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Employment as Fiduciary Relationship

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EMPLOYMENT AS FIDUCIARY RELATIONSHIP

Matthew T. Bodie*

ABSTRACT

Under traditional agency law doctrine, employees are agents of their employers and owe an agent's concomitant fiduciary duties. Employers, in turn, are merely principals and have no corresponding fiduciary duties. A new wave of thinking has unsettled this approach by concluding that only high-level employees have fiduciary responsibilities to their employers. Taking this controversy as a starting point, this Article reconceives the employment relationship as a mutual fiduciary relationship in which both employers and employees are fiduciaries of one another. Even though current law does not consider employers to be fiduciaries of their employees, employers have long had significant statutory and common-law responsibilities toward their employees that reflect a fiduciary character. Looking to these responsibilities as well as research on the theory of the firm, the Article argues that employers are fiduciaries and must refrain from opportunism, especially when employees have no voice in governance. However, in an organizational setting where employees do participate in governing the firm, it would be appropriate to recalibrate the reciprocal fiduciary duties to require a balanced set of obligations between all parties.

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INTRODUCTION

Are employees fiduciaries of their employers? The question seems largely settled. The hoary “master-servant” doctrine holds that employees are agents of their employers and owe traditional fiduciary duties.¹

¹ RESTATEMENT (SECOND) OF AGENCY § 2 (1958); RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006).

However, this blanket coverage of all employees has increasingly disturbed labor and employment law academics, who have pointed out that the fiduciary duties within the relationship seem fairly one-sided.² Indeed, it seems jarring to juxtapose an agent's selfless duties of loyalty and performance with an employer's minimal obligations under employment at-will.³ After all, fiduciary duties are traditionally called into being to protect the vulnerable against depredations from those with power over them. The resulting critique has left the existence as well as the strength of employee fiduciary duties open to question. The recent Restatement of Employment Law only applies the traditional fiduciary duty of loyalty to employees "in a position of trust and confidence."⁴ Other employees have only a limited duty of loyalty with respect to trade secrets or a contractual duty of loyalty.⁵ As the Restatement commentary describes: "As a general matter, the duty of loyalty stated in this Section has little practical application to the employer's 'rank-and-file' employees . . ."⁶

The debate over employee fiduciary duties is just the tip of a larger set of unresolved issues that make up the complicated fiduciary relationship between employees and employers. In a similar way, the

² See Ken Matheny & Marion Crain, *Disloyal Workers and "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1726 (2004) ("Such duties are unidirectional: workers are required to be loyal to their employers, but employers owe no reciprocal duty of loyalty.").

³ See, e.g., Catherine Fisk & Adam Barry, *Contingent Loyalty and Restricted Exit: Commentary on the Restatement of Employment Law*, 16 EMP. RTS. & EMP. POL'Y J. 413, 419 (2012) ("The employer owes no duty of loyalty to the employee and is free to pursue its self-interest by firing him to hire another for a lower wage or for better skills. Yet the employee's ability to pursue her own self-interest by seeking better opportunities is limited."); Michael Selmi, *The Restatement's Supersized Duty of Loyalty Provision*, 16 EMP. RTS. & EMP. POL'Y J. 395, 402-03 (2012) (noting that "some, though not many, courts to hold that at-will employees owe no duty [of loyalty] to their employer, while many other courts impose only a limited duty of loyalty on at-will employees, for to do otherwise would go beyond what the parties presumably bargained for").

⁴ RESTATEMENT OF EMPLOYMENT LAW § 8.01(a) (2015).

⁵ *Id.* ("Other employees who come into possession of the employer's trade secrets owe a limited fiduciary duty of loyalty with regard to those trade secrets. In addition, employees may, depending on the nature of the employment position, owe an implied contractual duty of loyalty to the employer in matters related to their employment.").

⁶ *Id.* § 8.01 cmt. a.

traditional “master-servant” doctrine⁷ provides an obsolete and facile legal label for a much richer and entangled set of legal relations. The legal obligations between employer and employee do not, in fact, run all one way; the employees’ duty of loyalty is but one facet of a multi-faceted set of obligations and responsibilities. Recognized in the context of this more nuanced relationship, employee fiduciary duties become less threatening and more understandable. But they do not stand alone. The employer itself has myriad fiduciary and quasi-fiduciary responsibilities to employees that have not been recognized as such or have not been given their appropriate weight. Employees and employers have multiple and interwoven fiduciary responsibilities to each other and amongst themselves that structure the employment relationship. As a result, it is appropriate to say that employers are fiduciaries, too.

This Article will explore the complexities of the fiduciary relationship between employees and employers. It will support the traditional approach that employees owe fiduciary duties to their employers. However, it will also argue that employers owe fiduciary or quasi-fiduciary duties—some through fiduciary common law, many through statute—to their employees. We have seen the progression of these responsibilities grow over time: minimum wages, overtime, pension benefits, time for parental and medical leave, and most recently health insurance mandates. Although these duties are often categorized as regulatory,⁸ they are in fact better characterized as organizational and relational duties: duties that derive from the employer-employee relationship itself. The relationship between an employer and its employees is best seen not as an adjunct of the principal-agent relationship, but rather as a new and more appropriate organizational designation.

⁷ RESTATEMENT (SECOND) OF AGENCY § 2 (1958) (referring to the employer as “master” and the employee as “servant”).

⁸ See, e.g., Cynthia Estlund, *Labor Law Reform Again? Reframing Labor Law as a Regulatory Project*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 383, 385 (2013) (arguing that labor law should be reframed “as part of the larger societal project of regulating work and working conditions”).

Critical to this new approach is the understanding that employees participate in the economic enterprise of the employer.⁹ They are not passive inputs, but rather part and parcel of the employer as an independent economic entity. Employment is a meaningful legal category because employees fall within the boundaries of the firm and are, in important ways, the firm itself. As such, they are responsible for and are the responsibility of the employer. The mutual relationship between the entity that acts as the legal employer and the employees that have been hired by that entity is what generates the duties between employer and employee—and thus, in an important way, between one employee and her fellow employees.

Part I of the Article explores the traditional fiduciary duties between employer and employee as set forth by the common law of agency and employment law. Part II examines the employment relationship from the perspective of the theory of the firm.

Part III sets forth the manifold common law and statutory duties that employers owe to employees, including what could be regarded as traditional fiduciary duties. Part IV discusses prior theories of employer fiduciary duties and introduces a new approach based on fiduciary theory and the theory of the firm. Finally, Part V looks at how the role of employees in the governance of the firm should shape the fiduciary duties that employers and employees owe.

I. EMPLOYEES AS AGENTS

Under the traditional common law, employees have been defined as a subspecies of agent whose actions were particularly aligned with the principal. The Restatement (Second) of Agency defines servants as “an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is

⁹ See Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 705 (2013) (discussing employment as participation).

subject to the right to control by the master.”¹⁰ The so-called “control” test is the dominant standard for employment, both nationally and internationally. The basics of the control test are straightforward. A servant is one who is “under the duty of rendering personal services to the master or to others on behalf of the master.”¹¹ In addition, the master must have the “right to control the servant’s work,” which means “being entitled to tell the servant when to work (within the hours of service) and when not to work, and what work to do and how to do it.”¹² This right of control is what separates master-servant from the principal-agent.

To a great extent, this traditional definition still holds in the law. The Supreme Court has made the common-law “control” test into the default definition for “employee” whenever used without further explanation in a federal statute.¹³ The Fair Labor Standards Act and the Family and Medical Leave Act define “employ” as “suffer or permit to work,”¹⁴ and the Supreme Court has recognized that the FLSA definition may extend to cover workers beyond the reach of the common law agency test.¹⁵ Outside of these statutory contexts, however, the Supreme Court has made it clear that the “control” test is to apply as the default rule. That is not to say, of course, that the control test is easy or straightforward to apply. The Restatement (Second) of Agency provides a ten-factor balancing test for determining whether the potential master/employer is

¹⁰ RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958); *see also* RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006) (defining an employee as “an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work”).

¹¹ FRANCIS R. BATT, *THE LAW OF MASTER AND SERVANT* 6 (1929), *quoted in* Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 403-04(1937).

¹² Coase, *supra* note RC1, at 404.

¹³ *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (“In the past, when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”).

¹⁴ 29 U.S.C. § 203(g) (2012) (FLSA); 29 U.S.C. § 2611(3) (2012) (FMLA) (referencing FLSA definitions).

¹⁵ *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (noting that the FLSA “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles”).

exercising control.¹⁶ As the Restatement commentary acknowledges, this employment relationship is “one not capable of exact definition.”¹⁷

Because agency law has taken the lead in defining the legal meaning of “employee,” and because agency law has always treated employees as a subcategory of agent,¹⁸ employees have been naturally assumed to be agents. As agents, employees have traditionally owed the same fiduciary duties that agents owe to their principals.¹⁹ These duties can be roughly categorized into two types: duties of loyalty and duties of performance.²⁰ The duty of loyalty is perhaps the more prominent; it requires the agent to “act solely for the benefit of the principal in all matters connected with his agency.”²¹ Nested within this overall duty are the duties to not take business opportunities from the principal,²² to not deal with the principal on behalf of an adverse third party,²³ to not compete with the principal during the agency relationship,²⁴ to not use the principal’s property for the agent’s own purposes, and to not disclose the principal’s confidential information.²⁵ As to duties of performance, the agent has the duty to exercise reasonable care, competence, and

¹⁶ RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) (including such factors as “whether or not the one employed is engaged in a distinct occupation or business,” “the skill required in the particular occupation,” and “whether or not the work is a part of the regular business of the employer”).

¹⁷ *Id.* § 220 cmt. c.

¹⁸ *Id.* § 2 cmt. a (“A master is a species of principal, and a servant is a species of agent.”).

¹⁹ RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) (characterizing agency as a fiduciary relation); RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (same).

²⁰ *See id.* §§ 8.02-8.12. *See also* Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1049 (2007) (“Within common law agency, an agent owes the principal fiduciary duties of loyalty as well as duties of performance.”).

²¹ RESTATEMENT (SECOND) OF AGENCY § 387 (1958); *cf.* RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006) (stating that the agent has “a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship”). *See also* Benjamin Aaron, *Employees’ Duty of Loyalty: Introduction and Overview*, 20 COMP. LAB. L. & POL’Y J. 143, 144 (1999) (stating that the duty of loyalty in general “require[s] the employee [to] behave during the period of employment so as to enhance, rather than harm or hinder, the business interests of the employer”).

²² RESTATEMENT (THIRD) OF AGENCY § 8.02 (2006).

²³ *Id.* § 8.03.

²⁴ *Id.* § 8.04.

²⁵ *Id.* § 8.05.

diligence,²⁶ to follow instructions,²⁷ to act reasonably and refrain from damaging conduct,²⁸ to provide information,²⁹ and to segregate the principal's property.³⁰ In contrast, the principal only has limited duties to the agent. Outside of contractual duties,³¹ the principal has a limited duty to indemnify the agent³² as well as a duty to provide information regarding potential for physical harm or pecuniary loss.³³

As a matter of doctrine, it seems hard to argue with the agency account of employment. If an agent is one who acts on behalf of a principal and is subject to the principal's control, then employees are agents-plus, or mega-agents—a special category of agents that are particularly tied to the principal. While many agency relationships are temporary and task-oriented, employment is seen as a wider-ranging and longer-lasting version wherein the employee is given greater discretion to act on behalf of the principal.³⁴ Moreover, the employee shares the characteristics of the agent that have called forth a specific body of agency law—namely, that the agent is given particularized power to act on behalf of the principal.³⁵ Because the agent has discretion to act on behalf of the principal, the principal is vulnerable to the agent's use of this power.³⁶ Similarly, employees acting on behalf of the interests of another entity

²⁶ *Id.* § 8.08.

²⁷ *Id.* § 8.09.

²⁸ *Id.* § 8.10.

²⁹ *Id.* § 8.11.

³⁰ *Id.* § 8.12.

³¹ *See id.* § 8.13.

³² *Id.* § 8.14.

³³ *Id.* § 8.15. The Restatement (Third) frames this duty as part of the overall duty of good faith and fair dealing.

³⁴ RESTATEMENT (SECOND) OF AGENCY § 2 (1958) (“The word ‘servant’ is used in contrast with ‘independent contractor’. The latter term includes all persons who contract to do something for another but who are not servants in doing the work undertaken.”).

³⁵ RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006) (“As defined by the common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person.”).

³⁶ *Id.* (“The common-law definition requires that an agent hold power, a concept that encompasses authority but is broader in scope and connotation.”).

(the employer) are agents and should be bound by the same set of fiduciary duties, including the duty of loyalty.

Two sets of critiques could be leveled against this status-based approach to employee-as-agent: one related to agency more generally, and one related to employment specifically. First, there is a generalized critique of fiduciary law that is based on the status of the parties at issue. Because of the immense variability within recognized categories of fiduciaries, many academics have argued that status-based fiduciary relationships are inherently suspect.³⁷ To provide one prominent example, Paul Finn contended that “it is meaningless to talk of fiduciary relationships as such. Once one looks at the rules and principles which actually have been evolved, it quickly becomes apparent that it is pointless to describe a person . . . as being a fiduciary.”³⁸ Given the wide variety of agency relationships, it could be argued that agents are too diffuse and variegated a category to ascribe as fiduciary in nature *per se*. However, there is a “general consensus” that agency is presumptively fiduciary in nature, based on the authority and discretion that the agent has to act on behalf of the principal and bind the principal.³⁹ The very definition of agent is one who acts on behalf of another.

The second, more specific critique of the employment-agency paradigm calls into question the application of the agent’s traditional fiduciary duties to the employment relationship. An agent’s fiduciary duties, although somewhat vaguely defined, are fairly extensive. In particular, agents have the duty of loyalty to the principal—the duty to “act solely for the benefit of the principal in all matters connected with his agency.”⁴⁰ This self-abnegation is a critical aspect of the agency

³⁷ Paul B. Miller, *The Fiduciary Relationship*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 63, 65 (Andrew S. Gold & Paul B. Miller eds., 2014). (“The dominant academic view is that the fiduciary relationship is indefinable. . . . Judges treat the fiduciary relationship as conceptually central to fiduciary liability; leading academics deny the coherence of the concept.”).

³⁸ PAUL D. FINN, FIDUCIARY OBLIGATIONS 1 (1977).

³⁹ Miller, *supra* note PMFR, at 79.

⁴⁰ RESTATEMENT (SECOND) OF AGENCY § 387 (1958). See also Aaron, *supra* note BA1, at 144 (stating that the duty of loyalty in general “require[s] the employee [to] behave during the period of employment so as to enhance, rather than harm or hinder, the business interests of the employer”).

relationship, as it balances out the agent's power to step into the shoes of the principal and act on the principal's behalf. But many scholars have criticized the duty as unfairly one-sided in the employment context. The at-will presumption allows employers to fire employees (and employees to quit) at any time and for a variety of reasons having nothing to do with performance.⁴¹ In comparison, under fiduciary law only one of the two parties must be "loyal" to the other; the employer has no fiduciary duties with respect to the employee. The duty of loyalty seems particularly onerous when framed in terms of the "faithless servant." According to this doctrine, an employee who violates the duty of loyalty must disgorge the entirety of her wages for the period of disloyalty.⁴² These doctrines work to disempower the employee.⁴³ The employee can be let go at any time and for a variety of reasons, but the employee must always act in the interest of the employer.⁴⁴ Although at-will employment and the employee's duty of

⁴¹ See Selmi, *supra* note MS1, at 397 ("The beauty of the employment at-will relationship, it is often said, is its reciprocity: neither employees nor employers are bound to continue the relationship.").

⁴² Charles A. Sullivan, *Mastering the Faithless Servant?: Reconciling Employment Law, Contract Law, and Fiduciary Duty*, 2011 WIS. L. REV. 777 ("The quaintly named 'faithless servant' doctrine requires employees subject to it not merely to pay damages for their derelictions, but also to disgorge the compensation paid during the period of faithlessness without any right to recover in quantum meruit for the value the employee may have provided during that time.").

⁴³ In addition, the origins of "master-servant" doctrine came at a time when employer obligations were generally to a term of employment, rather than at-will. See Matthew W. Finkin, *An Employee's Right Not to Obey Orders in the United States*, 31 COMP. LAB. L. & POL'Y J. 497, 497 (2010) ("Under the common law of master and servant that governed the employment relationship in the United States from the Federal period until the last quarter of the nineteenth century, non-casual labor was commonly contracted for a fixed duration or was held to be for a fixed term as determined by the usage of the trade or, later, by the periodicity of payment."). The employer thus had duties to the employee regarding grounds for termination and even the scope of the employee's duties to obey the employer. *Id.* ("An employee discharged for refusal to obey what he believed to be an unlawful or unreasonable order could sue for breach of contract, it being a question for a jury whether the order disobeyed was lawful and reasonable, although the standard of unreasonableness sufficient to justify disobedience was rather high . . .").

⁴⁴ Fisk & Barry, *supra* note F&B1, at 418-19 ("The employer owes no duty of loyalty to the employee and is free to pursue its self-interest by firing him to hire another for a lower wage or for better skills. Yet the employee's ability to pursue her own self-interest by

loyalty are not necessarily contradictory, they point up a larger problem of employee vulnerability. If fiduciary law is meant to protect the vulnerable, as is often stated, then why does it protect employers and not employees? Even if an employee might hold discretionary legal power in her hands, is there any doubt about who holds the real power in the relationship?

