Restatement of Employment Law

4/1/16

Professor Samuel Estreicher
NYU School of Law
40 Washington Sq. So.
New York NY 10012
Samuel.estreicher@nyu.edu

Aspects of the Restatement

- First Restatement of Employment Law
- Restatement of decisional law, not statutory law, but aspects of the work will inform interpretation of statutes (e.g., Ch. 1 definition of ”employee”; Ch. 9 on remedies)
- “Restatement”: tied to what the courts are in fact doing, but sometimes we adopt a minority formulation (the “better view”)
  - At times, we provide a reformulation/clarification of the dominant position of the courts (e.g., when are employees fiduciaries in Ch. 8; “forfeiture for disloyalty” remedy in Ch. 9
- Blackletter and Illustrations vs. Reporters’ Notes; only the former reflect ALI view; the Notes reflect only the reporters’ views

10 Highlights

- Existence of Employment Relationship [Ch.1]
  - § 1.01: Independent Contractor vs. Employee: employer's "right of control" is most of the time sufficient for "employee" status, but (even in the absence of control of manner and means of work) employer's preclusion of entrepreneurial capacity also indicates "employee" status
    - Elaboration of multi-factor test in second (multifactor) clause of Restatement 2d Agency §220
  - § 1.03: Partners as Employees?: controlling owners are not employees
  - § 1.04: Joint Employers: individuals can be employed by two or more employers at the same time ("joint employer")
    - Do both employers control central aspects of wages, hours and working conditions?

Restatement of Employment Law: Highlights (2)

- Employment-At-Will and Contractual Exceptions [Chs. 1-2]
  - §2.01: Default Rule of At-Will Employment
  - Traditional Contract Law Principles for Contract Formation (bilateral promise, unilateral contract); also promissory estoppel
  - § 2.03: Definite-Terms Contracts; Indefinite-Term Contracts Requiring "Cause" for Termination
  - § 2.04: Definition of "Cause"
  - § 2.05: Binding Employer Policy Statements
    - Way of dealing with large group for similarly situated employees where there is no collective bargaining agent
  - § 2.06: Modification/Revocation of Binding Employer Policy Statements
  - § 2.07: Implied Covenant of Good Faith and Fair Dealing (particularly important in compensation cases)

Restatement of Employment Law: Highlights (3)

- Right to Earned Compensation Whether or Not Employee-At-Will [Ch. 3]
  - § 3.01(c): Right to Timely Payment If No Bona Fide Dispute
  - § 3.04: Benefits Set Forth in Binding Employer Policy Statements Are Binding Promises Until Policy Statement Is Changed (Unless Vested Benefit)
  - § 3.05: Implied Duty of Good Faith and Fair Dealing

Restatement of Employment Law: Highlights (4)

- Principles of Employer Tort Liability for Injury to Employees [Ch. 4]
  - Underdeveloped area because of workers' compensation laws
  - § 4.02: Employer Direct Liability: Conduct of Employer or Controlling Owner
  - § 4.03*:* Employer Liability for Conduct of Employees or Agents
    - (a) authorized or ratified conduct of employee
    - (b) in the course of employment
    - (c) where provided by applicable law, tortious abuse of supervisor's authority even if not within scope of employment [absent proof of affirmative defense similar to Faragher v. Ellerth, 524 U.S. 775 (1998);
      - recently adopted by N.J. Supreme Court

Restatement of Employment Law: Highlights (5)

- Employer Torts [Chs. 4-7]
  - §§ 4.04-4.05: Negligence: Duty of Care in Providing Supervision, Safe Working Conditions
  - § 4.06: Intentional Torts By Employers In the Course of Employment (e.g.,)
    - False Imprisonment
    - Assault and Battery
    - Intentional Infliction of Emotional Distress

Restatement of Employment Law: Highlights (6)

- Employer Torts [continued]
  - Ch. 5: Wrongful Discharge in Violation of Public Policy
    - § 5.02: Protected Activities
    - § 5.03: Sources of Public Policy
  - §§ 6.01-6.02: Defamation
    - § 6.02(1): Employer Privilege
    - § 6.02(2): Abuse of Privilege
  - §§ 6.03-6.04: Wrongful Interference
  - § 6.05: Fraudulent Misrepresentation
    - § 6.06: Negligent Provision of False Information

Restatement of Employment Law: Highlights (7)

- Employer Torts: Invasion of Privacy [Ch.7]
  - § 7.02-7.05: Protected Employee Privacy Interests
    - §7 .03: In Employee's Physical Person and Physical and Electronic Locations
    - § 7.04: In Information of a Personal Nature
    - § 7.05: Against Disclosure of Employer Personal Information
  - § 7.06: Wrongful Employer Intrusion
  - § 7.07: Retaliatory Discharge
- Employer Torts: Invasion of Autonomy [Ch. 7]
  - § 7.08: Intrusion Upon Employee Personal Autonomy Interest
    - Implied contract claim only

Restatement of Employment Law: Highlights (8)

