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A Consumer Warning for the Restatement of Employment Law: READ CAREFULLY BEFORE APPLYING

*Matthew W. Finkin**

On May 19, 2009, the membership of the American Law Institute (ALI) voted to approve the *Restatement of the Law (Third) of Employment Law*,¹ Chapters one, two, and four, subject to the approval of remaining Chapters not yet drafted, rejecting a motion to defer for further study. About two weeks before the vote, the ALI administration distributed an informational circular to its members that included the following terse announcement: “A group of academics called the Labor Law Group has generated an extensive set of comments on the Employment Law draft and has requested we inform members that those comments are available at <http://www.law.tulane.edu/LaborLawGroupALIDocs.aspx>.”

This dry notice barely hints at the depth of the underlying controversy or of what is at stake in it.

The “group of academics” referred to, about thirty in number, are all specialists in labor and employment law. They form the membership of an organization founded more than fifty years ago, at the urging of then professor (later Secretary of Labor) Willard Wirtz, to modernize the teaching of labor law and, today, of employment law as well. The Group’s members engage in collaborative efforts to produce casebooks and other teaching materials attuned to the latest economic, social, and legal developments. The Group thus mirrors the ALI as a self-selected, self-perpetuating educational body differing in one key regard: whereas the ALI from its founding eschewed any role in labor law—until, that is, it launched its Restatement project in 2003—labor and employment law is the sole focus of the Labor Law Group.

The Group’s critique of the *Restatement*, prepared by working committees assigned to each subsection of the then current draft of September 2008, was presented at a conference at the Hastings College of Law in January 2009. Each *Restatement* subsection and the respective working committee’s critique of it was taken up, analyzed and debated, and the critique redrafted as needed in light

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1. RESTATEMENT (THIRD) OF EMPLOYMENT LAW (draft of Apr. 3, 2009) [hereinafter RESTATEMENT (2009)].

of that discussion. Although the ALI's Reporters were invited to attend, none did. Instead, the Group's report was submitted to the ALI, and in its wake a few small changes were made by the Reporters in the final draft: some superseded or misstated cases were omitted, some neglected cases were mentioned, few stylistic changes were made; but, in all essentials the Group's critique was ignored, its request to broaden the ideological complexion in the cohort of Reporters was brushed aside, and the draft was adopted.

Whence this warning to the judiciary, the ultimate consumers of the ALI's product: *Read Carefully Before Applying*. This injunction is not directed to the *Restatement*. It needs no attention called to it as it surely will be cited by counsel, especially by counsel for employers, and attention having been drawn to it, it will surely be read by the courts. No, this consumer alert calls attention to the Group's critique, which the ALI chose in substance to ignore.² That document should be read, and read carefully before the courts choose to apply what the *Restatement* advises. It supplies a strong corrective—academically rigorous, painstakingly researched, and powerfully argued—that should give pause before the courts uncritically assume that the ALI's good housekeeping seal of approval means that the *Restatement* will be good for the health of society.

All the many points of specific criticism made by each of the working parties need not be rehearsed here. Professor Kenneth Dau-Schmidt's introductory to the Group's report does a splendid job of that. But out of the welter of detail (and the devil *is* in the details) a single, dominant theme will emerge in stark relief: at almost every critical juncture, where the courts are divided or where there is room for the law to grow, the Reporters opt for the approach more solicitous of employer interests or less open to legal development; they do this with a high degree of indifference to either doctrinal faithfulness or consistency with existing *Restatements*; and, critically, they decline at every point to engage with the published criticism, perhaps on the esoteric assumption that if they do not acknowledge the *Restatement's* tendentiousness no one will notice it.

I will single out just three subsections to illustrate the point. I have chosen these out of so many others not due to any special salience but simply because I had worked through two of them in contemplating yet an earlier draft³ and worked on the third as a

2. The Group's product has been published at 13 EMP. RTS. & EMP. POL'Y J. 1-207 (2009) [hereinafter *Group Report*].

3. Matthew Finkin, *Shoring Up the Citadel (At-Will Employment)*, 24 HOFSTRA LAB. & EMP. L. J. 1 (2006).

member of the Group's working party; that is, simply because I am more familiar with that terrain to craft this warning notice in the immediate wake of the ALI's vote.

