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THE NEW RESTATEMENT OF EMPLOYMENT LAW: *An Analytical Synopsis*

BY JOSEPH GARRISON

IN April 2015, the American Law Institute published the Restatement of Employment Law, its first publication focusing on this area of law. The single volume consists of 550 pages and provides a comprehensive treatment of employment law. The Restatement promises to have great impact in state and federal courts.

The impressive group of Reporters on this project are: Samuel Estreicher, New York University Law School (Chief Reporter); Michael Harper, Boston University School of Law; Stewart Schwab, Cornell Law School; and Matthew Bodie, St. Louis University School of Law. For nearly a decade, they worked with advisors (most of whom were employment law experts) as well as a strong Members Consultative Group. The result is a sharp, concise, and comprehensive overview of employment law.

The Restatement contains nine chapters, divided by numerous sections and subsections as well as comments, narrative illustrations, and reporters' notes. Following are some highlights particularly relevant to employment law practitioners.

EMPLOYMENT CONTRACTS: TERMINATION (CHAPTER 2)

Employment Contract Formation

The Restatement recognizes the contract-law default rule of an at-will employment relationship, permitting either party to terminate the employment relationship with or without cause, unless there is a statutory, public policy, or contractual limit on the employment termination right. While at-will employment remains the default rule, it is subject to exceptions. Workplace realities are given effect in this Restatement. For example, Florida Employer X recruits competing manager E from California, promising "permanent employment" and a starting annual salary of \$100,000. E accepts by letter and starts moving. A business downturn causes X to believe it doesn't need E's services. E may claim breach of contract. (§2.03, comment b.) Or, even with no reply letter, E moves and begins work. A business downturn soon causes E's termination. By terminating, X breaches. (§2.03, comment b.) In each case, because these are definite-term contracts, E has the burden to show cause.

Some indefinite-term agreements may override the at-will default rule. The Restatement "departs from decisions holding that contracts for indefinite employment should always be treated as contracts terminable at-will. . . . Whether the parties contracted for indefinite employment with limits on the employer's power to terminate is normally a question of fact for the trier of fact." (§2.03, comment h.) The Restatement urges recognition that parties may intend to enter an enforceable agreement providing for indefinite employment containing limits on termination without cause; whether the parties did so is generally a factual question.

Binding policy statements can also establish an employment contract, as policy statements found in employee manuals, personnel handbooks, and policy directives, when reasonably read in context, can

establish limits on the employer's power to terminate. (§2.05.) Policy statements benefit the employer and therefore may bind it. It is often a question of fact whether a policy statement is binding. (§2.05, comments a & b.)

A prominent and clearly-articulated disclaimer may signify employer intent. But disclaimers may not be bulletproof. Consider this disclaimer in the comment: "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 each has the right to terminate this relationship at any time, with or without cause or prior notice." All employees are required to sign immediately below the disclaimer. Even here, the comment states: "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." (§2.05, illustrations.)

Definition of "Cause" for Termination of Employment Agreement

If the employment contract is for a definite term, cause for employment termination exists when the employee engaged in misconduct, other malfeasance, or other material breach of the agreement, such as persistent neglect of duties, gross negligence, or failure to perform the duties of the position due to permanent disability. (§2.04.) If the agreement is for an indefinite term, a significant change in the employer's economic circumstances can also satisfy cause, if the employer no longer has a business need for the employee's services. (§2.04.) Cause is an objective concept. An employer's reasonable, good-faith but erroneous belief that an employee engaged in certain conduct does not prove cause. Cause is a factual issue for the trier of fact. (§2.04, comment d.)

The reporters' notes identify the majority view that a jury would factually determine whether cause existed. An employer's objective good faith is not enough to require deferral to the employer. The jury should make its own objective inquiry, and the employer has the burden to show cause. Under the alternative approach,

California's good-faith reasonableness test, the jury would determine only whether the employer acted in objective good faith in deciding that there was cause for termination, not whether the factual bases for termination actually occurred or whether they were proved by a preponderance of the evidence. (§2.04, comment d.)

Cause may, finally, also have a procedural component. If the agreement, or a binding policy, mandates a procedure, then the agreement or policy controls. If silent, normally the employer must give reasons for the termination, and act consistently with regard to grounds for termination. (§2.04, comment d.)

Implied Duty of Good Faith and Fair Dealing

The implied duty of good faith and fair dealing recognizes that employers and employees have a duty to cooperate with each other in realizing the common purpose of their contractual relationship. The duty includes a party's obligation not to hinder the other party's performance under, or to deprive the other party of the benefit of, their contractual relationship. In particular, the duty protects an employee from employer termination to avoid what the contract intends. The employer must exercise discretion in good faith. The duty of good faith and fair dealing applies to both an employer and employee and cannot be waived. It is implied in every contract, including at-will employment.

This duty does not alter an at-will relationship, but it does prohibit an employer from taking action with the purpose of: (1) preventing the vesting or accrual of an employee right or benefit; or (2) retaliating against an employee for performing his or her obligations either under the contract or under law. (§2.07; *see also* §3.05 (compensation & benefits).)