Broadly speaking, there are three potential approaches to these concerns about employee fiduciary duties. The first approach would be to argue for the creation/recognition of greater fiduciary and quasi-fiduciary responsibilities from employers to employees in order to balance out the disparity. As will be discussed below, the United States has actually followed this approach much more extensively than commentators have appreciated.⁴⁵ However, employer duties have been imposed almost entirely by statute; as a matter of fiduciary law, courts have not made employers into fiduciaries and for the most part have not imposed significant common law fiduciary duties on them. A second approach would be to remove employees from the category of “agents” with respect to agency law. From a doctrinal perspective, that approach seems unsustainable: employees by definition act on behalf of their employers and are subject to the employer’s right to control their work as employees.⁴⁶ However, some commentators have argued that rank-and-file employees do not genuinely have the power and discretion generally attributed to agents, and that such low-level workers should not be

seeking better opportunities is limited. The employer can cast him or her onto the labor market whenever it is in the employer's interest to do so, yet the employee is burdened with an expansive duty of loyalty and can be contractually burdened with a non-compete agreement, making it hard for the employee to find alternate employment when he or she is back in the labor market.”).

⁴⁵ See Part III *infra*.

⁴⁶ RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. g (2006) (“As agents, all employees owe duties of loyalty to their employers. The specific implications vary with the position the employee occupies, the nature of the employer's assets to which the employee has access, and the degree of discretion that the employee's work requires. However ministerial or routinized a work assignment may be, no agent, whether or not an employee, is simply a pair of hands, legs, or eyes.”).

considered agents or fiduciaries.⁴⁷ A number of jurisdictions have found that employees are not subject to particular fiduciary duties, and at least some have based this reasoning on the absence of a fiduciary relationship.⁴⁸

The third and most traditional approach to the imbalance between employer and employee fiduciary duties is to acknowledge the existence of employee fiduciary duties but to modify, weaken, or diminish their content. The duty of loyalty, for example, has been held to apply only to employee competition with the employer while the employee is still working there.⁴⁹ The loyalty duty becomes essentially an implied covenant not to compete while one is still an employee. The contemporary version of the duty has been described as “well defined”: namely, that “employees can prepare to compete with their current employer, but they must not solicit business and, in some circumstances,

⁴⁷ Fisk & Barry, *supra* note F&B1, at 429 (“Not all employment relationships are fiduciary. Most low-level employment relationships are strictly contractual, in the sense that the employer has not put the employee in a position to affect its legal relations with third parties and need not trust the employee to exercise discretion on the employer’s behalf in order to get the benefit of the contractual relationship.”); Aline van Bever, *When is an Employee a Fiduciary?*, 18 CANADIAN LAB. & EMP. L.J. 39, 42 (2014) (arguing that “it is not the existence of an employment relationship as such, but the concrete circumstances of the particular relationship, that put an employee in a fiduciary position”).

⁴⁸ See Selmi, *supra* note MS1, at 397 (finding that “many, though not all, courts have seen fit to treat the employment relationship as a principal-agent relationship”); TalentBurst, Inc. v. Collabera, Inc., 567 F. Supp. 2d 261, 266 (D. Mass. 2008) (examining Massachusetts law to conclude that “the duty of loyalty does not extend to ‘rank-and-file’ employees under Massachusetts law, absent special circumstances indicating they held a position of ‘trust and confidence’”); Dalton v. Camp, 548 S.E.2d 704, 708 (N.C. 2001) (holding that the circumstances regarding the employment relationship in question were akin to “virtually all employer-employee relationships” and were therefore “inadequate to establish [the employee’s] obligations as fiduciary in nature”). For a critique of the Dalton decision, see Bret L. Grebe, *Fidelity at the Workplace: The Two-Faced Nature of the Duty of Loyalty under Dalton v. Camp*, 80 N.C. L. REV. 1815, 1815-16 (2002) (“Though relying on a traditional definition of the fiduciary relationship, the court applied that definition narrowly and in derogation to common law agency principles.”).

⁴⁹ RESTATEMENT OF EMPLOYMENT LAW § 8.04(a) (2015) (restricting competition by current employees); *id.* § 8.05 (allowing former employee to compete in the absence of a covenant not to compete or trade secrets).

employees prior to leaving their employment.”⁵⁰ The exact parameters are a source of contention, particularly with respect to the extent to which employees may work together to prepare for their exit.⁵¹ But such a “narrowly circumscribed” duty does not appear particularly objectionable to courts or particularly threatening to employee advocates.⁵² Moreover, it appears to fit well within existing agency doctrine, which recognizes that the duty of loyalty varies “with the position the employee occupies, the nature of the employer's assets to which the employee has access, and the degree of discretion that the employee's work requires.”⁵³

However, there has also been a trend toward the elimination of the duty of loyalty for the average, rank-and-file employee.⁵⁴ The new Restatement of Employment Law provides: “Employees in a position of trust and confidence with their employer owe a fiduciary duty of loyalty to the employer in matters related to their employment.”⁵⁵ Other employees

⁵⁰ Selmi, *supra* note MS1, at 397. See also *id.* (finding a “clear consensus that sees the duty serving a distinct but limited function relating to employees who leave for a competitor or to start a competing business”).

⁵¹ Many courts allow employees to plan their “escape” as long as they do not actively solicit clients for the new venture and do not use their time or the employer’s property in furtherance of the new venture. See, e.g., *Augat, Inc. v. Aegis, Inc.*, 565 N.E.2d 415, 419-20 (Mass. 1991) (“An at-will employee may properly plan to go into competition with his employer and may take active steps to do so while still employed. Such an employee has no general duty to disclose his plans to the employer, and generally he may secretly join other employees in the endeavor without violating any duty to his employer . . .”); *Illumination Station, Inc. v. Cook*, No. 07-3007, 2007 WL 1624458, at *4 (W.D. Ark. Nov. 20, 2007) (refusing to dismiss a breach-of-loyalty claim against a sales representative who, while employed, diverted customer orders to a rival company); *Bancroft-Whitney Co. v. Glen*, 411 P.2d 921, 939 (Cal. 1966) (en banc) (holding that a corporation’s president breached his fiduciary duty of loyalty by recruiting subordinates for a competitor prior to his departure); *Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1085 (9th Cir. 2003) (duty of loyalty violated when employee ran a competing pipe-repair business establishment while still employed by employer).

⁵² Selmi, *supra* note MS1, at 403.

⁵³ RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. g (2006).

⁵⁴ Leslie Larkin Cooney, *Employee Fiduciary Duties: One Size Does Not Fit All*, 79 MISS. L.J. 853, 853-54 (2010) (contending that “applying the same agency principles to all employees regardless of their level of power or ability to exercise discretion or affect the employer's interests generates an uncalled for advantage to the employer”).

⁵⁵ RESTATEMENT OF EMPLOYMENT LAW § 8.01(a) (2015).

may owe a “implied contractual duty of loyalty” based on the nature of their position, such as having access to certain accounts or critical information.⁵⁶ The agency relationship itself is insufficient, in the eyes of the Employment Law Restatement, to create a duty of loyalty *per se*.⁵⁷ Those employees with a “relationship of trust and confidence” are further defined as “(1) employees who exercise substantial discretion and are not subject to close supervision in carrying out their managerial, supervisory, professional, or similar highly skilled work responsibilities and (2) the employees who are entrusted with or come into possession of the employer's trade secrets.”⁵⁸ The commentary makes clear that “[e]mployees falling outside either category do not owe a fiduciary duty of loyalty to their employer but may nevertheless owe an implied contractual duty of loyalty”⁵⁹

Given the controversy over the duty of loyalty, it is perhaps not surprising that employees’ duties of performance have largely been ignored. The Restatement of Employment Law does not mention any such duties, and actions by employers against employees on performance grounds are largely nonexistent.⁶⁰ Although directors and officers owe their corporations a duty of care, these duties exist above and apart from

⁵⁶ *Id.* at cmt. b & illus. 3.

⁵⁷ *Id.* at cmt. b (“Courts often point to the agency relationship between the employer and employee as the source of the duty of loyalty. But as the decisions make clear, labels from agency law or elsewhere are no substitute for a fact-sensitive analysis of whether the employee in question either occupies a position of trust and confidence sufficient to trigger the fiduciary duty of loyalty, assumes a fiduciary duty for a limited time when coming into possession of the employer's trade secrets, or is subject only to an implied contractual duty of loyalty arising from the nature or circumstances of the employment.”).

An earlier version of the section provided more generally that “[e]mployees owe a duty of loyalty to their employer in matters related to the employment relationship.” RESTATEMENT OF EMPLOYMENT LAW § 8.01(a) (Tentative Draft No. 4, 2011).

⁵⁸ RESTATEMENT OF EMPLOYMENT LAW § 8.01(a) cmt. a (2015).

⁵⁹ *Id.*

⁶⁰ Such cases generally only arise in the context of corporate directors and officers, and even then are generally weak. *See, e.g.*, Stephen J. Lubben & Alana Darnell, *Delaware's Duty of Care*, 31 DEL. J. CORP. L. 589 (2006) (“In short, the classic duty of care no longer exists in Delaware.”).

the normal agency duties of performance.⁶¹ The Restatement (Third) of Agency cites to employee cases with regard to the agent's duty of good conduct.⁶² However, these cases all provide employers with justification for terminating an employee without notice in violation of a contractual provision.⁶³ Such justifications are not necessary in the at-will context.

Employee fiduciary duties, while seemingly straightforward as a matter of agency doctrine, are rather more complicated as a matter of practice. Courts and critics have questioned the existence of the agency relationship within the employment relationship as well as the existence and robustness of the duty of loyalty within that relationship. The policy concerns that justify this disengagement of employment from agency law largely revolve around the power imbalance between employer and employee. Employee fiduciary responsibilities seem unbalanced when employers do not have any fiduciary responsibilities of their own.

The doctrine behind employment as a fiduciary relationship is unsettled because the doctrine is unmoored from the nature of the relationship. Employees are not simply a type of agent; they have a unique relationship with the employer and their fellow employees. This relationship is best categorized as not as simply an agency relationship, but

⁶¹ The Restatement (Third) of Agency illustrates the agent's duty to comply with lawful instructions with reference to a loan officer's disregard of the bank's lending limits. The Reporter's Notes cite to *Omnibank of Mantee v. United S. Bank*, 607 So. 2d 76 (Miss. 1992), which specifically reference an officer's duties, rather than an agent's. *Id.* at 84 ("By law, officer Gray owed USB two principal duties: a duty of care and a duty of loyalty and fair dealing. These duties differ in nature and content, though they doubtless intersect and overlap. The law demands these duties of bank officers the same as officers of other corporations . . ."). See RESTATEMENT (THIRD) OF AGENCY § 8.09, Reporter's Notes to cmt. c (2006).

⁶² RESTATEMENT (THIRD) OF AGENCY § 8.10 cmt. b & illus. 2-4 (2006).

⁶³ See *McGarry v. St. Anthony of Padua Roman Catholic Church*, 704 A.2d 1353 (N.J.Super.App.Div.1998) (holding that misconduct of an employee justified termination without thirty-days notice); *Griep v. Yamaha Motor Corp.*, 120 F.Supp.2d 1196, 1201 (D.Minn.2000) (misconduct justified termination without contractually-required notice prior to discharge because employee breached "an implied contractual obligation . . . to observe rudimentary principles of appropriate behavior"); *Marsh v. Delta Air Lines, Inc.*, 952 F.Supp. 1458 (D.Colo.1997) (upholding employer's discharge of employee for letter critical of employer's customer service for publication in newspaper, despite Colorado's off-duty conduct law, because of employee's disloyalty).

rather as an organizational relationship in which the parties have overlapping fiduciary duties to one another. To better understand this relationship, we begin with the economic theory of the firm, and the role of employees within that economic concept.

II. EMPLOYEES WITHIN THE FIRM

To understand the nature of the employment relationship, we must move beyond its origins in master-and-servant law. The “master-servant” model imagines two separate and individual parties and their relationship with one another. Particularly under pre-industrial English common law, the master was an individual who ordered his servant or servants in a direct, person-to-person relationship.⁶⁴ In our modern economy, however, the employer is generally not a person but instead a business organization. This organization is a fictional “person” that represents the relationships between a handful, dozens, hundreds, or thousands of parties. These relationships between individuals for the purpose of carrying on a joint economic enterprise are known in economics as a firm.⁶⁵

The law conceives of a firm as a legal entity formed through state organizational law, such as a partnership, corporation, or LLC.⁶⁶ However, these entities represent only the legal relationships between the fictional legal entity and those who have ownership rights in the entity. To take the

⁶⁴ See WILLIAM BLACKSTONE, COMMENTARIES 410 (1765) (“If an innkeeper’s servants rob his guests, the master is bound to restitution; for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery.”).

⁶⁵ See, e.g., Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 783 (1972) (defining a classical firm as a “contractual organization of inputs” in which there is “(a) joint production, (a) joint input production, (b) several input owners, (c) one party who is common to all the contracts of the joint inputs, (d) who has rights to renegotiate any input’s contract independently of contracts with other input owners, (e) who holds the residual claim, and (f) who has the right to sell his central contractual residual status”).

⁶⁶ Cf. ERIC W. ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM 2 (2013) (describing a legal theory of the firm); LARRY E. RIBSTEIN, THE RISE OF THE UNINCORPORATION 21 (2013) (discussing the move “from the economic concept of the *firm* to the legal concept of the *business association*”).

most common organizational example—the corporation—the law organizes the governance structure around equity investors and ignores the relationship between corporation and employee. But as explained below, the corporation as economic firm is made up not only of directors, officers, and shareholders, but also of employees.

Employees have been central to our conception of the firm from the start. In early neoclassical economics, the theory of firm was quite rudimentary; it simply saw the firm as a black box which took in inputs and produced outputs.⁶⁷ Employees and capital assets were inside the black box, while customers and suppliers were outside.⁶⁸

When Ronald Coase revolutionized economic thinking about the firm, he focused on employees.⁶⁹ Coase contrasted firms with markets by noting that outside of the firm, “price movements direct production,” while within firms, markets are replaced by the entrepreneur-co-ordinator.⁷⁰ The reason for this replacement was that the price mechanism can be costly.⁷¹ In order to avoid the transaction costs of contracting, certain transactions will be more efficiently conducted within a firm rather than on an open market.⁷² The firm-based transactions described by Coase involve the purchase of labor for a particular endeavor. In explaining these transactions, Coase stated: “If a workman moves from department *Y* to department *X*, he does not go because of a change in relative prices, but because he is ordered to do so.”⁷³

The relationship between the entrepreneur-coordinator and the employee is, in fact, the primary distinction between the firm and the market. When Coase considered “whether the concept of a firm which has been developed fits in with that existing in the real world,”⁷⁴ his answer was that “[w]e can best approach the question of what constitutes a firm in

⁶⁷ Charles R.T. O’Kelley, *The Entrepreneur and the Theory of the Modern Corporation*, 31 J. CORP. L. 753, 757 (2006).

⁶⁸ Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1631 (2001).

⁶⁹ Coase, *supra* note RC1.

⁷⁰ *Id.* at 388 (footnote omitted).

⁷¹ *Id.* at 390–92.

⁷² *Id.*

⁷³ *Id.* at 387.

⁷⁴ *Id.* at 403.

practice by considering the legal relationship normally called that of ‘master and servant’ or ‘employer and employee.’”⁷⁵ Discussing the common law “control” test at length, Coase cited to its provision that “[t]he master must have the right to control the servant’s work, either personally or by another servant or agent.”⁷⁶ Coase concluded: “We thus see that it is the fact of direction which is the essence of the legal concept of ‘employer and employee,’ just as it was in the economic concept which was developed above.”⁷⁷

In an important response to Coase’s work, Armen Alchian and Harold Demsetz agreed that the employment relation is central to the concept of the firm.⁷⁸ However, they argued that Coase’s focus on control, authority, and direction was misleading, particularly within an at-will relationship.⁷⁹ Instead, they argued that the importance of the firm (as separate from the market) stems from the need to coordinate production in the midst of a variety of inputs—the need for a system of “team production.”⁸⁰ Alchian and Demsetz defined team production as “production in which 1) several types of resources are used and 2) the product is not a sum of separable outputs of each cooperating resource.”⁸¹

⁷⁵ *Id.*

⁷⁶ *Id.* at 404 (quoting BATT, *supra* note FB1, at 6).

⁷⁷ *Id.*

⁷⁸ Alchian & Demsetz, *supra* note AD1, at 777 (“When a lumber mill employs a cabinetmaker, cooperation between specialists is achieved within a firm, and when a cabinetmaker purchases wood from a lumberman, the cooperation takes place across markets (or between firms).”).

⁷⁹ *Id.* (“To speak of managing, directing, or assigning workers to various tasks is a deceptive way of noting that the employer continually is involved in renegotiation of contracts on terms that must be acceptable to both parties.”). As they put it:

Telling an employee to type this letter rather than to file that document is like my telling a grocer to sell me this brand of tuna rather than that brand of bread. I have no contract to continue to purchase from the grocer and neither the employer nor the employee is bound by any contractual obligations to continue their relationship. Long-term contracts between employer and employee are not the essence of the organization we call a firm.

Id.

⁸⁰ *Id.* at 777–78.

⁸¹ *Id.* at 779.

The inability to measure individual contributions to productivity is what makes the firm an efficient alternative to markets, but it is also the firm's central governance problem. Alchian and Demsetz argued that a specialized, independent monitor may be the best way of insuring that the team members all contribute appropriately and are rewarded appropriately.⁸² That central monitor—the recipient of the residual profits—would be the firm.⁸³

Transaction costs, monitoring costs, and team production have remained central concepts within theory-of-the-firm literature. The transaction-costs model identified the types of contractual difficulties which are likely to lead to firm governance, rather than market solutions.⁸⁴ In situations where contributions and compensation can be harder to define, the parties will be left with incomplete contracts that require a governance structure to prevent opportunism. This opportunism will be particularly problematic where one or both of the parties must invest significant resources in assets specific to the particular firm, project, or transaction. This asset specificity makes the parties susceptible to hold-ups

⁸² *Id.* at 782–83.