- Claims Against Employees [Ch. 8]
  - Common Law Duties
    - § 8.01: Duty of Loyalty Relating to Employment
      - Fiduciary Duty If Employee Is In Position of "Trust and Confidence" or if in possession of trade secrets, a fiduciary duty limited to that information
      - Otherwise Situation-Specific Implied Contractual Duty
    - Ways of Breaching Duty of Loyalty
      - § 8.02-8.03: Disclosure or Use of Employer Trade Secrets
      - § 8.04: Employee Competition with Current Employer
        - » §8.04(c): Carve-out for Employees Not Subject to a Fiduciary Duty
      - § 8.01(b)(iii): Misappropriation of Employer's Property or Self-Dealing

Restatement of Employment Law: Highlights (9)

- Claims Against Employees: Restrictive Covenants (RC)
  - § 8.06: General Rule of Enforceability of RC If Protectable Interest and Reasonably Tailored
    - § 8.06(a)-(d): Exceptions to General Rule
  - § 8.07: Protectable Interests
  - § 8.08: Modification of Unreasonable RC
    - Unless covenant does not allow for modification or employer lacked a reasonable and good-faith basis for believing covenant was enforceable

Restatement of Employment Law: Highlights (10)

- Remedies [Chapter 9]
  - Part A: Claims Against Employers
    - §§ 9.01-9.03: Contract Liability: Economic Loss, Less Mitigation
    - § 9.02: Tort Liability: Economic Loss, Noneconomic Loss, Punitive Damages, and Nominal Damages
    - Economic includes future loss subject to mitigation
    - Recognition of presumptive availability of "reasonably certain" future economic loss

Restatement of Employment Law: Highlights (10-B)

- Part B: Claims Against Employees
  - § 9.07: Contract Liability
    - "Concept of "actionable obligation"
    - No presumptive availability of lost profits relief
  - § 9.09(a)-(b): Tort Liability: Economic Loss, Noneconomic Loss, Punitive Damages, and Nominal Damages
    - § 9.09(c): Forfeiture Remedy for Breach of Fiduciary Duty Limited to Situations Where (1) Apportionment is Not Feasible and (2) Nature of Employee Disloyalty Renders Impracticable A Reasonable Calculation of Loss to the Employer Due to Employee's Disloyal Services
    - § 9.09(d): Disgorgement Remedy

Value of Restatement Process

- For the academics
  - "Tethered" academics at work
  - Multiple "vetting" mechanisms
  - Influencing actors in the real world
- For the judges
  - Open issues: guidance from other jurisdictions
  - Avoiding undue extension of precedent in the jurisdiction for want of authority
  - Will induce greater care in formulation (e.g., when are employees fiduciaries
- For the practitioners
  - New approaches
  - Basis for pushing courts to narrow/extent prrcd
- For the system
  - Greater clarity
  - Greater possibility of uniformity
  - Identification of issues for legislative reform

#NELA16
National Employment Lawyers Association
2016 Annual Convention
June 22-25, 2016
Westin Bonaventure Hotel & Suites, Los Angeles, California

Panel Presentation

Using The Restatement Of Employment Law To Your Client's Advantage

Joseph D. Garrison
Garrison, Levin-Epstein, Fitzgerald & Pirrotti, PC
405 Orange Street
New Haven, CT 06511
T: 203-777-4425
F: 203-776-3965
jgarrison@garrisonlaw.com

The New Restatement of Employment Law: An Analytical Synopsis

The American Law Institute has published the Restatement of Employment Law. It 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; 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.

What follows are some highlights:

Contract Formation

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). This 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).

The Definition of "Cause"

If the contract is for a definite term, cause 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. (§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 Restatement reflects 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.

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 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 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 actions taken 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 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 oligations under law or public policy?

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).

"Protected activities" are expansive, and include these sorts of reasonable and good faith actions taken by an employee:

- 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 are also expansive (§5.03). The sources of public policy 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?

Consider also the "inquiring about" protection, and the "other activity" protection. Is 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, so complains in good faith, is that report protected?

Employer's Negligent Provision of False Information to Employees

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.

Some 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, given this present disorder.

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).

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).

Privacy

The good news is that there remains such a thing as privacy. The bad news is that this Restatement may not do enough to maintain its presence in the workplace.

Claims for invasion of privacy require a reasonable expectation of privacy. In the workplace, an expectation of privacy may be reasonable if a location is customarily private, or if the employee has made reasonable efforts to keep a location private. Personal information that an employee has reasonably tried to keep private is protected, but not 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 Duty of Loyalty

To date, there has been minimal law defining the duty of loyalty in the employment setting. This 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).

Employees with a 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 and under employment and other law, as well as with any privilege provided by law to cooperate with regulatory authorities." (§8.01, Comment d).

Restrictive Covenants

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 allow more defenses to non-compete provisions. Many non-compete obligations, for example, are imposed for the first time as a condition to receipt of 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, or (4) purchase of the business owned by the employee. (§8.07).

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, this Restatement does not endorse a per se "forfeiture-for-disloyalty" approach, and reviews 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

This Restatement, like others, may well consolidate or reshape 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.

*The author is a member of the American Law Institute and served on the Members Consultative Group for the Restatement of the Law, Employment Law. He was also the National Employment Lawyers Association liaison to ALI, for this Restatement.