I. TENDENTIOUS AND UNRESPONSIVE: THREE ILLUSTRATIONS

A. *Revocation of Policies Assuring Job Security*

The prior draft of the *Restatement* held that the promulgation of an employer policy that expressly assured employees of job security provided a legitimate basis to require an employer to observe those terms. As this is in keeping with the result in most jurisdictions the Reporters could scarcely do less. But the legal basis they gave for that result was unusual. The Reporters' comments to the September 2008 draft observed first that "some courts"⁴ have applied implied contract theory while others have applied promissory estoppel to bind employers by their policies. The Reporters found neither persuasive and opted instead for "administrative estoppel," a doctrine borrowed from federal administrative law. The Reporters' Comment explained:

Such [policy] 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.⁵

On behalf of the Labor Law Group, Professor Steven Befort, noting that a clear majority of courts (not "some courts") had applied implied contract to reach that result, commented on the draft's alternative theory thusly:

The analogy to administrative agency estoppel may be subject to at least two criticisms in the context of employer policy statements. First, no jurisdiction has adopted administrative agency estoppel as the underlying rationale

4. RESTATEMENT (THIRD) OF EMPLOYMENT LAW at 84 (Tentative Draft No. 2) (Sept. 24, 2008) [hereinafter *2008 Draft*].

5. *Id.* at 85 (emphasis added).

for enforcing employer policy statements. As such, the draft *Restatement* here again proposes to change rather than to restate or clarify existing law.

Second, it is not clear that the rules governing administrative agency procedure are comparable in nature to the rules governing the substance of the employment relationship. While a procedural rule in an agency context serves to provide guidance on the process of how an agency intends to determine substantive rights going into the future, a promissory statement made in the context of an ongoing employment relationship itself directly establishes the substantive rules governing that relationship. In some employment contexts, such as in the realm of procedural due process rights afforded by the Constitution to public employees, an employer's unilaterally promulgated rules and even practices have been found to be binding and not subject to unilateral alteration.⁶

In other words, the analogy will not hold up. A public agency that promulgates a rule assuring its employees that they will not be dismissed except for just cause cannot unilaterally revoke that rule and then treat those employees who had been governed by it as at-will employees: the rule creates a property interest in the job that may not be abrogated unilaterally.⁷

How does the final draft respond to this? It does not. The text remains unchanged; the criticism passes unnoticed.

There is no doubt that the Reporters *want* employers to have the ability unilaterally to revoke commitments to job security that they no longer find expedient to observe. And though that is the result realized in a majority of jurisdictions, the reasoning in these cases is rather difficult to square with either implied contract or promissory estoppel; whence the contrary result reached by those courts that have disallowed unilateral abrogation.

Professor Befort points out that the courts in those several jurisdictions have required assent and consideration in order to abrogate an employee's job security guaranteed by prior policy. *This* the Reporters did consider worthy of response, by expanding their Comment to claim there to be a lack of clarity in some of those cases. They go on then to reiterate the language of the prior

6. *Group Report, supra* note 2, at 132.

7. *E.g., Saxe v. Bd. of Trustees of Metro. State Coll. of Denver*, 179 P.3d 67 (Colo. Ct. App. 2007) (court remanded for a determination of whether certain incidents of job security afforded under the agency's prior rule had vested, *e.g.*, priority of retention in staff reduction, there being no dispute that the entitlement to job security itself could not be abrogated unilaterally).

draft: “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 . . .*”⁸ The “therefore” is misleading for no reasoning precedes it: it announces the Reporters’ rejection as a fact, without explanation. What about the rest?

“*Seemingly*” require employee agreement? This is what the Illinois Supreme Court said in the case the Reporters cite:

[A]fter an employer is contractually bound to the provisions of an employee handbook, unilateral modification of its terms by the employer to an employee’s disadvantage fails for lack of consideration. This was the view adopted by the appellate court below, and a number of other courts have also relied on this reasoning in rejecting efforts by employers to unilaterally modify handbook terms or other personnel policies to the disadvantage of existing employees and in the absence of a reservation of the right to do so. *Applying well-established principles of contract law, these courts have held that modifications to terms and provisions of employee handbooks cannot apply to existing employees in the absence of consideration.* Moreover, these cases have held that the requisite consideration for a modification that would operate to an employee’s disadvantage is not supplied simply by the employee’s continued work for the employer. That is to say, in addition to an offer and acceptance, consideration must be found elsewhere, whether in the form of a new benefit to the employee or a new detriment to the employer, or as the product of mutual agreement.⁹

“*Irrespective*” of whether job security had vested or accrued? That assertion makes sense only if the Reporters’ *ipse dixit*—that a commitment to job security does not vest or accrue—is sound. But as that say-so rests on nothing other than that they say so, that pronouncement, too, passes undefended, as if it were a self-evident truth. In Illinois and like jurisdictions it is not. To these courts, as a contractual commitment to job security is, by definition, a contractual commitment, it cannot be terminated unilaterally and there is nothing “seeming” or “irrespective” about it.