⁸³ Alchian and Demsetz seemed to believe that the firm will be represented by a central figure who has claim to the entire residual, and thus an interest in coordinating the firm most efficiently. But they said nothing about who can appoint such a central figure, and they express skepticism about the ability of shareholders to perform the monitoring function. Rather than characterize shareholders as owners, they argued that shareholders should be viewed merely as investors, like bondholders, albeit “more optimistic” ones. They asked:

In sum, is it the case that the stockholder-investor relationship is one emanating from the *division of ownership* among several people, or is it that the collection of investment funds from people of varying anticipations is the underlying factor? If the latter, why should any of them be thought of as the owners in whom voting rights, whatever they may signify or however exercisable, should reside in order to enhance efficiency? Why voting rights in any of the outside, participating investors?

Id.

⁸⁴ Jeffrey T. Macher & Barak D. Richman, *Transaction Cost Economics: An Assessment of Empirical Research in the Social Sciences*, 10 *BUS. & POL.* 1 (2008) (discussing the transaction costs approach).

from their contractual partners in the absence of a system of governance. Firms can be useful in providing the structures that deter opportunism.⁸⁵

In the transaction costs model, employees' contributions must be recognized as assets of both the firm and the employee—often described as “human capital.”⁸⁶ Some types of human capital are transferable, such as education or general skills, but other types are specific to the firm and generally worthless outside it. To the extent an employee has invested in firm-specific skills, she is subject to opportunistic behavior, since she has little leverage to get the full value of those skills. In the transaction-cost model, employees may be precisely the vulnerable yet valuable contributors to the joint enterprise who are most vulnerable to opportunistic behavior.⁸⁷

The focus on assets has carried over into the “property rights” theory of the firm, which posits that the firm should be owned by those who contribute the most valuable and most asset-specific property to the joint enterprise.⁸⁸ This theory posits that firms are necessary as a repository of property rights for assets used in joint production. By owning the property outright, the firm prevents the problem of the commons (in which no one holds property rights over valuable assets) as well as the problem of the anticommons (in which property rights are divvied up amongst too many disparate actors). The property-rights model dictates that the firm should be owned by those who contribute the most valuable

⁸⁵ See OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 114-15 (1985); OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* 47-48 (1996).

⁸⁶ See Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657, 663 n.26 (1996) (discussing the need for asset specificity at to the firm, and highlighting firm-specific human capital, under Williamson's transaction cost theory).

⁸⁷ Indeed, Margaret Blair offers the following critique: “The tendency in the transactions cost literature has been to recognize that firm-specific human capital raises similar questions, but then to sidestep the implications of these questions for corporate governance.” Margaret M. Blair, *Firm-Specific Human Capital and Theories of the Firm*, in *EMPLOYEES AND CORPORATE GOVERNANCE* 58, 66 (Margaret M. Blair & Mark J. Roe eds., 2000).

⁸⁸ See OLIVER HART, *FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE* (1995); Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986); Oliver Hart & John Moore, *Incomplete Contracts and Renegotiation*, 56 *ECONOMETRICA* 755 (1988); Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119 (1990).

and most asset-specific property to the joint enterprise. They are not only most necessary to the firm's success; they are also the most vulnerable to hold-up problems as the joint enterprise moves forward in time. Although the property rights discussed in the model are generally nonhuman assets, the assets are "the glue that keeps the firm together" and thus keep employees within the firm.⁸⁹

Along these lines, the "access" model of power within the firm defines a firm "both in terms of unique assets (which may be physical or human) and in terms of the people who have access to these assets."⁹⁰ Access to the unique assets is what defines the power of the individuals within and outside of the firm. Access is defined as "the ability to use, or work with, a critical resource."⁹¹ Examples of critical resources include machines, ideas, and people.⁹² Access gives the employee the ability "to create a critical resource that she controls: her specialized human capital."⁹³ Control over this critical resource is a source of power.⁹⁴ Given the importance of access, the role of the firm is to allocate access efficiently amongst the firm's agents.⁹⁵

⁸⁹ HART, *supra* note OH1, at 57. Hart posed the following hypothetical: if firm 1 acquires firm 2, what is to stop workers at former firm 2 from quitting and forming a new entity? Hart's answer: "there must be some source of firm 2 value over and above the workers' human capital, i.e. some 'glue' holding firm 2's workers in place." *Id.* This source of firm 2's value could be "a place to meet; the firm's name, reputation, or distribution network; the firm's files, containing important information about its operations or its customers; or a contract that prohibits firm 2's workers from working for competitors or from taking existing clients with them when they quit." But there needed to be something, for "without something holding the firm together, the firm is just a phantom." *Id.* (footnotes omitted).

⁹⁰ Raghuram G. Rajan & Luigi Zingales, *Power in a Theory of the Firm*, 113 Q.J. ECON. 387, 390 (1998).

⁹¹ *Id.* at 388.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Rajan and Zingales argue that "[s]ince the amount of surplus that she gets from this power is often more contingent on her making the right specific investment than the surplus that comes from ownership, access can be a better mechanism to provide incentives than ownership." *Id.*

⁹⁵ *Id.* at 391.

Recent scholarship has taken the role of human capital even further. One aspect of this capital—knowledge—has served as the basis for a new set of approaches to the firm.⁹⁶ Knowledge is defined both as explicit sets of formal information as well as the ability to apply a repository of unspecified information in developing an answer or approach to a particular problem.⁹⁷ Rather than emphasize the ownership of physical assets, which can be fungible and nonspecific, the knowledge-based theory focuses on the need to produce, distribute, and ultimately retain valuable knowledge-based assets within the firm.⁹⁸ Knowledge-based theories of the firm provide an intersection for the economic, organizational, and sociological theories as to the nature of the firm.⁹⁹ In

⁹⁶ See generally Érica Gorga & Michael Halberstam, *Knowledge Inputs, Legal Institutions, and Firm Structure: Towards a Knowledge-Based Theory of the Firm*, 101 NW. U. L. REV. 1123 (2007) (arguing that an organization's structure is dependent on the type of knowledge it requires); Sarah Kaplan et al., *Knowledge-Based Theories of the Firm: A Review and Extension*, (Mass. Inst. Tech. Sloan Working Paper No. 4216-01, 2001) (introducing a view of the firm that is knowledge-based), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.8.8829&rep=rep1&type=pdf>; Katherine V.W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721 (2002) (discussing legal conceptions that govern the ownership of human capital within the workplace).

⁹⁷ For a discussion of explicit versus tacit knowledge, see Ikujiro Nonaka et al., *A Theory of Organizational Knowledge Creation: Understanding the Dynamic Process of Creating Knowledge*, in HANDBOOK OF ORGANIZATIONAL LEARNING & KNOWLEDGE 491, 494 (Meinolf Dierkes et al. eds., 2001). Gorga and Halberstam classify knowledge into three types: “knowledge embedded in physical assets,” “knowledge embedded in the organizational structure or the group of individuals that constitute the firm[,]” and “specialized knowledge embedded in the individual.” Gorga & Halberstam, *supra* note GH1, at 1141–42. As they explain, “[t]he way a firm develops the knowledge it will use in its production process and the extent that the firm can bind this knowledge to its structure will influence its organizational structure.” *Id.* at 1140

⁹⁸ *Id.* at 1137 (criticizing the property rights theory for failing to account for the importance of employees as assets). Along the same lines, a capability-based theory of the firm has focused on firm-specific knowledge and learning that can be translated into joint production. Thomas McInerney, *Implications of High Performance Production and Work Practices for Theory of the Firm and Corporate Governance*, 2004 COLUM. BUS. L. REV. 135, 137–38.

⁹⁹ See, e.g., Rajan & Zingales, *supra* note RZ1, at 424–25 (arguing that there is “ample opportunity for gains from trade” between economics and sociology, as sociologists have studied the role of power within organizations “in some detail”); D. Gordon Smith &

fact, one set of scholars has examined the role of the firm as a “collaborative community” in which employees work together toward common goals.¹⁰⁰

As these theories of the firm make clear, employees are part of the firm in ways that other stakeholders such as suppliers, customers, and lenders are not. If the firm is defined as an organization devoted to a continuing economic enterprise, then employees and equity holders are within the firm, and the other stakeholders are outside. This fits within our common conception of what a “firm” is: a company “is” its executives, its employees, and its shareholders, while it is not its lenders, suppliers, and customers. Indeed, this is the purpose of drawing the line between employees and independent contractors. Employees are part of the firm in ways that independent contractors are not; they are participants in the common economic enterprise of the firm.¹⁰¹ So employees have continuing duties to the employer, the employer has continuing duties to employees, and the employer is responsible for the actions of employees taken within the scope of employment.

A firm-oriented approach to the employment relationship explains why employers actually have a portfolio of legal responsibilities to their employees and on behalf of their employees. Employers are not simply helpless principals that depend on their employees to carry out their actions. They are instead legal entities with power over the joint production of the business enterprise carried on by equity and labor. As such, it is natural that the law assigns them responsibilities to and on behalf of their employees.

III. EMPLOYER DUTIES RELATING TO EMPLOYEES

Brayden G. King, *Contracts as Organizations*, 51 ARIZ. L. REV. 1, 1 (2009) (comparing organizational theories to the traditional legal and economic theories of contract and firm).

¹⁰⁰ See Paul S. Adler & Charles Heckscher, *Towards Collaborative Community*, in *THE FIRM AS COLLABORATIVE COMMUNITY* 11, 20 (Charles Heckscher & Paul S. Adler eds., 2006).

¹⁰¹ Bodie, *supra* note MTB1.

The fiduciary relationship between employee and employer looks unbalanced from the perspective of agency law: the employee as agent owes duties to the employer, but the employer owes no such duties to the employee. But employers under current law owe myriad duties to their employees and on behalf of their employees, not only under the common law but also under statutory and regulatory law. These duties are explored below.

A. Employer Duties to Employees

As discussed earlier, employers owe only minor fiduciary duties in their role as principals: the limited duty to indemnify the agent¹⁰² as well as a duty to provide information regarding potential for physical harm or pecuniary loss.¹⁰³ However, the common law has long placed particular duties on employers in their role as employers. Since the Progressive Era and the New Deal, employer duties have increased exponentially through a blossoming of federal and state statutory schemes. Below is a brief overview of these duties, categorized by subject matter.

1. Duties of workplace safety

Employers have duties to protect employees within the workplace from a variety of sources. First, employers are liability for the torts of their employees—not only when the victims are third parties, but also when the victims are fellow employees. When one employee harms another as a result of tortious behavior, the employer is liable if that tort was committed within the employee's scope of employment or if the employer later ratifies the conduct.¹⁰⁴ The Restatement of Employment Law also provides for employer liability if a supervisor or manager commits a tort outside the scope of employment, unless the employer took reasonable care to prevent the conduct and the employee failed to take advantage of this care.¹⁰⁵ This latter extension of respondeat superior tracks the

¹⁰² RESTATEMENT (THIRD) OF AGENCY § 8.14 (2006).

¹⁰³ *Id.* § 8.15. The Restatement (Third) frames this duty as part of the overall duty of good faith and fair dealing.

¹⁰⁴ RESTATEMENT OF EMPLOYMENT LAW § 4.03(a) & (b) (2015).

¹⁰⁵ *Id.* § 4.03(c).

Supreme Court's defense against vicarious liability under Title VII for sexual harassment.¹⁰⁶ Indeed, federal antidiscrimination statutes can be likened to torts,¹⁰⁷ and an employer also has responsibility for a hostile work environment when that environment was created by a supervisor or supervisors with authority over the employee.¹⁰⁸ Employers also have a common law duty to exercise care in selecting, retaining, and supervising its employees,¹⁰⁹ and they are liable for harm to employees caused by their failure to exercise reasonable care in these responsibilities.¹¹⁰

Employers also have a common-law duty to provide a reasonably safe workplace for employees and to provide warning of dangerous working conditions.¹¹¹ This duty dates back to master-servant law, whereby “[a] master is subject to a duty that care be used either to provide working conditions which are reasonably safe for his servants and subservants . . . or to warn them of risks of unsafe conditions . . . that they may not discover.”¹¹² However, modern interpretation has held that the provision of a warning does not obviate the need to provide a reasonably safe

¹⁰⁶ *Id.* § 4.03 cmt. g.

¹⁰⁷ Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051, 1052 (2014) (“Courts and commentators often label federal discrimination statutes as torts.”).

¹⁰⁸ See 42 U.S.C. § 2000e-2; *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 754 (1998). A similar duty has been found in tort. See, e.g., *Ford v. Revlon, Inc.* 734 P.2d 580, 584-85 (Ariz. 1987) (holding that a company's failure to investigate a complaint of sexually abusive treatment is independent of the abusive treatment itself and that a company may be liable for failing to stop the abusive treatment regardless of whether the treatment itself rises to the level of an actionable tort).

¹⁰⁹ RESTATEMENT OF EMPLOYMENT LAW § 4.04 (2015).

¹¹⁰ See, e.g., *Kerans v. Porter Paint Co.*, 575 N.E.2d 428, 432 (Ohio 1991) (“[A]n employer may be liable for failing to take appropriate action where that employer knows or has reason to know that one of its employees poses an unreasonable risk of harm to other employees.”); *Retherford v. AT & T Communications of Mountain States, Inc.*, 844 P.2d 949, 973 (Utah 1992) (describing the elements of a claim of negligent employment as “(i) [employer] knew or should have known that its employees posed a foreseeable risk of retaliatory harassment to third parties, including fellow employees; (ii) the employees did indeed inflict such harm; and (iii) the employer's negligence in hiring, supervising, or retaining the employees proximately caused the injury”).

¹¹¹ RESTATEMENT OF EMPLOYMENT LAW § 4.05 (2015). The duty has been recognized in all U.S. jurisdictions. See *id.* at Reporters' Notes for cmt. a.

¹¹² RESTATEMENT (SECOND) OF AGENCY § 492 (1958).

workplace.¹¹³ The common-law duty has been supplemented and expanded by the federal Occupational Safety and Health Act (OSHA),¹¹⁴ under which employers similarly have a general duty to provide safe working conditions.¹¹⁵ In addition to this general duty, OSHA provides for a complex regulatory framework as established through promulgated occupational safety and health standards.¹¹⁶

2. Duties of workplace privacy

The common law of torts provides for protections against privacy invasions such as intrusions into private locations or the public disclosure of private facts.¹¹⁷ These protections apply within the workplace as well. Even though the employer generally provides the physical locations and electronic resources that employees use for their work, employees can develop expectations of privacy in these locations and resources.¹¹⁸ An employer can thus be liable to an employee for, as examples, opening an employee's locker¹¹⁹ or reading an employee's email,¹²⁰ even when the locker and email are provided by the employer. Employers also assume a duty to prevent third parties, including certain other employees, from accessing employee confidential information.¹²¹ The Restatement of Employment Law considers employee information to be confidential if "the employer has promised, by words or conduct, to keep the information confidential or if the employer is required by law to treat the information as confidential."¹²² In some contexts, employers may be considered to be

¹¹³ RESTATEMENT OF EMPLOYMENT LAW § 4.05 cmt. g (2015).

¹¹⁴ 29 U.S.C. §§ 651-678 (2012).

¹¹⁵ See 29 U.S.C. § 654(a)(1) (2012) (requiring employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards").

¹¹⁶ *Id.* § 654(a)(2).

¹¹⁷ RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D (1965).

¹¹⁸ RESTATEMENT OF EMPLOYMENT LAW § 7.03 (2015).

¹¹⁹ See, e.g., *K-Mart Corp. Store 7441 v. Trotti*, 677 S.W.2d 632 (Tex. App. 1984) (providing that employee had a reasonable expectation of privacy in workplace locker).

¹²⁰ *Restuccia v. Burk Tech.*, 1996 WL 1329386 (Mass. Super. Ct.) (denying summary judgment against invasion-of-privacy claim based on search of employer-provided e-mail account).

¹²¹ RESTATEMENT OF EMPLOYMENT LAW § 7.05 (2015).

¹²² *Id.* § 7.05 cmt. b.

information fiduciaries with respect to health data or other personal information that the employer has collected through the employment relationship.¹²³

3. Duties regarding wage or income compensation

Under federal law, employers must provide a minimum wage to all employees.¹²⁴ The same statute provides that employees must receive one-and-a-half times their hourly wages if they work over forty hours per week.¹²⁵ These federal requirements are supplemented by state and local minimum wage laws, many of which go well above the federal minimums.¹²⁶ Employers also have duties as to when and how often they must pay their employees. Along with employer wage payment duties under the common law,¹²⁷ federal and state statutes require timely wage

¹²³ Employers do not currently have specific federal statutory duties of confidentiality. See Peter A. Winn, *Confidentiality in Cyberspace: The HIPAA Privacy Rules and the Common Law*, 33 RUTGERS L.J. 617, 634 (2002) (arguing that a federal obligation is necessary to “address the threat to health care confidentiality created by employer access to protected health information”). Employer-sponsored plans do have certain limits on disclosure to the employer. See 45 C.F.R. §§ 164.504(f) & 164.512(b)(v) (2001); Winn, *supra*, at 670 (“Under the [HIPAA] Rules, health plans maintained by employers are covered entities with similar duties to protect the confidentiality of personal health information.”). However, federal regulations have been used to create a common-law duty of confidentiality. See Ilene N. Moore et. al., *Confidentiality and Privacy in Health Care from the Patient's Perspective: Does Hipaa Help?*, 17 HEALTH MATRIX 215, 231 (2007) (“Because HIPAA places an affirmative duty on employers to properly train their employees, employees' failure to comply may lend support to plaintiffs' invasion of privacy or breach of confidentiality claims against employers.”). For a theory of employer fiduciary duties in the context of health insurance, see Margaux J. Hall, *A Fiduciary Theory of Health Entitlements*, 35 CARDOZO L. REV. 1729, 1737 (2014).

¹²⁴ See 29 U.S.C. § 206 (2012).

¹²⁵ See 29 U.S.C. § 207 (2012).

