to the at-will employment doctrine is confined to the express statements contained within our General Statutes or our Constitution.”); Moshtagi v. The Citadel, 443 S.E.2d 915 (S.C. 1994) (recognizing public policy of free speech in the state constitution); Kessler v. Equity Management, Inc., 572 A.2d 1144 (Md. Ct. Spec. App. 1990) (holding that landlord-employer’s discharge of employee for refusing to “snoop” around tenants’ apartments violated public policy protecting the right of privacy expressed in the federal constitution); Vasek v. Board of County Com’rs of Noble County, 186 P.3d 928 (Okla. 2008) (noting that a claim for wrongful discharge under the public policy exception may be based on a federal constitutional provision that prescribes a norm of conduct for Oklahoma).

Some states, however, are reluctant to permit suits for employer discipline brought against a private employer based on constitutional provisions that do not apply to private action. See Miller v. Fairchild Indus., 629 A.2d 1293 (Md. Ct. Spec. App. 1993), cert. denied, 634 A.2d 46 (Md. 1993) (holding that, in the absence of state action, employees who alleged violation of public policy mandated by free speech provisions in both federal and state constitution do not have a viable claim for retaliatory discharge). Likewise, several courts have criticized Novosel for recognizing a wrongful discharge claim under the Constitution absent a showing of state action. See Petrovski v. Fed. Express Corp., 210 F. Supp. 2d 943, 947 (N.D. Ohio 2002) (refusing to recognize, absent state action, an employee’s claim of wrongful discharge brought under the public policy embodied in the First Amendment and the state constitution, noting that Novosel was the only case the court could find in which the First Amendment and its state counterpart were held to embody a public policy sufficient to support a wrongful discharge action against a private employer); Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 619 (3d Cir. 1992) (declining to extend the approach in Novosel, noting that “[i]n light of the narrowness of the public policy exception and of the Pennsylvania courts’ continuing insistence upon the state action requirement, we predict that if faced with the issue, the Pennsylvania Supreme Court would not look to the First and Fourth as sources of public policy when there is no state action.”); Wiegand v. Motiva Enters., LLC, 295 F. Supp. 2d 465, 474 (D.N.J. 2003) (noting that Pennsylvania courts have not followed Novosel since it was decided and have not permitted wrongful discharge claims under the constitution absent a showing of state action); Radicke v. Fenton, 2001 U.S. Dist. LEXIS 2362 (E.D. Pa. 2001) (observing that “a review of state case law fails to reveal approval of the Novosel approach.”).

Some courts, however, reject federal law alone serving as the source of state public policy. See Guy v. Travenol Labs., 812 F.2d 911 (4th Cir. 1987) (determining that North Carolina law has no obligation to use its tort system in support of federal policies); Pratt v. Caterpillar Tractor Co., 500 N.E.2d 1001 (Ill. App. Ct. 1986) (holding that an employee’s refusal to engage in conduct prohibited by the Federal Corrupt Practices Act implicated no state policy because no harm to the state’s citizens was alleged); Darrow v. Integris Health, Inc., 176 P.3d 1204 (Okla. 2008) (holding that a federal statute alone does not articulate the state’s public policy under which an employee can bring a claim of wrongful discharge in violation of public policy).

In searching for public policy, courts can recognize a public policy contained in a single source of law such as a workers’ compensation or whistleblower statute. See McClain v. Birmingham Coca-Cola Bottling Co., 578 So.2d 1299 (Ala. 1991) (reversing a summary judgment for employer and recognizing a public policy protecting employees seeking workers’ compensation from retaliatory discharge); Kinzel v. Discovery Drilling, Inc., 93 P.3d 427, 435 (Alaska 2004) (reversing a summary judgment for the employer and recognizing a whistleblower tort claim because of the “desirability of implementing the statutory policy against retaliatory discharges.”); Palmer v. Brown, 752 P.2d 685, 689 (Kan. 1988) (finding that “[p]ublic policy requires that citizens in a democracy be protected from reprisals for performing their civic duty of reporting infractions of rules, regulations, or the law pertaining to public health, safety, and the general welfare” and providing for common-law whistle-blower protection to an employee discharged for reporting Medicare fraud by her employer). In this search for a statutory foundation of public policy, some courts look creatively to find a statute that the employer violated. See Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984) (applying Arkansas law) (holding that discharge of employee for refusing supervisor’s advances violated the public policy embodied in the state anti-prostitution statutes); Parsons v. United Techs. Corp., Sikorsky Aircraft Div., 700 A.2d 655 (Conn. 1997) (holding that discharge of employee for refusing to accept assignment in Bahrain during the gulf war violated public policy found in Connecticut Occupational Safety and Health Act, requiring an employer to provide a safe workplace for its employees); Cook v. Alexander & Alexander of Conn., Inc., 488 A.2d 1295 (Conn. Super. Ct. 1985) (holding that discharge of employee to avoid payment
of bonuses and vesting of thrift plan benefits violates public policy against withholding of wages by
an employer as expressed in state payment-of-wage law).