8. RESTATEMENT (2009), *supra* note 1, at 98 (emphasis added) (citing *Doyle v. Holy Cross Hosp.*, 708 N.E.2d 1140, 1144–46 (Ill. 1999).

9. *Doyle*, 708 N.E.2d at 1145 (emphasis added).

Were the *Restatement* to opt for one or the other of the accepted doctrines, unilateral contract or promissory estoppel, the Reporters would have had to engage with the societal implications of allowing unilateral abrogation, foreshadowed by the doctrinal obstacles to it, *i.e.*, the want of consideration under unilateral contract or detrimental reliance under promissory estoppel. This is how the Reporters' Comment in the prior draft grounded the result:

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.¹⁰

This is as close as the Reporters came to defending their choice: that as the employer is the master of its policies, and as it promulgates its policies to advance its economic interests, it is free to abandon them when it no longer sees the benefit to be gained, when it no longer believes that its interests are being served. In other words, if an employer believes that it will no longer gain productivity by assuring its employees the job security it previously had assured them, so be it for the employees. But, insofar as we are talking about "general estoppel principles," the very foundation they lay for their approach, would not the *employees'* reliance interest have to be factored in, *somewhere*? The final draft declines to address this point. The rationale is retained. No mention is made of the employees' interests nor, for that matter, of the rule in the *Restatement (Second) of Contracts* requiring contracts to be construed against the interests of the drafting (presumably the dominant) party.¹¹

In other words, the Reporters borrow a legal theory appearing nowhere in the law of employment and then misapply it for a

10. 2008 Draft, *supra* note 4, at 85 (emphasis added).

11. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981). Presumably, though by their silence it is hard to tell, the Reporters find the *Restatement (Second) of Contracts* to be inapposite because they stand on an analogy to administrative law, not on contract law, an adroit arabesque which avoids the inconvenience of § 206, though not the policy supporting it.

tendentious purpose without explaining why that is the socially preferable result. As employers can avoid the problem altogether by declining to give assurances of job security, this subsection may have rather limited practical impact going forward. But the Reporters' treatment is instructive nonetheless for it displays both the thrust of the project and its methodology.

B. Discharge in Violation of Public Policy

The working committee's report on this chapter is extensive and detailed. Focusing for the moment only on the effort to define when public policy is violated, by setting out clusters of cases, the working committee's members, Professors Richard Bales and Roberto Corrada, observe that even as the text "captures the nature of activities" protected, a substantial group of activities are missing. This dovetails with the working committee's overall conclusion that:

Although some value exists in merely stating the consensus respecting these rules, the mission of the ALI extends beyond that, to better adapt the law to social needs and secure the better administration of justice. Our principal problem with the current *Restatement* draft is that it does not adequately recognize the dynamic nature of this area of law and uses language which some lawyers and judges (assuming the proposed *Restatement* has some impact) may interpret to foreclose further development.¹²

Let us see how this plays out in just one small corner of the codification of case clusters. The *Restatement* would extend protection to an employee discharged for claiming a benefit or filing a charge under an *employment* law. The Reporters' Comment to the prior draft made clear that the purpose of the tort is to blunt "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."¹³ That protection extends no further. As a result, employers *would* be allowed to discharge employees for claiming benefits or exercising rights vis-à-vis their employers that are *not* grounded in employment. May an insurance company discharge an employee who is also a policy holder because she is considering suing it for an entitlement she believes is due her under her policy? An Ohio court held that that discharge

12. *Group Report*, *supra* note 2, at 159.

13. *2008 Draft*, *supra* note 4, at 136 (emphasis added).

would violate public policy.¹⁴ May a bank discharge employees who refuse to vote their stock in the bank as management orders them to? The Supreme Court of Virginia held that that discharge violated public policy.¹⁵ As none of these employees claimed or exercised an employment-based right, to the ALI their discharges would not be actionable. Consequently, the Labor Law Group's working committee urged an amendment making it clear that "public policy is broad enough to protect employees [from retaliation by their employer for] seeking benefits outside of the employment relationship."¹⁶ In response, no change was made in the text nor did the Reporters choose to come to grips with the criticism—to explain why they think the Ohio and Virginia courts had erred, why the use of economic pressure to deprive employees of rights or benefits would be actionable in the one situation but not in the other.