¹²⁶ See Irene Lurie, *Enforcement of State Minimum Wage and Overtime Laws: Resources, Procedures, and Outcomes*, 15 EMP. RTS. & EMP. POL'Y J. 411, 436 (2011) (providing a table of state minimum wage and overtime laws as of 2010).

¹²⁷ RESTATEMENT OF EMPLOYMENT LAW §§ 3.01-3.05 (2015); see, e.g., *id.* § 3.01(b) (“Whether compensation has been earned is determined by the agreement on compensation between the employer and employee or any relevant binding promise or binding policy statement on compensation made by the employer.”).

payments and divisible portions.¹²⁸ These mandatory rules displace contractual arrangements upon which the parties might otherwise have settled.¹²⁹

4. Duties regarding benefits

Apart from wage and income compensation, employers have generally not been required to provide certain benefits to employees as part of employment. One exception is the unpaid leave required under the Family and Medical Leave Act (FMLA).¹³⁰ Employers must provide their employees with up to twelve weeks of unpaid leave a year for family or medical leave and allow the employee to return to an equivalent position.¹³¹ The Obama Administration has expanded paid medical leave for federal employees¹³² and has proposed paid sick leave for all U.S. workers.¹³³

¹²⁸ In the 19th Century, employers would often hire employees for a term but then only pay them at the end of the term, and only if the employee completed the term. No recovery for partial performance was permitted under contract, and employees were left with a quantum meruit claim that was only intermittently successful. *See, e.g.*, *Stark v. Parker*, 2 Pick. 267, 293 (Mass. 1824) (denying recovery under quantum meruit); *Britton v. Turner*, 6 N.H. 481, 482-83 (1834) (permitting recovery under quantum meruit). Modern wage payment schemes require that employees be paid regularly and that they be paid for all time worked, regardless of the length of term. *See* RESTATEMENT OF EMPLOYMENT LAW § 3.01 cmt. b (2015) (“Many states have wage-payment laws that determine the mode and frequency of payment.”).

¹²⁹ In some countries, a smaller set of minimum wage protections have been extended to “dependent contractors” who work separately from the buyer but are dependent on the buyer (and the buyer’s industry) for their livelihoods. *See* Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View from Canada*, 21 COMP. LAB. L. & POL’Y J. 7, 22–29 (1999) (discussing dependent contractors in Canadian law).

¹³⁰ 29 U.S.C. §§ 2601-2654 (2012).

¹³¹ *Id.* § 2612(a)(1).

¹³² Presidential Memorandum, Modernizing Federal Leave Policies for Childbirth, Adoption and Foster Care to Recruit and Retain Talent and Improve Productivity, Jan. 15, 2015, <https://www.whitehouse.gov/the-press-office/2015/01/15/presidential-memorandum-modernizing-federal-leave-policies-childbirth-ad>.

¹³³ *See* Healthy Families Act, H.R. 1286, 113th Cong., March 20, 2013, <http://www.congress.gov/bill/113th-congress/house-bill/1286> (requiring employers to permit each employee to earn at least 1 hour of paid sick time for every 30 hours worked).

As to other employee benefits, the law has mostly not imposed duties to provide certain benefits, but rather has required employers to provide them in a certain way, if they are provided at all. The Employee Retirement Income Security Act (ERISA)¹³⁴ does not require that employers provide pension or welfare benefits.¹³⁵ However, it does provide mandatory standards for these benefits if they are provided, particularly in the pension context. The Supreme Court has interpreted ERISA to borrow principles from the law of trusts with respect to fiduciary obligations.¹³⁶ Specifically, the administrator of an ERISA plan has the same responsibilities as a trustee when it comes to administering the plan.¹³⁷ This means that the officials must abide by their fiduciary responsibilities when making decisions on behalf of the beneficiaries.¹³⁸ The statutory scheme provides for four primary fiduciary duties: the duty of loyalty to plan participants,¹³⁹ the duty of prudence,¹⁴⁰ the duty of prudent diversification of plan assets,¹⁴¹ and the duty to follow plan terms.¹⁴² In addition, there are specific requirements about the operation of the plan. Pension benefits must vest after a period of time, meaning that they cannot be taken away by employer fiat.¹⁴³ If the employer provides

¹³⁴ Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

¹³⁵ *Conkright v. Frommert*, 559 U.S. 506, 516 (2010) (“Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place.”).

¹³⁶ *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (“ERISA’s legislative history confirms that the Act’s fiduciary responsibility provisions codify and make applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts.” (citations and quotations omitted)).

¹³⁷ *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 111 (2008) (stating that courts “should analogize a plan administrator to the trustee of a common-law trust” and “should consider a benefit determination to be a fiduciary act”).

¹³⁸ Plan administrators need not follow the duty of loyalty when making decisions as a trust settlor, as opposed to a trust administrator.

¹³⁹ 29 U.S.C. § 1104(a)(1)(A) (2012) (also known as the exclusive benefit rule).

¹⁴⁰ *Id.* § 1104(a)(1)(B).

¹⁴¹ *Id.* § 1104(a)(1)(C).

¹⁴² *Id.* § 1104(a)(1)(D).

¹⁴³ *See, e.g., id.* § 1053 (providing for minimum vesting standards for employee retirement accounts).

benefits through a defined benefit plan, the plan must be funded appropriately as defined through a complicated series of requirements.¹⁴⁴ If the employer provides benefits through a defined contribution plan, it still owes the employee-beneficiaries duties of loyalty and following instructions.¹⁴⁵ The upside of this complicated regulatory scheme is a set of tax savings for both employer and employee. However, this tax savings is only available if the employer offers the benefits to a sufficiently broad number of employees.¹⁴⁶ This nondiscrimination principle prevents the employer from segregating off benefits only for the fortunate few.¹⁴⁷

Until recently, health insurance plans were regulated primarily by state law, with ERISA provide only framework protections.¹⁴⁸ However, the Affordable Care Act created a new set of incentives and requirements for employers with respect to such insurance. The employer mandate requires employers of a certain size to purchase health insurance for their employees or provide funding for employees to buy their insurance on

¹⁴⁴ See 29 U.S.C. §§1081-1086 (2012); 26 U.S.C. § 412 (2012).

¹⁴⁵ See 29 U.S.C. § 1104(a)(2) (providing an exemption for the duties of prudence and diversification); *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 256 (2008) (“We therefore hold that although [ERISA] § 502(a)(2), [29 U.S.C. § 1132(a)(2)] . . . does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant’s individual account.”). See also *Fifth Third Bancorp. v. Dudenhoffer*, 134 S. Ct. 2459 (2014) (discussing fiduciary duties of ESOP trustees).

¹⁴⁶ ERISA’s so-called “nondiscrimination” requirements endeavor to achieve the “social policy goal of ensuring that the employer’s rank and file employees benefit from the employer’s qualified plan.” COLLEEN E. MEDILL, *INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE* 164 (4th ed. 2015). Such requirements include minimum coverage requirements, 26 U.S.C. § 410(b), and the prohibition against discrimination in favor of highly compensated employees, 26 U.S.C. § 401(a)(4). For further discussion, see MEDILL, *supra*, at 163-204.

¹⁴⁷ See, e.g., 26 U.S.C. § 410(b)(1)(A) (requiring that the plan benefit at least seventy percent of employees who are not highly compensated employees). *But see* Bruce Wolk, *Discrimination Rules for Qualified Retirement Plans: Good Intentions Confront Economic Reality*, 70 VA. L. REV. 419, 420 (1984) (arguing that “despite its apparent egalitarianism, [ERISA] is ill-suited to achieve Congress’ goal of wide-spread pension coverage for lower paid employees”).

¹⁴⁸ Amy B. Monahan, *Federalism, Federal Regulation, or Free Market? An Examination of Mandated Health Benefit Reform*, 2007 U. ILL. L. REV. 1361, 1363-74.

state exchanges.¹⁴⁹ If employers fail to do so, they must pay a tax penalty. Some commentators have predicted that the high cost of insurance will lead employers to stop providing health benefits and instead pay the tax.¹⁵⁰ However, to this point, it does not appear that most employers have dropped coverage in light of the ACA mandate.¹⁵¹

Employers are also responsible for workplace injuries that require medical treatment and may result in employee disability. Although such responsibilities were handled through tort law up until the early 20th Century, employers are now responsible for employee injuries through workers' compensation laws.¹⁵² The workers' compensation model represents a bargain between employer and employees, struck by state legislatures: employees are covered for all workplace injuries without having to prove employer fault, and employers are only liable for statutory damages based on medical care and degree of disability.¹⁵³ Employers generally manage this responsibility through insurance.¹⁵⁴

¹⁴⁹ The employer mandate is developed in 26 U.S.C. § 4980H (2012). For a brief overview of the employer mandate, see Suja A. Thomas & Peter Molk, *Employer Costs and Conflicts Under the Affordable Care Act*, 99 CORNELL L. REV. ONLINE 56, 58-59 (2013).

¹⁵⁰ Amy Monahan & Daniel Schwarcz, *Will Employers Undermine Health Care Reform by Dumping Sick Employees?*, 97 VA. L. REV. 125, 127 (2011) (“[C]ommentators have generally focused on the prospect that employers will choose to drop health coverage entirely when ACA’s core reforms are implemented in 2014.”).

¹⁵¹ See Don McCanne, *Impact of ACA on employers and their employees*, PHNP BLOG, May 15, 2015, <http://pnhp.org/blog/2015/05/15/impact-of-aca-on-employers-and-their-employees/> (“Ninety-four percent of all surveyed organizations continue to provide health care coverage for all full-time employees in 2015 and, among that group, nearly all plan to continue coverage in 2016.” (citing study by International Foundation of Employee Benefit Plans, <http://pnhp.org/blog/2015/05/15/impact-of-aca-on-employers-and-their-employees/>)).

¹⁵² Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 53-59 (1967) (tracing the evolution of workers' compensation insurance in the United States).

¹⁵³ Shaubin Talesh, *Insurance Law As Public Interest Law*, 2 UC IRVINE L. REV. 985, 1001 (2012) (“[T]he workers' compensation system emerged from a desire to create a new, workable, and predictable mode of handling accident liability that balanced the interests of labor and management.”). Workers' comp systems are largely described as strict liability. There are exclusions in some states based on employee fault. MARC A. FRANKLIN ET AL., *TORT LAW AND ALTERNATIVES* 828, 834-35, 866-69 (8th ed. 2006)

5. Duties regarding discipline and termination

The “employment at will” doctrine frames that relationship as terminable at any time, with or without cause.¹⁵⁵ Protections within that relationship are largely contractual.¹⁵⁶ However, the common law of tort does render an employer liable for wrongful discharges in violation of public policy.¹⁵⁷ The employer has a duty not to fire an employee because the employee refused to violate the law in the course of employment,¹⁵⁸ or because the employee abided by professional codes of ethics or conduct.¹⁵⁹ The protections also extend to employees who report on employer wrongdoing, either up the chain within the employer or directly to outsiders such as government agencies or media members.¹⁶⁰ The wrongful discharge tort is a societal imposition on the flexibility of the at-will doctrine: that doctrine cannot be used to discharge employees when they are acting in the public interest. It thus forges an alliance between employees and the public against the employer when the employer engages in harmful conduct.¹⁶¹ Employer discretion is also bounded by numerous antidiscrimination statutory schemes that apply to employer termination or discipline. Federal law protects employees from

(discussing how workers' compensation insurance replaced tort law with a no-fault compensation scheme).

¹⁵⁴ Anthony J. Barkume & John W. Ruser, *Deregulating Property-Casualty Insurance Pricing: The Case of Workers' Compensation*, 44 J.L. & ECON. 37, 43 (2001) (noting that “states generally require workers' compensation insurance coverage”).

¹⁵⁵ RESTATEMENT OF EMPLOYMENT LAW § 2.01 (2015).

¹⁵⁶ See, e.g., *id.* § 2.02 (providing for contractual exceptions to at-will); § 2.03 (explaining cause requirements for contractual agreements for employment as to a definite term); § 2.05 (explaining the role of employer policy statements within the employment agreement); § 2.07 (discussing the implied duty of good faith and fair dealing within the employment relationship).

¹⁵⁷ *Id.* § 5.01.

¹⁵⁸ *Id.* § 5.02(a).

¹⁵⁹ *Id.* § 5.02(e).

¹⁶⁰ *Id.* § 5.02(e) cmt. f.

¹⁶¹ For a discussion of the employee's bifurcated loyalty between firm and polity in the context of wrongful discharge doctrine, see Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CAL. L. REV. 433 (2009).

discrimination based on race, ethnicity, sex, religion, age, and disability.¹⁶² State and local laws provide additional protections for these categories as well as additional ones, such as sexual orientation.¹⁶³

When employees are discharged otherwise lawfully, state law provides for unemployment compensation for a set period of time.¹⁶⁴ These laws were originally designed to provide disincentives for employers from firing workers by making them responsible for post-termination remuneration.¹⁶⁵ Although states manage their own systems, as a general rule they require employers to pay into an unemployment insurance fund¹⁶⁶ and require compensation when the employee is terminated unless the employee has quit or has engaged in significant malfeasance.¹⁶⁷ Thus,

¹⁶² See, e.g., 42 U.S.C. § 2000e-2(a) (2012) (making it an unlawful practice to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”); 29 U.S.C. § 623(a)(1) (2012) (providing similar protections against age discrimination within the employment relationship); 42 U.S.C. § 12112(a) (2012) (providing similar protections against disability discrimination).

¹⁶³ 1 Compensation and Benefits § 8:4 (“Nearly every state has a fair employment practice (FEP) law, and most states also have their own administrative agencies to investigate charges of discrimination and enforce these FEP laws. Almost 200 local jurisdictions also have FEP laws and companion enforcement agencies.”).

¹⁶⁴ See MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW* 1051 (7th ed. 2011) (“Fifty states, the District of Columbia, and Puerto Rico have individual unemployment insurance (UI) programs determining the length of unemployment insurance benefits and their amounts for qualifying recipients.”). For an overview of the federal-state unemployment insurance program, see U.S. Dep’t of Labor, *State Unemployment Insurance Benefits*, <http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp> (last visited February 5, 2016).

¹⁶⁵ JOHN A. GARATY, *UNEMPLOYMENT IN HISTORY: ECONOMIC THOUGHT AND PUBLIC POLICY* 213 (1978) (discussing a 1932 Wisconsin law which required a reserve fund with payouts to terminated workers).

¹⁶⁶ U.S. Dep’t of Labor, *State Unemployment Insurance Benefits*, <http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp> (last visited February 5, 2016) (“In the majority of States, benefit funding is based solely on a tax imposed on employers. (Three (3) States require minimal employee contributions.”). However, the federal government has provided significant funding for unemployment compensation, particularly in the wake of the 2008 Financial Crisis. See ROTHSTEIN & LIEBMAN, *supra* note MRLL1, at 1051.

¹⁶⁷ U.S. Dep’t of Labor, *State Unemployment Insurance Benefits*, <http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp> (last visited February 5,

unemployment insurance only kicks in if the employee is not deemed (at least in part) responsible for her termination.

6. Duties to bargain and allow collective representation

The National Labor Relations Act (NLRA)¹⁶⁸ is the closest that labor and employment regulation comes to addressing the management and governance of the employer. Under the NLRA, the employer (whatever its organizational form) must bargain with its employees' chosen representative over the employees' terms and conditions of employment.¹⁶⁹ A complex array of subsidiary obligations flow from this central one, such as the prohibition against employer discipline or discharge because of an employee's protected concerted activity.¹⁷⁰ The employer need not agree to any specific set of terms, but it must bargain in good faith and abide by the complex system of federal labor law for managing this bargaining relationship.

Unlike other duties imposed upon employers within the employment relationship, the duty to bargain does not require minimum employment terms or impose substantive obligations on the employer's business. Instead, the NLRA makes employers negotiate with employees as a group and prohibits employers from contracting individually with employees outside of collective bargaining.¹⁷¹ Framers of the NLRA intended to introduce a form of "industrial democracy" into the business

2016) ("You must be determined to be unemployed through no fault of your own (determined under State law), and meet other eligibility requirements of State law.").

¹⁶⁸ 29 U.S.C. §§ 151-169 (2000).

¹⁶⁹ *Id.* §158(a)(5) (holding it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees").

¹⁷⁰ *See id.* § 158(a)(1), (3) (2006) ("It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .").

¹⁷¹ *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944) ("The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.").

world and provide employees with a voice in workplace governance.¹⁷² Labor and management would work together to set the course for the business, in a form of self-regulation. In fact, employers have exemptions from certain ERISA responsibilities when they are in a collective bargaining relationship or when they have arrived at a collective bargaining agreement.¹⁷³ The idea is that when employees have power within the organization, there is less of a need to impose worker-friendly terms from the outside.

B. Employer Duties on Behalf of Employees

In addition to duties owed to their employees, employers also have duties to third parties on behalf of their employees. The oldest and best-known of these duties are the employer's responsibilities under respondeat superior. An employer is liable for the acts of its employees committed within the scope of employment.¹⁷⁴ Although many different justifications for the doctrine have been given, most center around the responsibility for

¹⁷² NATIONAL LABOR RELATIONS BOARD: HEARINGS ON S. 1958 BEFORE THE SENATE COMM. ON EDUCATION AND LABOR, 74th Cong., 1st Sess. 642 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1617, at 2028 (1949) (statement of Senator Robert F. Wagner that “[t]hat is just the very purpose of this legislation, to provide industrial democracy”).

¹⁷³ *See, e.g.*, 26 U.S.C. § 410(a)(26)(E) (2012) (exempting multiemployer plans that benefit only collective bargaining unit employees from certain minimum participation requirements); Treas. Reg. § 1.410(b)-2(b)(7) (2012) (same).