In addition to discerning public policies from a single statute, courts can also discern public
policy from an overall statutory scheme. See Reust v. Alaska Petroleum Contrs., 127 P.3d 807
(Alaska 2005) (noting that a number of statutes contain witness protection provisions, including the
Alaska Occupational Safety and Health Act, the Alaska Human Rights Law, and the Alaska Assisted
Living Homes Act, and that this public policy formed the basis of a retaliatory discharge claim
brought by an employee allegedly terminated for testifying adversely against his employer in another
claim); Antinerella v. Rioux, 642 A.2d 699 (Conn. 1994) (recognizing a public policy tort where
high sheriff's alleged misconduct violated General Statutes §§ 6-36, 6-46, both of which authorize
the removal from office of sheriffs who engage in fee splitting); Fingerhut v. Children's Nat'l Med.
Ct., 738 A.2d 799 (D.C. Ct. App. 1999) (finding that the three statutes on which the plaintiff relied,
§§ 1-142, 22-704 and 4-175, in concert with § 4-114 and its implementing regulations, “reflect a
clear mandate of public policy” against the termination of a police officer who records and reports a
bribe of a government official).

In addition to federal and state law, local ordinances may also provide a source public policy
under which employee's may bring a claim of wrongful discharge in violation of public policy. See
common-law tort claim for wrongful discharge in contravention of public policy against gender
discrimination embodied in part by a local ordinance providing for freedom from employment
(recognizing a cause of action for discharge in violation of public policy where the former employee
alleged she was discharged after conduct she believed required by state law and municipal
ordinances); Bible Way Church of Our Lord Jesus Christ of Apostolic Faith of Washington, D.C. v.
Beards, 680 A.2d 419 (D.C. 1996) (holding that the public-policy exception to at-will employment
requires that an employee show that the reason for the employee's discharge was the employee's
refusal to violate law expressed in a statute or municipal regulation). But see Greenwood v. Taft,
Stettinius & Hollister, 663 N.E.2d 1030 (Ohio Ct. App. 1995) (holding that municipal ordinance
against discrimination based on sexual orientation was insufficient to support public policy
exception); Aylward v. First Bank Corp., No. 11628, 1984 WL 2813 (Ohio Ct. App. Sept. 12, 1984)
(noting that violation of a local ordinance does not itself constitute a violation of the public policy of
the state); Gould v. Campbell's Ambulance Service, Inc., 488 N.E.2d 993 (Ill. 1986) (rejecting
plaintiff's allegation that she was discharged in retaliation for filing a complaint against her employer
because a city ordinance setting ambulance-worker requirements did not establish a state public
policy).