In one of the few passages recognizing the capacity of the law to grow, this section of the *Restatement* does close out with an open-ended category allowing for the creation of torts not set out in any of its preceding case clusters. But, because the Reporters foreclose a cause of action for retaliation where a non-employment based right is asserted against the employer, that avenue for the growth of law is foreclosed, without explanation or defense.

In any event, all may not be lost for the hapless insurance clerk and bank teller. As their employers have so obviously overreached, so obviously acted unfairly and unreasonably, these employees surely would be protected by the implied covenant of good faith and fair dealing as set out in the *Restatement (Second) of Contracts*, would they not?¹⁷ The answer the Reporters give is "no."

C. *The Covenant of Good Faith and Fair Dealing*

The prior draft asserted that the covenant does apply to at-will employment, but that it nevertheless must be read as "consistent" with the at-will rule. It then set out two and only two case categories where the covenant would apply: a discharge to avoid the vesting of a right or benefit and a discharge for doing an act authorized by the employer. Note that as the ground of discharge of our employee-insured and our employee-stockholder fall under

14. *Moskowitz v. Progressive Ins. Co.*, 811 N.E.2d 174 (Ohio Misc. 2d 2004).

15. *Bowman v. State Bank of Keysville*, 331 S.E.2d 797 (Va. 1985).

16. *Group Report*, *supra* note 2, at 187.

17. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

neither of these heads, they could not claim a breach of good faith or fair dealing.

The critique of this section concluded that many of the defects described by the Labor Law Group's working committee as characteristic of the entire *Restatement* were particularly evident here: "[T]he want of depth in scholarship; the lack of conceptual coherence; the absence of analysis, of any reasoned explanations for the choices it makes; and the blunting effect of the blackletter rules it proposes on the potential for the growth of law."¹⁸

In response, the Reporters did address the thinness of scholarship by mentioning seven additional cases, including one from Alaska, a jurisdiction that has taken a broad approach to the application of the covenant but whose law had been omitted in the prior draft. The Reporters also added the words "if not earlier" to the statement that the seeds of the covenant were planted in a famous New York decision of 1917—this in response to the critic's pointing to the roots of the doctrine in Roman, medieval, and modern German law,¹⁹ which deeper roots, however, continue to remain unmentioned. So the want of "depth of scholarship" was disposed of by adding three words and a handful of case citations.

As for coherence, the Reporters maintain that the covenant must be "consistent" with the at-will rule. But the at-will rule, as they set it out in an earlier provision, is merely a default rule or a presumption governing duration of employment. In that earlier part, the Reporters do not maintain that employers must be free to discharge for any reason, let alone a morally squalid, unfair, or indecent reason not otherwise violative of law. That notion is insinuated here. Consequently, the two blackletter rules the Reporters set out—that employers must observe a duty of fair dealing which must be applied consistent with the employer's power to discharge unfairly—simply cannot be reconciled.

As the Group's working committee's critique pointed out, the two categories the *Restatement* sets out as being "consistent" with the at-will rule are consistent by virtue of these obligations being tacit contractual limits on the power to discharge, *i.e.*, by promising the benefit or authorizing the act the employer will have tacitly promised, "I will not fire you to avoid paying the benefit or for doing the act." This contractual consequence does not require *any* notion of good faith or fair dealing to be implied.

Good faith and fair dealing comes into play, according to the *Restatement (Second) of Contracts* § 205, when the contracting party acts indecently or unreasonably as gauged by community

18. *Group Report*, *supra* note 2, at 133.

19. *See infra* note 21.

standards. This was not accepted by the Reporters in the prior draft. They noted that some jurisdictions had applied the covenant to discharges grounded in fraud or deceit, but they rejected that application. The final draft also notes those cases, but now it adds to that reference the statement, “these courts, too, interpret the covenant consistently with the at-will rule.”²⁰ The final draft then omits the prior Comment’s observation that it “disagrees with” the broader implication to that effect in an early New Hampshire decision, which case reference remains but now barren of comment. That is where the Reporters’ commentary leaves it, and I leave it to the reader to figure out what these editorial changes mean.

But the blackletter rules continue just as before. Unlike the treatment of public policy, which includes a final category that acknowledges at least that other categories of protection might yet emerge, such an open-ended invitation to the growth of the law is notable here by its absence.