¹⁷⁴ RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006) (“An employer is subject to liability for torts committed by employees while acting within the scope of their employment.”). employers are generally not liable for acts of independent contractors. RESTATEMENT (SECOND) OF TORTS § 409 (1965) (“Except as stated in §§ 410–429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.”). The Restatement (Second) of Torts enumerates three exceptions: (1) the employer is negligent in “selecting, instructing, or supervising the contractor;” (2) the employer has a nondelegable duty of care to the public as a whole or the particular plaintiff; or (3) the work done by the contractor for the employer is “specially” or “inherently” dangerous. RESTATEMENT (SECOND) OF TORTS § 409 cmt. b (1965). The employer is also liable when it has performed a contract using independent contractors when those services were accepted in the belief that they were to be performed by the employer and its employees—an “apparent employee” scenario. *Id.* § 429.

or control of the employer over the employee.¹⁷⁵ United States common law used to follow the “fellow servant” rule, in which the employer was absolved of liability to an employee for an injury caused by a fellow employee.¹⁷⁶ However, this rule has rendered obsolete by workers compensation statutes, and it would not likely remain the law if reconsidered today.¹⁷⁷ Employers may also be criminally responsible for the misdeeds of their employees if committed within the scope of employment.¹⁷⁸ In order to satisfy the mens rea requirement, courts have additionally required that the employee have acted with the intent to benefit the business entity.¹⁷⁹

Firms are also given responsibility for their employees when it comes to taxes. Employers must withhold their employees’ taxes¹⁸⁰ and must pay a share of Social Security and Medicare (FICA)¹⁸¹ and

¹⁷⁵ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499–501 (W. Page Keeton ed., 5th ed. 1984).

¹⁷⁶ See RESTATEMENT (SECOND) OF AGENCY § 474 (1958) (“A master is not liable to a servant or subservant who, while acting within the scope of his employment or in connection therewith, is injured solely by the negligence of a fellow servant in the performance of acts not involving a violation of the master’s non-delegable duties, unless the servant was coerced or deceived into serving, was too young to appreciate the risks, or was employed in violation of statute.”).

¹⁷⁷ KEETON ET AL., *supra* note PK1, at 575–76; J.M. Balkin, *Too Good to Be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447, 1487 (1987) (reviewing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987)) (“[T]he fellow servant rule is like a mastodon preserved in a glacier—it was rendered obsolete by workers’ compensation, and, given the general trend of twentieth century tort law, there can be no question that if workers’ compensation were abolished today few courts would follow the fellow servant rule in industrial accident cases.”).

¹⁷⁸ See *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 495 (1909). Although the “scope of employment” rule has faced steady criticism over the years, it has become “firmly entrenched as, more or less, the across-the-board rule of enterprise liability for all manner of crimes.” Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 475–76 (2006); see also Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 836 (1994) (stating that the existing legal regime closely approximates a rule of “pure strict vicarious liability” (internal citation marks omitted)).

¹⁷⁹ See, e.g., *Standard Oil Co. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962) (describing the requirements as elements of liability taken from civil tort law).

¹⁸⁰ 26 U.S.C. §§ 3401(c), 3402 (2006).

¹⁸¹ 26 U.S.C. §§ 3101, 3121(d) (2006).

unemployment (FUTA) taxes.¹⁸² The IRS defines employees based on the common law control test.¹⁸³ Employer withholding extremely important to the public fisc; payroll taxes alone make up 34 percent of all federal revenues.¹⁸⁴ And the consequences of an employer misclassification can be extremely costly, as the business is then subject to the mandatory back-tax formula.¹⁸⁵

These employer duties—both to employees and on behalf of employees to third parties—express the depth of the legal relationship between employer and employee. The employee is not simply an agent tasked with handling the principal’s matters; she is a part of the employer’s responsibilities and both owes duties and is owed duties. These duties help to paint a picture of a fiduciary relationship that runs not only from employees to employers, but also from employers to employees.

IV. EMPLOYERS AS FIDUCIARIES

This section explores potential theories for a set of fiduciary obligations flowing from employers to their employees. It first addresses why the contractual duty of good faith is not sufficient to handle the relational aspects of the employment contract. Second, it discusses other academic proposals for the creation of employer fiduciary duties. Finally,

¹⁸² 26 U.S.C. §§ 3301, 3306(i) (2006).

¹⁸³ 26 U.S.C. § 3121(d)(2) (2006) (defining an employee as, among other definitions, “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee”); 26 C.F.R. § 31.3121(d)-1(c)(2) (2012) (finding an employment relationship “when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished”); *see* 26 U.S.C. § 3306(i) (2006) (stating that “the term ‘employee’ has the meaning assigned to such term by section 3121(d)”); Rev. Rul. 87-41, 1987-1 C.B. 296, 298–99 (laying out a twenty factor test to aid in “determining whether an individual is an employee under the common law rules”).

¹⁸⁴ Center for Budget and Policy Priorities, Policy Basics: Federal Payroll Taxes, April 2, 2014, <http://www.cbpp.org/research/federal-tax/policy-basics-federal-payroll-taxes>.

¹⁸⁵ 26 U.S.C. § 3509(a) (2006). In fact, Congress was moved to create a safe harbor. Revenue Act of 1978, Pub. L. No. 95-600, § 530, 92 Stat. 2885.

it argues for the recognition of a reciprocal fiduciary relationship by drawing on insights from fiduciary theory and the theory of the firm.

A. The Contractual Duty of Good Faith in the Employment Relationship

Given that employees and employers have a contractual relationship, it may seem fruitful to explore a robust version of the duty of good faith before looking to fiduciary duties. Indeed, good faith has been characterized as “halfway between a fiduciary duty (the duty of *utmost* good faith) and the duty merely to refrain from active fraud.”¹⁸⁶ Good faith in performance is generally recognized as an implied term in all contracts under the common law.¹⁸⁷ The sense of the good faith duty is that contractual partners owe obligations of performance that go beyond the simple black letter of the agreement. Although these obligations do not have exact definitions,¹⁸⁸ several distinct threads have been noted. The Uniform Commercial Code characterized good faith simply as “honesty in fact in the conduct or transaction concerned.”¹⁸⁹ One common expansion upon this definition is the notion of good faith as an obligation to

¹⁸⁶ *Market St. Associates Ltd. P'ship v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991). *See also* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 438 (1993) (“Good faith in contract merges into fiduciary duties, with a blur and not a line.”).

¹⁸⁷ *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”); *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1431 (2014) (finding that “most States recognize some form of the good faith and fair dealing doctrine”). The duty finds its roots in traditional Roman and canon law, in which the doctrine imposed “an obligation to deal honestly, forthrightly, and faithfully with one’s commercial counterpart in both negotiation and performance.” Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 627-28 (2011).

¹⁸⁸ *Northwest, Inc.*, 134 S. Ct. at 1431 (“[I]t does not appear that there is any uniform understanding of the doctrine’s precise meaning.”). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (“A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.”).

¹⁸⁹ UNIFORM COMMERCIAL CODE § 1-201(19).

effectuate the reasonable intentions of the parties – the spirit, rather than the letter, of the contractual terms.¹⁹⁰ Somewhat more rarely, the duty has been used to ensure that “a party does not violate community standards of decency, fairness, or reasonableness.”¹⁹¹ Courts could use good faith to ensure that employers live up to the reasonable expectations of the parties when it comes to the employment relationship, or to police businesses to make sure that they were treating workers according to norms of fairness and decency. Such a programme of good faith enforcement might mitigate or obviate the need for additional employer fiduciary duties.

Ultimately, however, the doctrine of good faith in the employment contract does not serve the same role as a fiduciary relationship. First, purely as doctrinal matter, good faith has had a fraught history within employment.¹⁹² Many jurisdictions refuse to recognize a duty of good faith when the underlying employment agreement is at-will.¹⁹³ Their refusal stems from the complete discretion that at-will termination provides to the employer. In their view, it is nonsensical to impose a duty of good faith when the contract explicitly allows the employer to fire the employer for any reason at all.¹⁹⁴ If the employer has complete freedom to fire under

¹⁹⁰ See *Northwest, Inc.*, 134 S. Ct. at 1431 (noting that “some States are said to use the doctrine to effectuate the intentions of parties or to protect their reasonable expectations” (citation and quotations omitted)).

¹⁹¹ *Id.* (citations and quotations omitted).

¹⁹² See James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law*, 32 COMP. LAB. L. & POL’Y J. 773, 773 (2011) (“In the employment setting, however, the covenant has not fared nearly so well.”).

¹⁹³ RESTATEMENT OF EMPLOYMENT LAW § 2.07, Reporters’ Notes to Cmt. a (“Some courts do not recognize the implied covenant in at-will employment or significantly limit its scope.”); Brudney, *supra* note JJB1, at 773-74 (“The majority of states have declined to apply Good Faith at all when reviewing disputes between employers and individual employees.”).

¹⁹⁴ See, e.g., *Cweklinsky v. Mobil Chemical Co.*, 837 A.2d 759, 768 (Conn. 2004) (“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.”); *Darrow v. Integrus Health, Inc.*, 176 P.3d 1204, 1210 (Okla. 2008) (“Employers are free to discharge at will employees in good or bad faith, with or without cause.”); *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

the express terms of the contract, the argument goes, then one cannot impose an implied good-faith obligation that would impose some duty to follow societal norms or “reasonable expectations.”¹⁹⁵ There was a general intellectual effort, adopted to some extent in California, to use the duty of good faith to weaken the at-will presumption and create something closer to a “good cause” standard for termination.¹⁹⁶ However, that movement has gradually disappeared from the scholarship, and California rejected good faith as a vehicle for undermining at-will.¹⁹⁷

A number of jurisdictions, as well as the Restatement of Employment Law, have carved out a limited role for good faith and fair dealing in the employment context. The duty only applies when the employer is proactively using its termination power (or other power) to

could be dismissed for any or no reason.”). *See also* Cramer v. Fairfield Med. Ctr., 182 Ohio App. 3d 653, 663 (2009); Brozo v. Oracle Corp., 324 F.3d 661, 668 (8th Cir. 2003) (applying Minnesota law); Miller v. Mass. Mutual Life Ins. Co., 455 S.E.2d 799, 802 (W. Va. 1995); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 838 (Wis. 1983).

¹⁹⁵ *See* Jenkins v. Boise Cascade Corp., 108 P.3d 380, 390 (Idaho 2005) (“[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.”). *Cf.* Brudney, *supra* note JJB1, at 775 (“It is not surprising that state courts are reluctant to impose norms of fairness on job security arrangements when employers’ residual authority to act in summary, arbitrary, or malicious fashion toward their employees remains legislatively undisturbed.”).

¹⁹⁶ *See* Cleary v. Am. Airlines, Inc., 168 Cal. Rptr. 722, 729 (Ct. App. 1980) (“Termination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts. As a result of this covenant, a duty arose on the part of the employer, American Airlines, to do nothing which would deprive plaintiff, the employee, of the benefits of the employment bargain-benefits described in the complaint as having accrued during plaintiff’s 18 years of employment.”); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1836-37 (1980) (“By implying a duty to terminate only in good faith, courts can provide a private remedy for wrongful discharge to replace the at will rule.”); *see also* Pugh v. See’s Candies, Inc., 171 Cal. Rptr. 917, 927-28 (Ct. App. 1981) (discussing good faith but also ultimately relying on implied contractual promise).

¹⁹⁷ *Guz v. Bechtel Nat. Inc.*, 8 P.3d 1089, 1112 (Cal. 2000) (“To the extent Guz’s implied covenant [of good faith] cause of action seeks to impose limits on Bechtel’s termination rights beyond those to which the parties actually agreed, the claim is invalid.”); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 398 (Cal. 1988) (rejecting a claim in tort for violations of the duty of good faith on the grounds that “the employment relationship is fundamentally contractual”).

deprive the employee of some benefit that has already been earned under the contract. So the duty is violated if the employer prevents the vesting or accrual of an employee right or benefit; if the employer retaliates against an employee because of an earned right or benefit; or if the employer retaliates because the employee performed his or her obligations under the employment contract itself or under the law.¹⁹⁸ When it comes to compensation and benefits that have been earned under the contract, the employer is not permitted to use its termination power to pressure the employee into foregoing them. For example, in *Fortune v. Nat'l Cash Register Co.*,¹⁹⁹ a salesman was fired soon after securing a big deal that would have earned him a large bonus; the purpose of the termination was to deprive him of that bonus. The court held that the employer violated the duty of good faith by firing him to deprive him of the benefits of the bonus structure.²⁰⁰ This definition of good faith fits well within the historical ambit of the doctrine, as it goes beyond the explicit text of the agreement to prevent one party from opportunistically acting to deprive the other party of the benefit of the bargain.²⁰¹ But it is also carefully cabined to a limited set of specific circumstances.²⁰² There must be an

¹⁹⁸ RESTATEMENT OF EMPLOYMENT §§ 2.07(c), 3.05(c).

¹⁹⁹ 364 N.E.2d 1251, 1257 (Mass. 1977).

²⁰⁰ *Id.* at 1258 (“Where the principal seeks to deprive the agent of all compensation by terminating the contractual relationship when the agent is on the brink of successfully completing the sale, the principal has acted in bad faith and the ensuing transaction between the principal and the buyer is to be regarded as having been accomplished by the agent.” (citing to RESTATEMENT (SECOND) OF AGENCY § 454 & cmt. a (1958))).

²⁰¹ RESTATEMENT OF EMPLOYMENT LAW § 2.07 (“[T]he employer's duty to cooperate means that once an employee has substantially performed, unless there is independent cause for termination, the employer cannot use its right to terminate without cause for the purpose of depriving the employee of the benefit of the contract.”); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 387 (1980) (“Bad faith performance consists of an exercise of discretion in performance to recapture opportunities forgone at formation.”); see also Oliver E. Williamson, *Transaction Cost Economics: The Governance of Contractual Relations*, 22 J. L. & ECON. 233, 234 (1979) (discussing opportunism in the contractual context).

²⁰² *Cf.* RESTATEMENT OF EMPLOYMENT LAW § 2.07 cmt. b (arguing that “the implied duty of good faith and fair dealing serves as a supplementary aid in implementing the parties' reasonable expectations and should not be read as a means of overriding the basic terms of, or otherwise undermining the essential nature of, their contractual relationship”).

effort by the employer to prevent the employee from receiving a specific benefit that has already vested or been earned under the contract. This generally-accepted definition of good faith in the employment context, while offering well-justified protection, does not evidence the type of mutual, fiduciary-based relationship to which this Article is pointing. It is simply an employment version of the contractual duty of good faith.

This Article points to an employment relationship that goes beyond contract and beyond good faith. Of course, good faith and fiduciary duties are related: they are cousins, perhaps, or even siblings in the family tree of legal doctrine.²⁰³ But as Gordon Smith has pointed out, “the scope of these two doctrines is sufficiently different that they are not often viewed as tackling related problems.”²⁰⁴ Most importantly, the duty of good faith is contractual, while the fiduciary duties are relational.²⁰⁵ As this Article argues below,²⁰⁶ the nature of the employment relationship is based in our concept of the firm. It is the employee’s relationship with the firm that separates the employment contract from those of independent contractors that might also provide “work” for the employer.²⁰⁷ Independent contractors are protected by a contractual duty of good faith. But employees should have something more—something that reflects the deeper relationship that employment provides. Rather than promoting a version of the duty of good faith in the employment context that takes on relational characteristics,²⁰⁸ the Article argues for the application of relational duties, rather than simply contractual ones.

²⁰³ D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1487 (2002) (“Fiduciary duty and the duty of good faith and fair dealing are variations on a theme.”).

²⁰⁴ *Id.* at 1488.

²⁰⁵ *Id.* (“While fiduciary duty is determined by the structure of the relationship, the obligation of good faith and fair dealing emanates from the terms of the contract.”).

²⁰⁶ See part IV.C *infra*.

²⁰⁷ See Bodie, *supra* note MTB1.

²⁰⁸ For example, the Seventh Circuit interpreted the duty of good faith and fair dealing to potentially require an employer to inform its employee about an upcoming merger. *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429 (1987). The court held that “an *avowedly* opportunistic discharge is a breach of contract” under the duty of good faith and fair dealing. *Id.* at 438. In addition, the employee was a shareholder in the employer, which was a closely held company, and the court held that “[c]lose corporations buying their own stock, like knowledgeable insiders of closely held firms buying from outsiders, have

B. Prior Theories of Employer Fiduciary Duties to Employees

Suggestions for the creation of employer fiduciary duties range from specific, particularized duties to a broader set of responsibilities. Those advocating for particular duties often point to a pre-existing employer responsibility and build a fiduciary duty around that responsibility. For example, Margaux Hall argued that employers act as fiduciaries when they make health-care coverage decisions on behalf of their employees as part of an employer-provided plan.²⁰⁹ Although many employers have long provided health-care benefits to their employees, this responsibility was heightened through the Affordable Care Act's "employer mandate."²¹⁰ Because employers are so integral to employees' health care decisions, they play a unique role in managing choices that go to the core of employees' personal and family lives. Hall proposed that employers be considered employee "health fiduciaries" that make health-care-related decisions in the interests of their employee-beneficiaries.²¹¹

a fiduciary duty to disclose material facts." *Id.* at 435. For contrasting views on the import of the court's decision in *Jordan*, compare Marleen O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1249-50 (1991) (arguing that *Jordan* created "an implied fiduciary duty that the stock would not be bought back in an opportunistic fashion") with Deborah DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 887 ("[T]he employer's ability in *Jordan* to terminate the plaintiff's employment and thereby oblige him to sell his shares to the corporation is irrelevant to the employer's obligation, as fiduciary, to disclose information to the selling shareholder."). See also Aline van Bever, *An Employer's Duty to Provide Information and Advice on Economic Risks?*, 42 INDUS. L.J. 1 (2013) (considering "whether the implied duty of trust and confidence has developed so as to impose on the employer a duty to inform, advise and warn his employees on economic risks").

