

ESSAY

FOREWORD: THE RESTATEMENT OF EMPLOYMENT LAW PROJECT*

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After over a dozen years of work, the American Law Institute (ALI or Institute)'s Restatement of Employment Law has been completed. The membership of the ALI, the nation's leading private organization dedicated to clarifying and improving the law, approved the proposed final draft, subject to editing, at its May 2014 annual meeting. The final edits are done and the volume is now available both electronically and as a book to practitioners, judges, scholars, and law libraries around the country and world.

We have had the honor to serve as Reporters for the Restatement of Employment Law and are pleased to have this opportunity to discuss the project for the *Cornell Law Review* symposium, the first academic analysis of the completed project. We are fast becoming ex-reporters, and in this Essay we do not speak on behalf of the Institute.

The Drafting Process

Dean Lance Liebman (Columbia) was appointed the fifth Director of the ALI in 1999. Dean Liebman is himself a specialist in employment law and coauthor of a leading casebook. Shortly after becoming Director, he encouraged discussions of a possible Restatement of the field. The project was launched in 2001 at an NYU Center for Labor and Employment meeting of leading employment law academics and practitioners and distinguished judges with experience in the field. The ALI then named four Reporters—Professors Samuel Estreicher (NYU), Michael Harper (Boston University),

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Christine Jolls (Harvard), and Dean Stewart Schwab (Cornell). Several years into the project, with wheels spinning slowly, Jolls resigned and Sam Estreicher was named Chief Reporter. Professor Matthew Bodie (Saint Louis) joined in 2008, as did Dean Andrew Morris (Texas A&M), who left after two years.

The completed Restatement has nine chapters. It was truly a collective effort, but each of us (indicated by our initials below) took first-draft responsibility for various chapters.

Restatement of Employment Law: Table of Contents

- Chapter 1 – Existence of Employment Relationship (MCH)
- Chapter 2 – Employment Contracts: Termination (SE)
- Chapter 3 – Employment Contracts: Compensation and Benefits (SE)
- Chapter 4 – Principles of Employer Liability for Tortious Harm to Employees (MCH)
- Chapter 5 – The Tort of Wrongful Discharge in Violation of Public Policy (SJS)
- Chapter 6 – Defamation, Wrongful Interference, and Misrepresentation (MCH)
- Chapter 7 – Employee Privacy and Autonomy (MTB)
- Chapter 8 – Employee Obligations and Restrictive Covenants (SJS)
- Chapter 9 – Remedies (SE)

As is standard in ALI Restatement projects, four important groups assisted the process. The first was the Advisers, a group of some forty judges, practitioners, and academics selected by the Council for their expertise in employment law. Particular care was taken to ensure that the Advisers included people with considerable experience representing employees, unions, and management. The second was the Members Consultative Group, about 200 members of the ALI with interest in the field and who volunteered to attend meetings and comment on drafts. The third group was the ALI Council; this group of about fifty lawyers, judges, and academics is the governing body of the Institute. The Council considered drafts, gave directions and advice, and decided whether to approve individual chapters and ultimately the project as a whole. Once the overall project was approved, the Council recommended it to the membership for adoption. Finally, the membership of the ALI, the organization's decision-making

body, discussed drafts at several annual meetings and ultimately voted unanimously to approve the Restatement.¹

As Reporters, we assumed and played a professional role that included professional constraints. Our task was to present drafts—and ultimately a finished product—stating current employment law, following ALI guidelines and its format of black letter law, comments, illustrations, and Reporters' notes. The goal was to describe, clarify, harmonize, and modernize the law, but not to change it in a particular substantive direction. It was an “is, not ought” exercise. We were not acting as aides to a legislative process or members of a legislature. We did not attempt to put our personal stamp on what we thought employment law should be but rather to describe the law as coherently and uniformly as possible. Of course, Reporters are not simply scribes, either. When articulating, summarizing, and clarifying the law of fifty jurisdictions, choices had to be made, and we tried to make the better or wiser choices.² A key aspiration was to help give the decisional employment law of fifty states a common terminology and framework and to offer a formulation of principles that made sense of the decisions and were also workable and accessible to judges and lawyers across the country.