As a discharge of an at-will employee based upon fabricated evidence, or the discharge of one employee for the very same conduct that is condoned when engaged in by a second employee, falls into neither of the two prohibitions the draft sets out, these discharges could not be in breach of good faith or fair dealing as the Reporters see it. The former would be actionable in Delaware, as the prior draft noted, but now the draft notes that that application *to that court* is “consistent” with the at-will rule.²¹ The Reporters decline to say that a duplicitous discharge would be in breach of the covenant as *they* see it, and were it to be so the blackletter rule would say so, which it does not. The latter, an application of the principle of industrial justice that like discharge cases must be treated alike, would be actionable in Alaska, for breach of good faith and fair dealing. The Reporters now note that that is so as well, but here without any further comment, that is, without even suggesting that that, too, would be “consistent” with the at-will rule in the eyes of Alaska’s courts.

All this in the name of the *Restatement’s* declared purpose: to clarify and simplify as well as modernize the law. But there is nothing clear or simple in the Reporters’ commentary. And the rules they lay down are scarcely modern as measured by the ALI’s own *Restatement of Contracts*.²²

20. RESTATEMENT (2009), *supra* note 1, at 104.

21. *Id.* (emphasis added).

22. Neither do the Reporters care to take note of the increasing judicial use of the covenant in other countries in the common law orbit—the United Kingdom, Australia, or Israel—adverted to by the working committee. This is in

II. THE HUMAN DIMENSION

It remains still to be seen whether employment law, more particularly only that corner composed of the common law, is fit for “restatement.” The volatility and disputatiousness of the subject alone argues that it is not, as several members of the Labor Law Group’s working party concluded. But if it is fit to be restated, how is it that after five years of drafting and review within the ALI so flawed a product could emerge and, when faced with serious and sobering criticism, be rushed to adoption? How could the ALI believe that no possible benefit could be derived from a thoughtful engagement with the collective judgment of a body that surely cannot be regarded as lacking in competence, experience, or judiciousness?²³ This touches upon a sensitive matter captured in the Labor Law Group’s appeal to the ALI:

Although the reporters that the ALI currently has working on the project are all talented academics, we feel that they are unduly dominated by the employer perspective. The Chief Reporter, Sam Estreicher, is a talented academic whose work is strongly identified with employer interests and who works “of counsel” for a management firm. Andy Morriss is also very talented, and perhaps the strongest supporter of the “at will” doctrine in the academy. Either because of perspective, experience or time commitments, there is no current reporter who can act as an effective counter-balance to these perspectives. Consistent with common practice in labor and employment law, we feel that at least two new reporters should be appointed, one

keeping with the Restatement’s tacit rejection to resort to international law as a source of public policy in the employment relationship, another point made by the Group with which the Reporters decline to engage. But the absence of foreign reference is especially surprising here for, as the working committee pointed out, the covenant of good faith and fair dealing was taken into the law in the United States by borrowing from German law *via* the Uniform Commercial Code.

23. The members of the Labor Law Group’s working committee included Theodore St. Antoine, former dean of the University of Michigan Law School and the moving force behind the Model Employment Termination Act project of the Commissioners for Uniform State Law; Joseph Grodin of the Hastings College of Law and former Associate Justice of the California Supreme Court; and Dennis Nolan of the University of South Carolina Law School and former President of the National Academy of Arbitrators. Of the thirteen other participants, at least eight are co-authors of one or more casebooks, treatises, and related teaching materials; they have extensive profiles of scholarly publication, professional experience, and public service.

with work identified with employee interests and one clearly neutral, who are of equal authority with any of the reporters currently on the project. Such a balancing of perspective would undoubtedly improve the Proposed Restatement and its claim on being a consensus view of the law. We also feel that the reporters should be given time to rework their drafts to take account of the views of the new reporters and the comments of our Working Committees before they receive final approval by the American Law Institute.²⁴

The call was rejected—without explanation or defense. Whence the admonition: **READ CAREFULLY THE CRITIQUE BEFORE APPLYING THE RESTATEMENT.**

24. Report from Kenneth Dau-Schmidt, President, Labor Law Group to the Labor Law Group, May 7, 2009 (on file with author). The Restatement's Chief Reporter, Professor Samuel Estreicher, is also the Director of the Center for Labor and Employment Law at the New York University Law School. Of the four other Reporters, one is the co-author of a casebook with Professor Estreicher and two others are affiliated with his Center. In a fair moment one might be tempted to term the ALI's project "Sam's Club."