For a discussion of a strengthened duty of good faith as applied to employees, see Jeffrey M. Judd, Note, *The Implied Covenant of Good Faith and Fair Dealing: Examining Employees' Good Faith Duties*, 39 HASTINGS L.J. 483, 485 (1988) (arguing that "under appropriate circumstances a court might find that an employee who abuses a special position of trust and confidence is liable to his employer for tortious breach of the covenant of good faith and fair dealing implied in his employment contract").

²⁰⁹ Hall, *supra* note MH1, at 1737.

²¹⁰ *Id.* at 1751-52.

²¹¹ *Id.* at 1759-65.

Under this fiduciary relationship, employers would need to “(1) pursue employees' sole interest in making discretionary coverage decisions; and (2) refrain from acting in a self-interested manner.”²¹² Although the specifics of these duties raise difficulties in hammering out, the creation of a fiduciary relationship here “clarifies the underlying entitlements and interests,” “helps bound otherwise unlimited discretion around formative duties,” and “illuminates the deeper structural role that employers play in this space.”²¹³

Employers have also been targeted for obligations related to their handling of private employee information. Scott Fast has argued that employers should owe a duty of confidentiality to their employees similar to that owed in other fiduciary relationships.²¹⁴ Pointing to the sensitivity of employee information on job performance, personal health, and financial records, Fast argued that employers should be considered to have a confidential relationship with their employees.²¹⁵ Employers would be liable for disclosing confidential employee information to third parties under a tort theory similar to fiduciary duties.²¹⁶ The Restatement of Employment Law has adopted at least part of this approach by noting that an employee has a protected privacy interest “in personal information related to the employee that is provided in confidence to the employer.”²¹⁷ The employer is liable in tort for providing such confidential information to third parties without consent, if such disclosure is highly offensive.²¹⁸

Progressive corporate law scholars have called for the imposition of fiduciary duties on corporations that would run to corporate stakeholders

²¹² *Id.* at 1763.

²¹³ *Id.* at 1768. *See also* Lauren R. Roth, *The Collective Fiduciary*, 94 NEB. L. REV. ___ (2016) (discussing employer and insurer duties when deciding whether to grant health benefits under health insurance plans).

²¹⁴ Scott L. Fast, *Breach of Employee Confidentiality: Moving Toward a Common-Law Tort Remedy*, 142 U. PA. L. REV. 431, 433 (1993) (“[C]ourts could provide a common-law remedy for disclosures to third parties in much the same way that they recognize the confidentiality of physician-patient or attorney-client relationships.”).

²¹⁵ *Id.* at 456-59.

²¹⁶ *Id.*

²¹⁷ RESTATEMENT OF EMPLOYMENT LAW § 7.05(a) (2015).

²¹⁸ *Id.* §§ 7.05(b) & 7.06.

beyond shareholders.²¹⁹ In some instances, employees have been given a special role amongst stakeholders. Some of these calls for fiduciary duties to employees are designed to mirror similar existing duties from the corporation to shareholders. Kent Greenfield has argued that “workers should have some kind of representation on the board of directors or have some role in electing directors, and that directors of companies should be held to have some kind of fiduciary duties to workers in the employ of their firm.”²²⁰ Greenfield has also advocated for a specific prohibition against fraud in the context of the employment relationship, as a parallel obligation to Rule 10b-5, which prohibits fraud in the context of the sale of a security.²²¹ The specific critique of existing policies behind these proposals is that shareholders have been given specially protected status within the corporation, and other stakeholders—especially employees—deserve similar protections.

There have also been specific suggestions for limited extensions of corporate fiduciary duties to employees in particular contexts. Marleen O’Connor has proposed that corporate directors should owe a duty to employees during fundamental corporate changes.²²² Although flexibly defined, the essence of the duty would require that “directors take the actions that are necessary to compensate employees for their investments in the corporation.”²²³ Drawing in part from corporate constituency statutes, which gave directors the freedom to act on behalf of all corporate stakeholders when making decisions as to transformative transactions,²²⁴

²¹⁹ For example, Margaret Blair has argued that boards of directors should take into account the effects of their decisions on all of the corporation’s stakeholders, not just shareholders. MARGARET M. BLAIR, *OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY* 16 (1995).

²²⁰ Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 287 (1998).

²²¹ Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715, 785-86 (1997) (proposing a model rule based on the text of Rule 10b-5).

²²² O’Connor, *supra* note MOC1, at 1247-59.

²²³ *Id.* at 1253.

²²⁴ See, e.g., Brett H. McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1227, 1232-36 (2004) (discussing arguments for and against constituency statutes); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992).

this duty would up the ante by making directors responsible to defend employee interests during these transactions. O'Connor justified this duty on the basis of employee "investments of time and human capital," in conjunction with their "trust and confidence" in directors to manage their investments on their behalf.²²⁵ In particular, O'Connor believed that the fiduciary duty "should include an obligation for the directors to safeguard pension plan assets during hostile battles for control and internal recapitalizations."²²⁶ In a similar vein, Katherine Stone argued for fiduciary duties that are owed to all stakeholders but would be enforceable by employees.²²⁷ These duties would stem from corporate constituency statutes and would protect employees "from major corporate restructuring decisions that threaten to expropriate those investments."²²⁸

These arguments for corporate director fiduciary duties to employees all have in common a "stakeholder" model of the corporation. They are contraposed to the "shareholder primacy" model of the corporation, under which shareholders govern the company and should have the sole right to enforce fiduciary duties against directors.²²⁹ At the risk of giving short-shrift to this debate,²³⁰ it is more about the legal

²²⁵ O'Connor, *supra* note MOC1, at 1252.

²²⁶ *Id.* at 1254.

²²⁷ Katherine Van Wezel Stone, *Employees as Stakeholders under State Nonshareholder Constituency Statutes*, 21 STETSON L. REV. 45, 48 (1991). See also Kent Greenfield, *The Third Way*, 37 SEATTLE U. L. REV. 749, 751 (2014) (arguing that directors should owe their fiduciary duties to the corporation as a whole, including all of its stakeholders).

²²⁸ *Id.* But see Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 25 (1991) (arguing that "nonshareholder constituency statutes fail to recognize that fiduciary duties are owed to residual claimants and residual claimants alone because this is the group that faces the most severe set of contracting problems with respect to defining the nature and extent of the obligations owed to them by officers and directors").

²²⁹ See, e.g., DEL. CODE tit. 8, § 211 (shareholder franchise); *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) ("The derivative action developed in equity to enable shareholders to sue in the corporation's name where those in control of the company refused to assert a claim belonging to it.").

²³⁰ Grant Hayden and I have engaged in this debate as well. Grant Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071, 2120 (2010) (arguing for a "reexamination of the scope of the corporate franchise" to include other stakeholders).

structure of the corporation and of corporate governance than it is about the relationship between employer and employee. Although a large portion of employees are employed by public corporations, a large portion are not.²³¹ Developing a corporate director's duty to employees does not address whether similar duties would be owed by members of an LLC or managing partners in a partnership—and if not, why not. Although commentators have recognized this,²³² they have not developed a corresponding set of duties to employees within these other business organizations. This paper takes a different approach. By discussing duties owed by employers to employees, the particular type of business organization becomes irrelevant to the analysis.²³³ And the duties owed by the employer stem specifically from the employer-employee relationship—not from the mix of participants in a particular type of business enterprise.

C. Employers as Fiduciaries under Agency & Fiduciary Theory

The traditional debate over the fiduciary nature of employment has focused on employees—specifically, employees as agents. Employees are fiduciaries because they are a subspecies of agents. The theory behind agents as fiduciaries is relatively simple. Characterized as falling within one of the “core” categories of fiduciary relationship,²³⁴ agents have power over the interests of their principals and are empowered to act on behalf of the principals. Agents have discretion in carrying out their responsibilities as agents. This discretion requires contracts that are sufficiently

²³¹ Andrew Lundeen & Kyle Pomerleau, *Corporations Make Up 5 Percent of Businesses but Earn 62 Percent of Revenues*, TAX POLICY BLOG, Nov. 25, 2014, at: <http://taxfoundation.org/blog/corporations-make-5-percent-businesses-earn-62-percent-revenues>.

²³² Greenfield, *supra* note KG-PW, at 317 n.161 (“While the focus of this Article is on corporations, this argument from the relational basis of fiduciary duty might conceivably be extended to all employer/employee relationships, even when the employer is not a corporation.”).

²³³ As discussed in Part V, however, the governance of that organization is relevant—particularly the degree to which employees participate in that governance.

²³⁴ Miller, *supra* PMFR, at 76, 79-80.

incomplete to require fiduciary duties.²³⁵ Employees are agents because they similarly have discretion over the interests of the employer, and they receive delegated authority to act in the interests of the employer.²³⁶

But this analysis is missing half of the equation. Both employees and the employer have a set of mutual interests that differentiate employment from other contractual relationships. And that relationship gives both employees and employer discretion over aspects of the relationship that allow for opportunism. For these reasons, the employer should also be considered to be a fiduciary for its employees. As discussed further below, the employer—as legal entity, and as aggregate of the individuals who make up the employer—has relational responsibilities in the vein of fiduciary duties. It therefore makes sense to characterize the employment relationship as a whole as fiduciary, and the employer as a fiduciary of its employees.

There are several approaches in fiduciary theory for determining whether a relationship should be characterized as fiduciary in nature. Many courts follow a status-based approach in which the relationship is fiduciary if it has historically been categorized as such.²³⁷ As a theoretical matter, this approach is fairly unsatisfying, as it is based on history and only recognizes new categories (if any) by a purely analogical method.²³⁸ But there is support for a status-based approach to employment as a fiduciary relationship. Employees, of course, have traditionally been treated as fiduciaries. And as discussed in Part III, employers have gradually accreted a plethora of statutory, regulatory, and even common-law responsibilities for their employees that are fiduciary in substance. Thus, it is not too radical to envision the employment relationship as a

²³⁵ See Easterbrook & Fischel, *supra* note EF1, at 427 (“[A] ‘fiduciary’ relation is a contractual one characterized by unusually high costs of specification and monitoring.”).

²³⁶ RESTATEMENT (SECOND) OF AGENCY § 429 cmt. a (1958) (“The principles determining the servant's duties to the principal are the same as those in regard to other agents . . .”).

²³⁷ Deborah A. DeMott, *Relationships of Trust and Confidence in the Workplace*, 100 CORNELL L. REV. 1255, 1261 (2015) (“Most fiduciary relationships are treated as such as a matter of status or convention.” (quotations omitted)); Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 241-43 (2011) (stating that courts determine “whether the category is conventionally recognized as fiduciary”).

²³⁸ *Id.* (“[N]ew categories of relationship are recognized as fiduciary simply by virtue of having been found sufficiently similar to a paradigmatic category . . .”).

mutual fiduciary relationship, even if employers have not traditionally been treated as fiduciaries.

Other courts have shunned a categorical or status-based approach and instead treated each particular relationship at issue as potentially fiduciary under a fact-based approach.²³⁹ The indicia of fiduciary status vary from court to court. Common-law courts have at various times looked at the following factors: the ability of the fiduciary to exercise discretion in carrying out its tasks;²⁴⁰ the vulnerability of the beneficiary to the fiduciary's exercise of power and potential opportunism;²⁴¹ the trust and confidence reposed in the fiduciary by the beneficiary;²⁴² and reasonable expectations of the parties.²⁴³ These factors all support specific theories of fiduciary responsibility, which will be discussed in more depth below.

Many of the most prominent fiduciary theorists place the primary emphasis on discretion. Paul Miller has defined the fiduciary relationship as “one in which one party (the fiduciary) enjoys discretionary power over the significant practical interests of another (the beneficiary).”²⁴⁴ Gordon Smith has stated that: “fiduciary relationships form when one party (the ‘fiduciary’) acts on behalf of another party (the ‘beneficiary’) while

²³⁹ *Id.* at 243-47.

²⁴⁰ *Zastrow v. Journal Commc'ns, Inc.*, 718 N.W.2d 51, 59 (Wis. 2006) (“A consistent facet of a fiduciary duty is the constraint on the fiduciary's discretion to act in his own self-interest because by accepting the obligation of a fiduciary he consciously sets another's interests before his own.”).

²⁴¹ *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992) (“The common law imposes that [fiduciary] duty when the disparity between the parties in knowledge or power relevant to the performance of an undertaking is so vast that it is a reasonable inference that had the parties in advance negotiated expressly over the issue they would have agreed that the agent owed the principal the high duty that we have described, because otherwise the principal would be placing himself at the agent's mercy.”).

²⁴² *Wiener v. Lazard Freres & Co.*, 672 N.Y.S.2d 8, 14 (N.Y. App. Div. 1998) (inquiring as to whether one party “reposed confidence in another and reasonably relied on the other's superior expertise and knowledge”).

²⁴³ *DeMott*, *supra* note DDM-Cornell, at 1261 (finding that “courts impose ad hoc or fact-based fiduciary duties when although the parties' relationship was not categorically fiduciary, its characteristics nonetheless justified one party's expectation of loyal conduct from the other”).

²⁴⁴ *Id.* at 262 (*italics omitted*); see also *Miller*, *supra* note PMFR, at 69.

exercising discretion with respect to a critical resource belonging to the beneficiary.”²⁴⁵ And Larry Ribstein has argued that fiduciary duties should apply “where an ‘owner’ who controls and derives the residual benefit from property delegates open-ended management power over property to a ‘manager.’”²⁴⁶ The notion of discretion as critical to fiduciary relationships forms the cornerstone of many fiduciary theories.

The employment relationship fits this paradigm. An employee is a fiduciary of the employer because the employee exercises discretion in carrying out the duties of employment.²⁴⁷ However, an employer also exercises discretion over the employees’ practical interests and critical resources. The employer—the legal entity that employs the employees—controls the employees’ employment as well as the fruits of the employees’ labor. The joint production accomplished by employees working together with the capital provided by equity contributors is what constitutes the firm.²⁴⁸ And the controllers of the firm have a fiduciary responsibility to employees over the management of that joint production. Thus, the employees’ significant practical interests include: the terms and conditions of their employment,²⁴⁹ the structure of employment, the opportunities for

²⁴⁵ D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1402 (2002). See also D. Gordon Smith & Jordan C. Lee, *Fiduciary Discretion*, 75 OHIO ST. L.J. 609, 644 (2014) (“The most commonly cited scholarly works in the canon of fiduciary law emphasize the importance of discretion in fiduciary relationships.”).

²⁴⁶ Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 215. See also Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899, 901 (2011) (“[M]y definition [of fiduciary relationships] focuses on the particular type of entrustment that arises from a property owner’s delegation to a manager of open-ended management power over property without corresponding economic rights.”).

²⁴⁷ However, the amount of discretion afforded to an individual employee may vary widely based on the circumstances. Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 154 (2005) (“Most employment relationships permit the employee at least some discretion in performing tasks.”); DeMott, *supra* note DDM-Cornell, at 1256 (“[A]lthough a firm’s employees share a common employer, the nature of their work spans a broad spectrum, ranging from responsibilities that necessarily involve exercising substantial discretion to closely monitored and highly specified tasks.”).

²⁴⁸ Alchian & Demsetz, *supra* note AD1, at 794 (defining the firm to include “joint input production” and “several input owners”).

²⁴⁹ Terms and conditions include not only wages, but also short-term and long-term benefits such as the health-care coverage. See Hall, *supra* note MH1 (discussing employer control over health care).

promotion or termination, the distribution of responsibilities within the employer, and the distribution of resources within the employer. In terms of a “critical resource,” the employer controls the critical resource of the employer’s ongoing business.²⁵⁰ Employees cannot individually take that business and operate it for themselves; the employer controls the business as well as the relationships, contracts, property, intellectual property, goodwill, and other legal aspects of the business.²⁵¹ The employer exercises its discretion in making business decisions on behalf of those who participate in the business—namely, the equity investors and the labor contributors (employees). The employer’s ongoing business is clearly a critical resource for employees. Even Ribstein’s notion of property ownership would apply if we use the Alchian and Demsetz model of the firm that includes all firm inputs, such as capital and labor, as part of the firm’s property interests.²⁵²

A foreseeable objection to this approach is to argue that employees are not the beneficiaries of the employer with respect to the business enterprise. Instead, the owners of the employer (in whatever organization form it takes) are the beneficiaries. Thus, in a corporation, shareholders would arguably be the beneficiaries of the corporation’s exercise of its discretion over the critical resource of the corporation’s business.²⁵³ However, while shareholders have an interest in the employer-corporation’s business, employees are also beneficiaries who are interested in that business. Shareholders are not traditional “owners” of the corporations in many respects; they at best have an ownership interest in a

²⁵⁰ Bainbridge, *supra* note SB-PM, at 661 (making the assumption for his model that “managers have substantial experience in running large organizations and, accordingly, are properly vested with almost unfettered discretion”).

²⁵¹ *Cf.* Dan L. Burk & Brett H. McDonnell, *Trademarks and the Boundaries of the Firm*, 51 WM. & MARY L. REV. 345, 376 (2009) (“As in the case of the closely held mark, trademark law may serve to partition the reputational investment of the firm from that of the rank and file employee.”).

²⁵² Alchian & Demsetz, *supra* note AD1, at 794.