The comments emphasize that the duty protects against opportunistic firings, such as terminating an employee eligible by performance for a substantial bonus, just before the bonus is due. That opportunistic firing violates the duty of good faith and fair dealing. (§2.07, comment c.)

The definition of good faith and fair dealing appears expansive. What does "not to hinder the other's performance" encompass? For a veteran salesperson, might this include ▶

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an adverse change in territory? Can breach of the duty be more expansive than public policy, for example, if an employee claims retaliation for performing obligations under her contract’s job description, rather than obligations under law or public policy?

THE TORT OF WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY (CHAPTER 5)
Wrongful Discharge in Violation of Public Policy

The Restatement covers only wrongful discharge and constructive discharge. It takes no position on wrongful demotion or other forms of discipline short of discharge. That question remains one for state-by-state determination. (§5.01, comment c.)

An employer who discharges an employee for engaging in certain “protected activities” is subject to tort liability. “Protected activities” likely to have a sufficiently close relationship to public policy to support the cause of action are expansive, and include the following types of employee reasonable and good-faith actions:

- refusing to act in violation of law or other well-established public policy such as a code of professional conduct or occupational code protecting the public interest;
- performing a public duty or obligation believed to be imposed by law;
- filing a charge or claiming a benefit under an employment statute or law;
- refusing to waive a nonnegotiable or nonwaivable right;
- reporting or inquiring about conduct believed to violate law or codes;
- engaging in other activity directly furthering a well-established public policy. (§5.02.)

Sources of public policy establishing grounds for wrongful discharge are also expansive (§5.03). They are broad and include not only statutes, regulations, and codes but also settled common law. The key is whether the policy is well-established. (§5.03.)

Questions remain: Under the “refusing to waive” protection, for example, if an employer enforces a mandatory arbitration policy that shortens an existing statute of limitations, but the employee refuses to consent and is terminated, is that a valid public policy claim? The reporters’ note

provides some guidance: “There should be no bar, in principle, to recognizing decisional law as a source of public policy, provided the employee is retaliated against for engaging in protected activity . . . and the public policy is sufficiently well established and clearly articulated to give the employer fair notice that the employee’s activity is protected.” (§5.03, comment d.)

Consider also the “inquiring about” protection, and the “other activity” protection. Is a water-cooler conversation about a rumored sexual harassment claim, made by an employee against her boss, protected activity? Suppose a potential witness is engaging in the conversation? And how broad is the “other activity” protection? It may extend to activity involving health and safety concerns, at least. But if an employee observes that bullying adversely affects the health of other employees, and complains in good faith, is that report protected?

DEFAMATION, WRONGFUL INTERFERENCE, AND MISREPRESENTATION (CHAPTER 6)
Employer’s Negligent Provision of False Information to Employees

The general doctrine of negligent misrepresentation has been adopted in many states in the commercial context, and the Restatement urges that it is equally viable in the employment context.

Several federal circuits have required a plaintiff to plead misrepresentation with the particularity necessary to plead fraud; others have used a relaxed notice pleading standard; still others hold that the pleading standard depends on state law requirements. The Restatement may provide beneficial consistency.

Under the Restatement, an employer has a duty, in its interactions with an employee or prospective employee, “to exercise reasonable care not to provide false information” when the employer has “special knowledge” upon which the receiver of information may reasonably rely when deciding to enter or maintain an employment relationship. The employee must only show that the employer intended to guide or influence the business transaction. (§6.06.) Although an employer has a duty not to mislead, it has no general duty to disclose.

There is no liability for communicating false opinions or intentions; there is liability for misrepresenting information or materially misleading by incomplete information. If an employer intends to induce action, however, even an opinion may negligently convey false information. (§6.06, comment c.)

Damages are restricted to “pecuniary loss,” and misrepresentation damages do not include the benefit of what would have been the contract. Loss of the bargain damages may be awarded to a victim of fraud, not a victim of misrepresentation. (§6.06, comment f.)

EMPLOYEE PRIVACY AND AUTONOMY (CHAPTER 7)

Protection of Employee Privacy

The good news is that there remains such a thing as privacy. The bad news is that the Restatement may not do enough to maintain its presence in the workplace, especially in regards to private information housed in the workplace personal computer.

Claims for invasion of privacy require a reasonable expectation of privacy. In the workplace, an employee has a reasonable expectation of privacy in a physical location, including a personal computer, if the employer has given notice that the location is private for employees; or the employer has acted in a manner that treats the location as private for employees, the type of location is customarily treated as private for employees, and the employee has made reasonable efforts to keep the employee’s activities in that location private. Even if an employee reasonably tried to keep the information private, it is not protected if the personal information is relevant and customarily required by the employer. (§7.03.) Personal information the employee gives confidentially to an employer is private, unless the employer is compelled by law to allow access by third parties. (§7.05.)

An employer may invade one’s privacy without consent but be liable for wrongful discharge only if the relevant privacy invasion would be highly offensive to a reasonable person under the circumstances. This means the “nature, manner, and scope” are “clearly unreasonable” when balanced against business or public interests. (§7.06.) Whether the intrusion

is highly offensive is a question of fact. (§7.06, comment i.)