Comment d. Judicial decisions can be a valid source of public policy in appropriate cases.
Notable decisions here include Palmateer v. Harvester Co., 421 N.E.2d 876, 877 (Ill. 1981) (holding
that, although the employee could not point to a constitutional or statutory provision that protected
him from discharge for reporting criminal activity to local law-enforcement agents, the employee
could sustain a cause of action for retaliatory discharge based on common-law public policy, because
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public policy “is to be found in the State’s constitutions and statutes and, when they are silent, in its judicial decisions.”); Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (holding employer liable for discharging an employee who served on jury duty, because public policies expressed in judicial decisions and elsewhere “clearly indicate that the jury system and jury duty are regarded as high on the scale of American institutions and citizen obligations.”); Feliciano v. 7-Eleven, Inc., 559 S.E.2d 713 (W. Va. 2001) (holding that the discharge of an employee who successfully fights off and arrests an armed robber violates public policy in favor of self defense when employee faces imminent danger because the state’s jurisprudential history “clearly demonstrates the existence of a public policy favoring an individual’s right to defend him/herself,” even though neither the state constitution nor state legislation articulate such a definite statement of public policy); Hysten v. Burlington N. Santa Fe Ry. Co., 108 P.3d 437 (Kan. 2004) (recognizing public policy established in prior judicial case law protecting employee from being discharged for filing a claim under the Kansas Workers Compensation Act); Ballinger v. Delaware River Port Authority, 800 A.2d 97 (N.J. 2002) (holding New Jersey common law as the source of public policy protecting retaliatory discharge of law enforcement officer for reporting suspected criminal activity); Faulkner v. United Technologies Corp., 240 Conn. 576 (1997) (allowing for public policy claims based on decisional law).

Decisional law as a source of public policy may be from other states as well, so long as the underlying policy has been sufficiently established. See Dunwoody v. Handskill Corp., 60 P.3d 1135, 1142 (Or. Ct. App. 2003) (‘We look for ‘evidence’ of such a [public policy] in constitutional and statutory provisions, as well as in the case law of this and other jurisdictions.’); Crews v. Buckman Laboratories Intern., Inc., 78 S.W.3d 852 (Tenn. 2002) (considering the decisions of other states to determine whether the dismissal of in-house counsel who reported the unauthorized practice of law of the her superior constituted wrongful discharge in violation of public policy).

Some courts are reluctant to predicate a tort action entirely on judge-made law. See, e.g., Green v. Ralee Eng’g Co., 960 P.2d 1046, 1048 (Cal. 1998) (employees must point to public policies “tethered to fundamental policies . . . delineated in constitutional or statutory provisions.” (quoting Gantt v. Sentry Ins., 824 P.2d 680, 687 (Cal. 1992))); Follett v. Gateway Regional Health System, Inc., 229 S.W.3d 925, 927 (Ky. Ct. App. 2007) (noting that employees bringing claims of wrongful discharge in violation of public policy must refer to a public policy “evidenced by a constitutional or statutory provision.”).

The threshold question is whether the judicial decisions give the employer fair notice that the employee is engaged in a protected activity. If the judicial decisions do not give the employer fair notice, courts generally refuse to allow the cause of action. See Parnar v. Am. Hotels, 652 P.2d 625, 631 (Haw. 1982) (cautioning against basing claims of wrongful discharge on judicially created public policies in the absence of “some prior . . . expression on the subject”); Geary v. U.S. Steel Corp., 319 A.2d 174, 180 (Pa. 1974) (holding that the employer was not liable for discharging an employee who complained about the safety of products produced by the employer, given that “[t]he facts alleged show only that there was a dispute over the merits of the new product,” as opposed to the product being clearly dangerous).
This Restatement takes the position that provided the employee is retaliated against for otherwise engaging in protected activity under § 4.02 and the judicially articulated public policy is sufficiently well established and clearly articulated to put the employer on fair notice that the employee was engaging in such activity, then there should be no bar to recognizing decisional law as the source of the relevant public policy.

Illustration 1 is based on Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974). In Geary, the court refused to recognize a claim of wrongful discharge in violation of public policy brought by an employee discharged after raising safety concerns to his superiors. Id. at 184-85. The court held that “where the complaint itself discloses a plausible and legitimate reason for terminating an at-will employment relationship and no clear mandate of public policy is violated thereby, an employee at will has no right of action against his employer for wrongful discharge.” Id.

Illustration 2 is based on Nees v. Hocks, 536 P.2d 512 (Or. 1975).