²⁵³ This distinction matters more to Smith’s formulation, which requires that the critical resource “belong” to the beneficiary, Smith, *supra* note GS-CRT, at 1402, whereas Miller’s formulation requires only that the beneficiaries’ significant practical interests are at stake. Miller, *supra* note PMFR, at 69.

sliver of the corporation's designated profits.²⁵⁴ While shareholders are clearly invested in the corporation and its business, employees are also invested. Shareholders' funds may be uniquely vulnerable, and their returns are more contingent and less defined than those provided to employees.²⁵⁵ However, the average employee arguably has more invested in the business enterprise than the average shareholder.²⁵⁶ Workers have invested their ongoing time and labor in the enterprise; they may also invest their careers and their vocational aspirations, as well as their

²⁵⁴ See Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1428 (1993) ("The old [private property] model depended upon the corporation being a thing capable of being owned As we have seen, however, nexus of contracts theory squarely rejects this basic proposition."); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1192 (2002) ("From both a legal and an economic perspective, the claim that shareholders own the public corporation simply is empirically incorrect."). Moreover, employees need not be owners in order to have a claim to the critical resource. As Smith has elaborated:

Whether the existence of a particular thing justifies the imposition of fiduciary duties, therefore, depends on whether that thing provides the fiduciary with the occasion to act opportunistically. And whether that thing provides the fiduciary with the occasion to act opportunistically will depend in large part on whether society has made a normative decision that the thing belongs to the beneficiary. This decision is exogenous to the critical resource theory.

Smith, *supra* note GS-CRT, at 1444.

²⁵⁵ See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 67-70, 91 (1991).

²⁵⁶ As Kent Greenfield notes:

Most shareholders of public corporations have little in the way of a genuine relationship with the companies in which they hold stock, other than as arms-length investors. A typical shareholder may have a significant amount of turnover in her portfolio in any given year. Workers, by contrast, have a close connection to the firm that employs them and may hold their jobs for years.

Greenfield, *supra* note KG-PW, at 317-18.

personal character and identity.²⁵⁷ They invest in firm-specific capital that by definition is not alienable, unlike most stock investments.²⁵⁸ Along with the equity investors, they are the co-participants in the economic life of the firm.²⁵⁹

Vulnerability is also a critical feature of fiduciary relationships. The beneficiary is vulnerable to the power/discretion of the fiduciary, which is what calls down fiduciary duties on the exercise of this power.²⁶⁰ If the beneficiary were able to protect itself through contract or other legal protection, it would not need the fiduciary duty. However, the open-endedness of the relationship subjects the beneficiary to the fiduciary's potential opportunism.²⁶¹ Vulnerability is often characterized as dependency: the beneficiary is dependent on the fiduciary's discretion or good graces to get what they need or deserve.²⁶² This link between power/discretion and vulnerability/dependency is a critical justification for the fiduciary relationship.²⁶³

²⁵⁷ See Marion Crain, *Managing Identity: Buying into the Brand at Work*, 95 IOWA L. REV. 1179, 1184-85 (2010) ("The most effective branding programs secure a competitive advantage for the branded business by generating a sense of community and belonging that induces extraordinary effort and productivity on the job, furthers cohesion even among an increasingly diverse workforce, minimizes the need for surveillance and close supervision, and reduces employee turnover.").

²⁵⁸ Bainbridge, *supra* SB-PM, at 1049 (describing the conditions under which employees will invest in firm-specific capital).

²⁵⁹ Greenfield, *supra* note KG-PW, at 299 ("What is important at this juncture is to notice that workers have some of the same problems as shareholders: they contribute something of value to management and they must depend on management both to maximize the return on that input and to share that return with them.").

²⁶⁰ See, e.g., Lawrence E. Mitchell, *Trust. Contract. Process.*, in PROGRESSIVE CORPORATE LAW 185, 190 (Lawrence E. Mitchell ed., 1995) ("Fiduciary relationships are, characteristically, relationships of power and dependency.").

²⁶¹ Smith & Lee, *supra* note S&L, at 620 ("Although incomplete contracts are inevitable, contracting parties routinely create fiduciary relationships, in which one party (the beneficiary) seems especially vulnerable to opportunism by the counterparty (the fiduciary).").

²⁶² Miller, *supra* note PM-TFL, at 254 ("Dependence is usually taken to mean that certain interests of the beneficiary are subject to influence by the fiduciary.").

²⁶³ See *id.* at 620 n.54; Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 470 (2010) ("[A]ll beneficiaries are vulnerable to the fiduciary's abuse of legally entrusted administrative power over

Critics of employee fiduciary duties point to this factor to emphasize the inapplicability of such duties to employees. The employer is not vulnerable to its employees, they argue; if anything employees are vulnerable to and dependent on their employers.²⁶⁴ The first claim is perhaps overstated: the employer is vulnerable to employee opportunism as a result of the discretion afforded to those employees.²⁶⁵ But employees are unquestionably vulnerable to their employers with respect to their livelihoods and their connection to the ongoing business enterprise.²⁶⁶ For at-will employees, their investments in their career and in the employer's business can vanish in an instant.²⁶⁷ Employees are vulnerable to the employer's control over the business enterprise to steer a greater share of the firm's profits back to equity owners and away from employees.²⁶⁸ Similarly, employees must place trust and confidence in their employers on a variety of levels to look out for their interests and manage the joint enterprise in which they participate; they trust that the employer (and those who run it) will utilize their labor with care and competence to

their legal and practical interests.”); Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEENS L.J. 259, 275 (2005)(asserting that a fiduciary obligation arises “whenever one party unilaterally assumes discretionary power of an administrative nature over the important interests of another, interests that are especially vulnerable to the fiduciary's discretion”).

²⁶⁴ See Fisk & Barry, *supra* note FB1, at 419 (“The employer owes no duty of loyalty to the employee and is free to pursue its self-interest by firing him to hire another for a lower wage or for better skills. Yet the employee's ability to pursue her own self-interest by seeking better opportunities is limited [under a duty of loyalty].”).

²⁶⁵ See, e.g., Andrew Frazier, *The Employee's Contractual Duty of Fidelity*, 131 L.Q. REV. 53, 54 (2015) (discussing opportunities for employee opportunism).

²⁶⁶ FRANK TANNENBAUM, *A PHILOSOPHY OF LABOR* 9 (1951) (“We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. . . . For our generation the substance of life is in another man's hands.”).

²⁶⁷ Greenfield, *supra* note KG-PW, at 302 (noting that firm-specific skills “make a worker more valuable to her present employer, but also make her more vulnerable to a firm's opportunistic behavior”).

²⁶⁸ See Greg Dow & Louis Putterman, *Why Capital (Usually) Hires Labor: An Assessment of Proposed Explanations*, in *EMPLOYEES AND CORPORATE GOVERNANCE* 17, 37 (Margaret M. Blair & Mark J. Roe eds., 1999) (“[I]t is unclear why equity investors have a greater need for safeguards against managerial abuse than employees.”).

create a successful business.²⁶⁹ Thus, the vulnerability factor weighs in favor of the employer as fiduciary.

Under a more specifically contractual approach to the fiduciary relationship, the parties' reasonable expectations justify fiduciary duties.²⁷⁰ Because contracts in certain types of relationships are substantially incomplete,²⁷¹ there is a need for a gap-filler to manage the incompleteness in a flexible way. The fiduciary duty should thus be based on the parties' reasonable expectations—an off-the-rack legal form, like the corporation, that best suits the underlying interests of the parties involved. Employees are assigned fiduciary duties under this theory because the employer cannot dictate every aspect of the job in the contract. Because the employee is charged with managing the employer's business, the employer and employee would want the employee to act in the interests in the employer in carrying on the business. However, the problem of opportunism within incomplete contracts is one that employees confront vis-à-vis employers as well. Employers make myriad decisions that affect employees—both those that directly involve employees (like decisions to hire or fire) and those that indirectly but significantly affect employees (like the decision to start a new product line). These decisions cannot be reduced to specific contractual provisions at the outset of the relationship.²⁷² Given the resulting incompleteness,

²⁶⁹ Bainbridge, *supra* note SB-PM, at 666 (“Both the livelihood and much of the wealth of employees is thus dependent on the firm’s survival.”).

²⁷⁰ Easterbrook & Fischel, *supra* note EF1, at 427 (“The duty of loyalty replaces detailed contractual terms, and courts flesh out the duty of loyalty by prescribing the actions the parties themselves would have preferred if bargaining were cheap and all promises fully enforced.”); Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899, 900 (2011) (“[T]he fiduciary duty is most usefully viewed as a type of contract.”).

²⁷¹ Easterbrook & Fischel, *supra* note EF1, at 426 (“[T]he duty of loyalty is a response to the impossibility of writing contracts completely specifying the parties’ obligations.”)

²⁷² Bainbridge, *supra* note SB-PM, at 664 (“Because employees and employers cannot execute a complete contract under conditions of uncertainty and complexity, many decisions must be left for later contractual rewrites imposed by employer fiat.”); Greenfield, *supra* note KG-PW, at 317 (“Workers and management thus face significant barriers to contracting, in that they face huge transaction costs in reducing to writing all the implicit understandings necessary to reach the outcome best for both parties.”).

fiduciary duties are justified to balance out the expectations of the parties.²⁷³

The economic justification for the fiduciary law of agency is the reduction of agency costs—the costs that a principal must incur in monitoring an agent. In the simple framework of principal-agent or master-servant, the one-person principal/beneficiary clearly must expend monitoring costs on the agent/fiduciary, some of which are mitigated by the fiduciary duty. However, employees also incur agency costs in making sure that the employer abides by its promises as to pay and benefits, allocates the responsibilities for the enterprise fairly, and allocates the returns to the business equitably.²⁷⁴ As to the latter, the employer may favor equity investors over employees,²⁷⁵ may favor one group of employees over another, or may unfairly deprive one employee of reasonable compensation.²⁷⁶ Individual employees generally have no way

²⁷³ Judge Easterbrook himself penned an opinion which gave potential protections to employees against employer opportunism that was effectuated by withholding confidential information. *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429 (1987). Although this opinion was based on the duty of good faith, it nevertheless showed the depth of the relationship between employer and employee, and the concern for employer opportunism. *Id.* at 438 (“Employment creates occasions for opportunism.”).

²⁷⁴ Greenfield, *supra* note KG-PW, at 299 (“Employees in a firm, in fact, must bear certain monitoring costs—‘agency costs’—associated with making sure that the firm’s management is keeping their interests at heart.”).

²⁷⁵ *Id.* (“What is important at this juncture is to notice that workers have some of the same problems as shareholders: they contribute something of value to management and they must depend on management both to maximize the return on that input and to share that return with them.”).

²⁷⁶ Lilly Ledbetter provides one example of the need for monitoring costs. Ledbetter spent nineteen years as a manager and executive at Goodyear Tire & Rubber and assumed that she was being paid a fair income. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007); *id.* at 643 (Ginsburg, J., dissenting). At the end of her tenure, however, she discovered (through an anonymous office note) that male employees in similar positions were making significantly more money than she was. Transcript at DNC Convention, at: http://www.pbs.org/newshour/bb/politics-july-dec08-ledbetter_08-26/. By the time she retired, Ledbetter was paid \$3,727 per month; the lowest paid male area manager received \$4,286 per month, the highest paid, \$5,236. *Ledbetter*, 550 U.S. at 643 (Ginsburg, J., dissenting). Ledbetter sued for sex discrimination under the Title VII. Her lawsuit was originally found to be time-barred but ultimately led Congress to change the Statute of Limitations to allow for suits like hers. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No.

of monitoring these decisions, other than through their own personal experience and what evidence they can glean from other employees.²⁷⁷ Employees have no right to see each other's pay, and social norms generally prevent the free spread of such information.²⁷⁸

Unions address these vulnerabilities in certain respects: they can represent a group of employees, bargain in good faith with the employer, and require that the employer disclose the employees' terms and conditions of employment.²⁷⁹ But unions can only insist on bargaining; they cannot provide any legal remedies for opportunism that is not otherwise prohibited by law. Although often treated as a panacea in incomplete-contracting literature,²⁸⁰ labor unions fail to play the same role that fiduciary duties would. Moreover, less than seven percent of private-sector employees are represented by unions.²⁸¹

The steady decline in unionism has had an important cost to the role of employees in governance. Unions provide a vehicle for workers to participate in the governance of the employer. By choosing a collective

111-2, 123 Stat. 5 (2009). However, Ledbetter would never have known to bring a suit if it were not the secret informant.

²⁷⁷ Even a duty of care would be important to employees, as their human-capital investments in the firm will only pay off if management does not manage the business poorly. Greenfield, *supra* note KG-PW, at 300 ("Like shareholders, workers depend on the care, skill and good faith of the management. If the managers do not take care, or are stupid, or look after themselves only, both the shareholders and the workers will be harmed.").

²⁷⁸ See Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. PA. J. LAB. & EMP. L. 121 (2003); Leonard Bierman & Rafael Gely, "Love, Sex and Politics? Sure. Salary? No Way": *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167 (2004); Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 BERKELEY J. EMP. & LAB. L. 41, 62 (2005).

²⁷⁹ 29 U.S.C. § 158(a)(5) (duty to bargain in good faith); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (requiring an employer to provide information to union to substantiate bargaining claims).

²⁸⁰ See, e.g., Benjamin Klein, Robert Crawford & Armen Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 315-16 (1978) (describing how unions can stifle employer opportunism).

²⁸¹ Bureau of Labor Statistics, Press Release, *Union Members Summary*, Jan. 28, 2016, <http://www.bls.gov/news.release/union2.nr0.htm>.

representative, workers can have a voice in the affairs of the workplace.²⁸² But workers should not be dependent on unions for such a voice; instead, they should be incorporated into the governance mechanisms of the firm. If they left outside the firm governance structure, they are vulnerable to the firm's decisionmakers in ways that make them less like fiduciaries and more like beneficiaries.

Part V will describe the fiduciary relationship between employees under two very different models. The first model represents the current economic reality: employees work for an employer in which they have no participation in governance or ownership. The second model represents a potential for the future: employees participate in governance and ownership along with the other equity investors in the firm. The differences between these models of governance result in two very different paradigms for the fiduciary relationship.

V. EMPLOYER DUTIES AND EMPLOYER GOVERNANCE

The employment relationship is best conceived as a mutual set of fiduciary relationships between employer and employee. Employees owe fiduciary duties of loyalty and performance to the employer, and the employer owes such duties to its employees. However, the nature and scope of these relationships will differ depending on the nature of the relationship.

The critical factor, from a fiduciary perspective, should be whether employees participate in the governance of the firm/employer. If they do not, as is common at most American workplaces, the employer will owe stronger fiduciary duties to employees in order to address the employer's untrammelled discretion (*vis-à-vis* employees) and the potential for opportunism. However, if employees do participate in the governance of their employer, the employer will be less akin to a remote fiduciary and more akin to a participatory democracy. The firm will be the mechanism

²⁸² Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 804 (2011) ("The organization of workers in unions was also viewed as beneficial because it would give them a greater say in the running of the workplace, and perhaps the country.").

of coordinating joint production, through which employees and equity investors manage the business together. In such a relationship, employees will have duties to themselves and other participants akin to the duties that partners owe to one another. There is less need for fiduciary duties and the concomitant oversight they provide if employees are represented within the “firm” itself.

A. Employer Fiduciary Duties Without Employee Participation in Governance

Employees share many of the characteristics of beneficiaries in fiduciary relationships: the employer exercises discretion in the management of the firm; employees are vulnerable to the use of that discretion and the potential for opportunism; and employees must incur agency costs in managing their relationship with the employer.²⁸³ In that discussion, we bracketed the idea of the “employer,” allowing the term to perhaps slip into the personification called to mind by “master-servant” doctrine. But the employer is a firm. It is a group of people working together in a joint business enterprise. Like a partnership, it is an entity and an aggregate—a fictional person representing the interests of the collective. Employees participate in the business of the firm—but do they participate in its governance?

In most cases, they do not. Employees are not a meaningful category when it comes to corporate law.²⁸⁴ They are simply one category of the many parties who form contracts with the corporation. Although individual states have their own separate sets of corporate law, states uniformly delineate the roles of directors, officers, and shareholders in governing the entity. The relationships between these three groups constitute the purpose and function of corporate law.²⁸⁵ Shareholders

²⁸³ See Part IV.C *supra*.

²⁸⁴ Matthew T. Bodie, *Employees and the Boundaries of the Corporation*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 85 (Claire Hill & Brett McDonnell eds., 2012).

²⁸⁵ See, e.g., ROBERT C. CLARK, CORPORATE LAW 93-140 (1986) (discussing distribution of power between shareholders, directors, and officers).

select the directors at the annual shareholders meeting.²⁸⁶ The board manages the firm and may bind the corporation through contracts and transfers of property.²⁸⁷ Directors are bound to act in the interests of the firm through common law fiduciary duties of care, good faith, and loyalty. Officers are the titular heads of the corporate hierarchy, with authority to manage the company until the board replaces them.²⁸⁸ This structure—shareholders select the directors, who select the officers, who in turn run the corporation—is the internal engine of corporate governance. Employees are not included.

Corporations are not alone in their exclusion of employees. An employee may in some cases be characterized as a partner if she is part of a group that meets the partnership definition: “an association of two or more persons to carry on as co-owners a business for profit.”²⁸⁹ But employees-as-employees are excluded from partnership governance, which is controlled by partners, either as a whole or a designated sub-group.²⁹⁰ Limited partnerships and LLPs are managed by general partners,²⁹¹ and LLCs have a flexible governance structure but one that defaults to governance by its “members.”²⁹² Members are designated within the LLC, and membership does not extend to employees as a category.

As the above should make clear, United States business organizational law has been remarkably successful in separating employment from ownership.²⁹³ Under our current system, employees

²⁸⁶ DEL. CODE tit. 8, § 211.

²⁸⁷ *Id.* § 141.

²⁸⁸ See CLARK, *supra* note RCC, at 113-23 (discussing the powers and duties of officers).

²⁸⁹ R.U.P.A. § 101(6) (1994); see, e.g., *Holmes v. Lerner*, 74 Cal. App. 4th 442, 457-58 (1999) (finding that a partnership was created informally, without a governing document, when parties agreed to build business together and share profits).

²⁹⁰ R.U.P.A. § 401(f) (1994); LARRY E. RIBSTEIN & JEFFREY M. LIPSHAW, UNINCORPORATED BUSINESS ENTITIES 431 (4th ed. 2009) (“A hallmark of the partnership form is the co-equal right of every partner, absent a contrary agreement, to participate in the management of the enterprise.”).