The Restatement also protects “personal autonomy.” Autonomy concerns lawful conduct outside the workplace that does not reference or involve the employer or its business. It can include adhering to or expressing personal beliefs (political, moral, ethical, religious, or other), or belonging to or participating in lawful associations. An employer may not discharge an employee for exercising a personal autonomy interest, unless the employer can prove its reasonable good-faith belief that the employee’s out-of-work conduct interfered with its “legitimate business interests, including its orderly operations and reputation in the marketplace.” (§7.08.)

EMPLOYEE OBLIGATIONS AND RESTRICTIVE COVENANTS (CHAPTER 8)

Employee Duty of Loyalty to the Employer

To date, there has been minimal law defining the duty of loyalty in the employment setting. The Restatement makes an important departure from the general agency doctrine that all employees, denominated as agents, owe a duty of loyalty to their employers. Under a more nuanced and common-sense analysis of workplace realities, the fiduciary duty of loyalty applies only to employees in positions of trust and confidence, as the duty of loyalty “has little practical application to [most] rank-and-file employees.” (§8.01, comment a.) Other employees may owe an “implied contractual duty of loyalty” depending on the nature or circumstances of their employment. Employees with a fiduciary loyalty obligation are those who have, for example, been entrusted with trade secrets as part of the job; have obtained even inadvertent knowledge of trade secrets; or may be in a position to misappropriate the employer’s property or engage in self-dealing. (§8.01.) If not in a position of trust and confidence, however, an employee breaching a loyalty duty may be subject only to a remedy for breach of an implied contractual duty. (§8.01, comment a.; *see also* §9.07 – §9.08.) There is a nice symmetry here: An employer is liable for breach of the implied duty of good faith and fair dealing; an employee may be liable for breach of the implied contractual duty of loyalty.

Both are subject only to contract remedies. Breach of a fiduciary duty, however, can appropriately allow much broader tort remedies. (§9.09.)

Poor job performance is not a loyalty breach and is typically enforced by workplace discipline. (§8.01, comment e.) And, there is a balancing test that should act as a substantial protection for whistleblowers: “[T]he duty of loyalty must be read in a manner consistent with the rights and responsibilities as set forth in Chapter 5 [protected activities related to public policy] and under employment and other law, as well as with any privilege provided by law to cooperate with regulatory authorities.” (§8.01, comment d.)

Enforcement of Restrictive Covenants in Employment Agreements

Under the Restatement, a covenant in an agreement between an employer and a former employee restricting the former employee’s working activities is enforceable only if it is reasonably tailored in scope, geography, and time to further a protectable employer interest, with several notable exceptions. (§8.06.) Restrictive covenants are generally unenforceable against employees who are terminated without cause or who quit employment for cause attributable to the employer. (§8.06, comment f.) Although restrictive covenants are enforceable if “reasonably tailored in scope, geography, and time,” they may still be invalid if: (1) the discharge is based on factors making enforcement inequitable; (2) there was bad faith in requiring or enforcing the covenant; (3) the employer materially breached; or (4) the geographic region has a great public need for the employee’s services. (§8.06.)

These exceptions could support more defenses to noncompete provisions. Many noncompete obligations, for example, are imposed for the first time as a condition for receiving severance benefits. What is a good-faith reason to restrict future employment of an employee just laid off as surplus, or let go for substandard performance? Under those circumstances, is enforcement inequitable?

Even if a restrictive covenant is reasonably tailored, it is enforceable only when it covers “protectable interests.” The Restatement

lists four “legitimate” interests: (1) trade secrets and other protectable confidential information; (2) customer relationships; (3) investment in the employee’s reputation in the market; and (4) purchase of the business owned by the employee. (§8.07.)

REMEDIES (CHAPTER 9)

Damages Recoverable in Claims Against Employees

Generally, employers have no contract claim against employees for poor performance, as poorly performing employees may be terminated or disciplined. (§9.07, comment b.) But if the contract expressly provides for damages, and the employee’s breach leads to “foreseeable economic loss that the employer could not have reasonably avoided,” the employer may recover certain damages. Such economic loss normally does not include lost profits. (§9.07, comment d.)

Employees can be liable for foreseeable harm for breaching tort-based duties or fiduciary duties. The employer must reasonably mitigate damages. (§9.09, comment a.) On whether forfeiture of past compensation should be an available remedy, the Restatement does not endorse a per se “forfeiture-for-disloyalty” approach, and describes many cases limiting that remedy to proof of actual loss. Because even disloyal employees can produce some value in the work they did, complete wage forfeiture is discouraged. If the employee personally profits from disloyalty, however,

disgorgement of such profits is proper. (§9.09, comment c.)

No matter what claim an employer may make against an employee, however, the Restatement follows the American rule on attorney’s fees, i.e., fees are normally not recoverable. (§9.05, comment i.)

CONCLUSION

The Restatement of Employment Law, like other Restatements, may well have the effect of consolidating or reshaping employment jurisprudence in state and federal courts. Employment law practitioners owe it to themselves, and to their clients, to read and analyze this work in full. Courts are likely to consider and often adopt the law as stated within it.



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