Comment e. Administrative regulations, decisions, and orders can be appropriate sources of public policy. See Bonidy v. Vail Valley Ctr., 186 P.3d 80 (Colo. Ct. App. 2008) (finding administrative regulations may be sources of public policy in some circumstances); Hobson v. McLean Hosp. Corp., 522 N.E.2d 975 (Mass. 1988) (holding that hospital employee responsible for enforcing state safety regulations governing patient care, alleging to have been fired for performing her job accordingly, stated a claim for wrongful termination under the public policy exception); Coman v. Thomas Mfg. Co., Inc., 381 S.E.2d 445 (N.C. 1989) (finding termination of truck driver who refused to violate federal rules adopted in state administrative code violated public policy); Schumann v. Dianon Sys., Inc. No. CV05500747S, 2007 WL 2938615 (Conn. Super. Ct. Sept. 24, 2007) (unpublished opinion) (holding that regulations established pursuant to statutory authority can establish a public policy); Kanagy v. Fiesta Salons, Inc., 541 S.E.2d 616 (W.Va. 2000) (certifying affirmatively that West Virginia would recognize a cause of action for wrongful discharge where employee was allegedly discharged for speaking truthfully to an investigator, as required by a state regulation).

Sometimes, however, an administrative regulation may not implicate public policies important enough to support a public-policy tort. Compare Green v. Ralee Eng’g Co., 960 P.2d 1046 (Cal. 1998) (allowing a regulation-based public policy to serve as the basis of wrongful-discharge claim, given that the employee’s complaints that the employer was shipping airline parts that had failed safety inspections, in violation of federal regulations that required shipped parts to pass safety inspections, implicated important public policies focused on commercial airline safety) with Franklin v. Swift Transp. Co., 210 S.W.3d 521, 530 (Tenn. App. 2006) (rejecting a regulation-based public policy from serving as the basis of wrongful-discharge claim, given that the employee’s refusal to drive a truck with a photocopied vehicle registration card, opposed to the original copy that was required by state regulation, did not implicate an important public policy, and noting that the employee was not asked to perform an act hazardous to health or safety).

Illustration 4 is based on Green v. Ralee Engineering Co., 960 P.2d 1046 (Cal. 1998)

Comment f. Ethical codes of learned professions may also serve as a basis of public policy in appropriate circumstances. See General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994) (holding that in-house counsel could claim retaliatory discharge where discharge was for reasons violating mandatory ethical obligations or where non-attorney employee could bring claim and some provision allowed counsel to depart from client confidentiality rule); Rocky Mountain Hosp. and Med. Serv. v. Mariani, 916 P.2d 519 (Colo. 1996) (holding that an employee accountant states a valid wrongful-discharge claim when she was allegedly discharged for refusing to violate the Colorado State Board of Accountancy Rules of Professional Conduct); Shearin v. E.F. Hutton Group, Inc., 652 A.2d 578 (Del. Ch. 1994) (holding that an attorney’s responsibility to report employer wrongdoing according to the code of ethics of the legal profession is a basis for public policy); Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992) (finding an exception to employment-at-will through an implied-in-law obligation to follow professional conduct rule DR-1-103(a)); Crews v. Buckman Laboratories Intern., Inc., 78 S.W.3d 852 (Tenn. 2002) (holding in-house counsel may bring a common-law action for retaliatory discharge resulting from counsel's compliance with a provision of the Code of Professional Responsibility that represents a clear and definitive statement of public policy); LoPresti v. Rutland Regional Health Services, Inc., 865 A.2d 1102 (Vt. 2004) (accepting medical ethical code as potential source of public policy). But see Wright v. Shriners Hosp., 589 N.E.2d 1241 (Mass. 1992) (“We would hesitate to declare that the ethical code of a private professional organization can be a source of recognized public policy.”).

To be considered as a source of public policy under this Chapter, the code of ethics must express a clear mandate of public policy. See Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505 (N.J. 1980) (granting summary judgment for employer after concluding that the Hippocratic Oath does not contain a clear mandate of public policy). In addition, some ethical rules do not implicate important public policies and thus, do not serve as the basis of a public policy tort claim. See Wallace v. Skadden, 715 A.2d 873 (D.C. Ct. App. 1998) (finding no public policy tort claim where an attorney claimed she was terminated for refusing to violate rules of professional conduct, specifically Rules 5.1 and 5.2, because those laws do not impose a duty upon the subordinate attorney to report anything to her superiors); Wright v. Shriners Hosp., 589 N.E.2d 1241 (Mass. 1992) (“We would hesitate to declare that the ethical code of a private professional organization can be a source of recognized public policy.”).

Illustration 5 is based on Shearin v. E.F. Hutton Group, Inc., 652 A.2d 578 (Del. Ch. 1994).