²⁹¹ REV. UNIF. LTD. P'SHIP ACT § 403 (1976); cf. RIBSTEIN & LIPSHAW, *supra* note R&L, at 529 (noting that LLPs may prefer centralized partnership management).

²⁹² *Id.* at 432 (“Most LLC statutes provide that, in the absence of a contrary agreement, the LLC is managed directly by members.”).

²⁹³ See Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1864 (2003) (exploring “how, in the course of the twentieth

hand over their labor, good will, and personal capital to the firm, but then the firm – established as a corporation, partnership, or LLC – directs those assets to the ultimate benefit of the governance participants, which are generally equity investors. “Shareholder primacy” in corporate law is the most familiar instantiation of these mechanics. The justification for shareholder primacy generally proceeds as follows: because shareholders are the most vulnerable, they are given control over governance rights, including voting rights and the ability to seek redress for violations of fiduciary duties.²⁹⁴ The end result is that all other stakeholders, including employees, are fenced out from participation in governance.²⁹⁵

If employees as a category are excluded from governance, they have no way to address the employer’s discretion, their own vulnerability to that discretion, and the opportunism and agency costs that are inherent in the relationship. Because of this, the employer as legal entity must assume stronger fiduciary duties to address the imbalance. Essentially, the employer would have a duty not to use its discretion to take undue advantage of employees, either individually or as a group.²⁹⁶ This duty would be placed on all employers, regardless of their underlying business organizational form. The fiduciary duty would be an effort at boundary enforcement, closing off a narrow but important range of discretion that would otherwise be open to employers.²⁹⁷ In their words, the duty would “distinguish the *appropriate pursuit of self-interest* from the *inappropriate*

century, legal scholars and political theorists helped remove the interests of workers (as differentiated from shareholders, officers, and directors) from the core concerns of corporate law and theory”).

²⁹⁴ EASTERBROOK & FISCHER, *supra* note EF-Book, at 67-70, 90-93.

²⁹⁵ For an employee-centric attack on shareholder primacy, see Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334, 335 (2008) (arguing instead for employee primacy in corporate decision-making). *Cf.* David I. Yosifon, *Consumer Lock-In and the Theory of the Firm*, 35 SEATTLE U. L. REV. 1429 (2012) (arguing that certain consumers have long-term and locked-in interests that should give them certain governance rights).

²⁹⁶ Robert Bird proposed that employment contracts have an “implied covenant of the employment relation” that would address some of the relational opportunism concerns discussed here. Bird, *supra* note RCB1, at 200 (“Thus, a covenant of the employment relation would be satisfied if the employer did not engage in relational opportunism towards its employees.”).

²⁹⁷ Smith & Lee, *supra* note S&L, at 635.

*pursuit of self-interest.*²⁹⁸ Here, self-interest would be the firm's pursuit of its individual interests and the interests of its owners/controllers at the expense of employees' interests.

This robust-sounding fiduciary duty may scare traditionalists, who might see the corporate world turned upside-down. But this duty complements, rather than replaces, the rule of shareholder primacy, and would in fact apply to every employer, no matter the business-organizational form. The rule would sit within the existing common-law and statutory protections for employees that, in fact, treat the employer as something of a fiduciary already. Many of the labor and employment protections discussed above in Part III are responses to employer opportunism.²⁹⁹ Minimum wages protect against employers using their market power to force substandard remuneration on employees—remuneration less than what we deem to be societally acceptable for labor. Required benefits such as family and medical leave or health-insurance coverage force the employer to provide basic level of care for all employees. Fiduciary responsibilities under ERISA prohibit an employer from underfunding a plan or succumbing to a conflict of interest. Employers cannot subject their employees to unsafe workplaces and must bear responsibility for injuries that workers suffer in the scope of employment. The common law has also restrained employer discretion: covenants not to compete are subject to a reasonableness test, and terminations cannot be carried out in bad faith or in retaliation for protected conduct. Perhaps the most meaningful set of quasi-fiduciary or governance rights are the employees' rights to choose a bargaining representative and require the employer to bargain in good faith. The bargaining representative can fight employer opportunism against employees by collecting information about employees and their terms and conditions of employment, forcing the employer to justify those terms and conditions through a process of negotiation, providing rights for employees to work together and even strike, if they feel they are not

²⁹⁸ *Id.* (emphasis in original).

²⁹⁹ *Cf.* Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 273 (2013) (arguing that “employment law can be profitably understood as serving the interest in promoting social equality and that its rules can be analyzed, defended, and critiqued based on the degree to which they advance that interest”).

getting treated properly, and establishing a grievance-arbitration system for the resolution of individual employee concerns about mistreatment or opportunism.³⁰⁰ But whatever their strengths, these labor and employment protections do not obviate the need for a common-law fiduciary duties toward employees. Instead, they provide further evidence for the concerns underlying such duties as well as support for a fiduciary approach.

So what would change? Starting incrementally, an employer fiduciary duty would look similar to the existing duty of good faith, such that the employer could not fire an employee to prevent the accrual of a bonus or could not conceal business information to mislead an employee.³⁰¹ Expanding this outward, courts could develop norms—based both on industry standards and social policy—about what sorts of conduct unfairly take advantage of employees and reek of opportunism.³⁰² In addition, employers would take on a duty to act in the interests of employees when making decisions regarding employee interests, such as pension and health insurance plans.³⁰³ Pursued even more aggressively, employer fiduciary duties could be used to examine the structure of the employment relationship and compare the relative returns to employees and the employer. It is conceivable that an employer using its contractual power to extract huge rents from its business enterprise while sharing only paltry amounts with employees could be subject to the duty against opportunistic behavior.³⁰⁴ Finally, perhaps the employer's fiduciary duty

³⁰⁰ See Part III.A.6 *supra*.

³⁰¹ See Part IV.A *supra* (discussing RESTATEMENT OF EMPLOYMENT LAW §§ 2.07, 3.05 (2015)).

³⁰² In their discussion of fiduciary duties, Smith and Lee place an emphasis on the role of social norms and industry customs in developing these duties. However, they also recognize that “some industry customs and social norms may be undesirable from a societal standpoint.” Smith & Lee, *supra* note S&L, at 638.

³⁰³ Margaux Hall's argument for specific fiduciary duties in the context of health insurance coverage provides a nice application of this principle. Hall, *supra* note MH1.

³⁰⁴ Wal-Mart Stores, Inc. is the largest private employer in the United States. Lesley Wexler, *Wal-Mart Matters*, 46 WAKE FOREST L. REV. 95, 95 (2011). It has often been cited in the legal and economic literature for its relatively paltry wages and benefits, as compared with the returns distributed to its shareholders—members of the Walton family. See, e.g., *id.* at 97 (noting “Wal-Mart's quasi-monopsonistic hiring power [and] its vigorous union-busting efforts”); Benedict Sheehy, *Corporations and Social Costs: The Wal-Mart Case Study*, 24 J.L. & COM. 1, 40 (2004) (“Wal-Mart's low wage policy drives down prices in the labour market. It off loads its operating costs onto the state and other businesses. It

could include a prohibition against subcontracting, restructuring, or other forms of workplace “fissuring” in which employees are cut loose from the firm and cut out of their share of the pie.³⁰⁵

It may seem objectionable to saddle the employer with such a significant and potentially ambiguous responsibility for the interests of its employees, who (under current law) are deemed contractual partners looking after themselves. But this contractual model of the employment relationship is outdated, and it is blind to the many common-law and statutory responsibilities that society has already loaded upon employers, starting with the original doctrine of respondeat superior. We may also object to the paternalistic way in which we expect the business to look out for the interests of its workers—a “nanny employer,” as it were.³⁰⁶ There is a way out of this paradigm—a way in which employees depend less on the employer as a separate entity and take more responsibilities upon themselves. But this would require giving employees meaningful governance rights within the employer itself.

B. Employer Fiduciary Duties under a Participatory Governance Model

If employees participate in the governance of the employer, the fiduciary relationship changes. No longer are workers simply subject to

damages the well-being of employees by eliminating opportunity to access psychic income generating activities, and increasing stress resulting from employee turn-over.”); Carol Zabin et al., *The Hidden Public Costs of Low-Wage Jobs in California*, The National Economic Development and Law Center, at 23-25 (May 2004) <http://laborcenter.berkeley.edu/pdf/2004/workingpoor.pdf>; Edward B. Shils, *Measuring the Economic and Sociological Impact of the Mega-Retail Discount Chains on Small Enterprise in Urban, Suburban and Rural Communities*, SHILS REP., Feb. 7, 1997. *But see* Richard A. Epstein, *On Wal-Mart: Doing Good by Doing Nothing*, 39 CONN. L. REV. 1287, 1304 (2007) (“Wal-Mart is the source of opportunity. Its opponents block opportunities. They do not create them.”).

For a discussion of a company that allegedly broke its relational promises to employees, see Judy Pate & Charles Malone, *Post-“Psychological Contract” Violation: The Durability and Transferability of Employee Perceptions: The Case of TimTec*, 24 J. EUR. INDUS. TRAINING 158 (2000).

³⁰⁵ For a discussion of new ways in which employees are sliced, diced, and minced out of the modern firm, see DAVID WEIL, *THE FISSURED WORKPLACE* (2014).

³⁰⁶ M. Todd Henderson, *The Nanny Corporation*, 76 U. CHI. L. REV. 1517 (2009).

the whims of a separate entity that controls the underlying business enterprise. Instead, they have a voice in the decisionmaking mechanisms of that enterprise. They have a role to play in the employer's exercise of its discretion. They are no longer as vulnerable to opportunism. Their vulnerability is that of one set of participants to another, rather than of a powerless beneficiary and a powerful fiduciary. It becomes less a question of fiduciary responsibility and more one of appropriately structured governance rights. Instead, it is about the use of fiduciary duties to manage the discretion and vulnerabilities within the employment relationship. And such duties could be changed—diminished—if employees had participatory rights in firm governance.³⁰⁷

As participants in the firm, employees would no longer be able to view the “employer” as simply an us-against-them relationship. Instead, the employer would consist of the employees as well as the equity investors. As such, employees would have duties to each other and to the other participants through their own fiduciary duties to the employer. This approach provides a much stronger foundation for the traditional employee fiduciary duties to the firm. The employees as a group are committing to refrain from opportunism that would harm their fellow employees. An employee would not be harming a nameless, faceless “employer” by stealing business opportunities or disclosing confidential information. Instead, the employee would be harming the ongoing business enterprise, represented by the firm, in which his fellow employees were still participating. So instead of being tribute paid to a master, the duty of loyalty is a pact amongst equals not to engage in opportunism. Similarly, intellectual property doctrines that seem to harm employees, like the shop-right doctrine³⁰⁸ or the work-for hire doctrine,³⁰⁹ could be

³⁰⁷ An extensive discussion of employee participation in management is beyond the scope of this paper. However, such an approach would be more consonant with employees' participatory role within the firm. See Bodie, *supra* note MTB-EBF, at 100, 102. For an argument that participatory management may be an adaptive market response but should not be made mandatory, see Bainbridge, *supra* note SB-PM, at 658. For arguments in favor of worker participation, see Greenfield, *supra* note KG-PW. For an argument that employee participation in governance only works when workers are homogenous, see HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 91-98 (1996).

³⁰⁸ CATHERINE L. FISK, *WORKING KNOWLEDGE: EMPLOYEE INNOVATION AND THE RISE OF CORPORATE INTELLECTUAL PROPERTY, 1800-1930* 118 (2009).

seen instead as agreements amongst employees to share the fruits of their common labors with the collective, rather than jumping ship opportunistically.

Because the fiduciary relationship would be with one's co-venturers in the economic enterprise, the relationship would more closely resemble those business relationships with default rules of equal participation, such as partnerships. Partners owe fiduciary duties to the partnership as a separate entity as well as to their fellow partners in the aggregate.³¹⁰ Employees would have similar duties within the context of the employer.³¹¹ If employees do have governance rights, individual and smaller groups of employees would still need protection against opportunities by the voting majority to behave opportunistically and deprive the minority of its fair share. But such duties would resemble the shareholder "minority oppression" doctrine, rather than an agent's fiduciary duties.³¹² Under this doctrine, courts have equitable power to

³⁰⁹ *Id.*

³¹⁰ ALAN R. BROMBERG & LARRY E. RIBSTEIN, 2 BROMBERG AND RIBSTEIN ON PARTNERSHIP § 6.07(a) (2004); Smith, *supra* note GSCRT, at 1458. Modern partnership law is engaged in an ongoing debate as to whether a partnership is simply a collective of individuals (aggregate theory) or is an entity unto itself (entity theory). This divergence reflects a similar tension in the role of employees who participate in the firm's governance.

³¹¹ Larry Ribstein has argued that in fact, partners should not all have fiduciary responsibilities to each other; only those who have open-ended managerial discretion should owe fiduciary duties. Ribstein, *supra* note LRAPE, at 215. According to Ribstein, governance rights are not themselves sufficient to create fiduciary duties; there must be some discretionary, managerial power over other owners to justify the imposition of such duties. *Id.* at 237-40. The duties that partners would owe to each other under Ribstein's approach follow the duties that co-owners—co-participants in governance—owe to each other. In fact, he raised concerns about the denigration of governance rights if fiduciary duties were also imposed on top of the governance rights. *Id.* at 233. Ribstein's approach to nonmanaging partners would have similar resonance as to employees with governance rights. On the other hand, employees with managerial discretion would owe fiduciary duties, given the entrustment of the firm in their hands. See Tamar Frankel, *Fiduciary Law in the Twenty-First Century*, 91 B.U. L. REV. 1289, 1293 (2011) (discussing the concept of entrustment).

³¹² Minority shareholder oppression occurs when the majority group in a closely-held corporation uses its power over the corporation to deprive minority shareholders of certain fruits or expected returns from the business. Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 VAND. L.

adjust decisions made by controlling shareholders (or shareholder blocs) that unfairly target minority shareholders and deprive them of their proportional shareholder value.³¹³ Minority oppression includes not only conduct such as unfair buybacks or dividend distributions, but also disproportionate employment salaries for majority owners or decisions to terminate the employment of minority shareholders.³¹⁴ It is a holistic doctrine that tries to root out decisions that violate the boundaries of fairness and the reasonable expectations of the parties.³¹⁵ A similar doctrine could apply to employees to make sure a majority bloc within the employer did not use its power to disadvantage a minority bloc of employees unfairly.³¹⁶

REV. 749, 750 (2000) (“The doctrine of shareholder oppression protects the close corporation minority stockholder from the improper exercise of majority control.”). For example, majority shareholders may terminate a minority shareholder’s employment by the company, depriving that shareholder of the expectations of a continued salary. *See, e.g., Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 662 (Mass. 1976) (describing one type of shareholder oppression as “to deprive minority stockholders of corporate offices and of employment with the corporation”). Some courts have characterized the minority oppression doctrine in the language of fiduciary duty. *Donahue v. Rodd Electrotype Co. of New England*, 328 N.E.2d 505, 515 (Mass. 1975) (“Because of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation, we hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another.”).

³¹³ *See Moll, supra* note DM-Vand, at 759-61 (describing oppression doctrine and the avenues of relief available to courts).

³¹⁴ *See Douglas K. Moll, Shareholder Oppression v. Employment At Will in the Close Corporation: The Investment Model Solution*, 1999 U. ILL. L. REV. 517, 520 (1999) (discussing the conflict between employment at-will and shareholder oppression doctrine when at-will shareholders are terminated).

³¹⁵ Benjamin Means, *A Contractual Approach to Shareholder Oppression Law*, 79 FORDHAM L. REV. 1161, 1199 (2010) (“In a growing number of jurisdictions, courts evaluate claims of oppression by asking whether the majority has deprived the minority of the objectively reasonable expectations that motivated its investment.”).

³¹⁶ As with the minority oppression doctrine, the courts would need to walk a fine line between the rights of the minority to minimum standards and the rights of the majority to manage the business enterprise as it saw fit. Benjamin Means, *A Voice-Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation*, 97 GEO. L.J. 1207, 1211 (2009) (“Rather than insisting upon strained

If employees participate in governance, the employer would not have a duty not to use its discretion to take undue advantage of employees, either individually or as a group. Instead, the governing group as a whole would need to agree not to unfairly target minority interests within the firm. These democratically-structured rights and duties would better align the employee's interests with the interests of the firm itself. As such, there would be much less of a need for fiduciary protection. For those looking to free the workplace of many of the employment and labor law regulatory encumbrances,³¹⁷ employee governance participation provides a way to reduce these regulations without rendering employees unduly vulnerable.

CONCLUSION

Employee fiduciary duties sit uneasily within agency doctrine: they are clearly required by traditional doctrine, but their justifications have become harder to defend. However, when seen within a more holistic approach to the employment relationship, these duties are justified as a set of protections for one's fellow employees and the other participants in the firm. If allowed to participate in firm governance, employees would rightfully have duties against opportunism, and employers would simply be fictional placeholders for the aggregate governance mechanisms they would represent. On the other hand, if employers continue to fence employees out of governance, stronger fiduciary responsibilities are required to prevent employer opportunism. Either approach would be superior to our current law, under which vulnerable employees owe ill-defined fiduciary duties and employers have no reciprocal obligations.

comparisons to public corporation or partnership models of governance, courts should minimize deterrents to minority investment by preventing majority shareholders from taking unfair advantage of their power while also recognizing the majority shareholders' right to benefit from control in order to encourage their investment.”). This is the work that a vague word like “unfair” must take on within the doctrine.

³¹⁷ See, e.g., Richard A. Epstein, *Contractual Solutions for Employment Law Problems*, 38 HARV. J.L. & PUB. POL'Y 789, 802 (2015) (“The best response today to labor market regulation comes straight from Moses: ‘Let my people go.’”); cf. Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 91 (2008) (arguing for simplification of employment law through a uniform unjust dismissal law).