Not a Law Review Article

The Restatement of Employment Law is not a law review article. It took much too long for an article, and our principal audience is judges and practitioners. Hopefully, they will use the work and draw guidance from it. Academics, in a sense, have no audience and have the world as their audience; realistically, their audience is comprised of other scholars in the same specialty. They are often more inclined to criticize the law than work within it. They are not, as a general matter, constrained by precedent or even a sense of the practical

¹ See *Projects: Overview*, A.L.I., <http://www.ali.org/index.cfm?fuseaction=projects.main> (last visited Aug. 21, 2015). The process saw numerous drafts: altogether, the Restatement of Employment Law had eight Preliminary Drafts presented to the Advisers and Members Consultative Group, eleven Council Drafts presented to the Council, and six Tentative Drafts presented to the membership. These drafts were all entitled “Restatement of the Law Third: Employment Law,” even though the ALI has never had a first or second Restatement of Employment. This numerology followed the ALI convention that all Restatements in the first period of its history, from 1923 to 1944, were Restatement Firsts, all Restatements from 1952 to 1986 were Restatement Seconds, and all Restatements from 1987 to the present were part of the Restatement Third series. The ALI recently changed its convention, and our effort is now simply called the Restatement of Employment Law. Presumably, a later revision of this Restatement, if and when it occurs, will be called the Restatement (Second) of Employment Law.

² See Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U. L.J. 185, 189–90 (1968) (“[I]f we ask ourselves what courts will do in fact . . . can we divorce our answers wholly from our view of what they ought to do . . . ?”).

feasibility of their normative prescriptions. Academics often take sides in their published work. In employment law, for example, many avowedly push the law to be more protective of workers. Although we are academics and have written many law review articles and books over the years, that was not our mission or orientation as Reporters. Our task and constraints were closer to those of judges. Judges make choices about the law but feel constrained by their role and try, with differing degrees of success, to separate their understanding of what the law is from applying their personal view of what the law should be. As Reporters we operate similarly, mindful of our constraints but subject to our own limitations.

Whether writing law review articles or drafting Restatements, we are all “legal realists” now. The process of discerning the law on a given subject is not a purely deductive science where the proper legal result in individual fact patterns can be deduced from general principles. It is, as Holmes put it, experience more than it is logic.³ Law, especially the law of the employment relationship, furthers a range of public policies, and various policies sometimes push in conflicting directions. Law is also a moving target, shaped by changing social values. This makes an ideal Restatement project unattainable. No area of law can be distilled or abstracted into perfectly consistent principles whose logic compels a certain result in any particular case. Real-world law is messier than that. But the law is not utter chaos, and what the judge ate for breakfast or where the judge’s political preferences lie is not a useful predictor of how most cases are decided. As Reporters, we tried to replicate the judicial task, although without the aid of the particular facts of an actual case and without the constraint of the statutory and decisional law in a particular jurisdiction. The Restatement task, as we see it, is to articulate a relatively precise and detailed set of principles that help explain most results in a particular field or, at the least, provide useful guidance for judges and practicing lawyers laboring in the field.

As law professors, we care about what other academics in our field say about this work. But as Reporters, the principal audience for the Restatement are the judges and lawyers who will read and use the book in their opinions and briefs, respectively. If the Restatement is frequently cited, it is a success. If it is largely ignored, we all will have spent time and effort producing a molehill, not a viable framework for the law’s development.

³ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Am. Bar Ass’n 2009) (1881).

Scope of the Project

We did not start from scratch as many first Restatements do. Rather, the Restatement of Employment Law builds on the earlier great work of the ALI Reporters and others who penned Restatement (Second) of Contracts, Restatement (Second) and (Third) of Torts, and Restatement (Second) and (Third) of Agency. What we tried to do was highlight the issues that have special force in the employment context.

An initial question was whether to limit ourselves to the state common law or also attempt a Restatement of statutory law. For many, the field of employment law began with landmark federal legislation such as the National Labor Relations Act of 1935⁴ and the Fair Labor Standards Act of 1938.⁵ Federal legislation, along with cognate state statutes, has mushroomed since the enactment of Title VII of the Civil Rights Act of 1964.⁶ Beginning in the early twentieth century, industrial states enacted occupational safety, workers' compensation, unemployment insurance, wage-hour, and wage-payment laws, and other states followed suit. But the sheer range of state employment legislation—covering such matters as employment discrimination, wiretaps, interception of electronic communications, employee healthcare records, drug testing, and protection of “whistleblowers” and “lawful activities”—is the product of later decades of the century.

As for decisional law, employment law was an offshoot of decisions dealing with the law of domestic relations and the law of agency. A common law of employment, thought of as a distinct area, really only emerges in the postwar period, and perhaps takes off with the onset of the economic downturn and layoffs of the 1970s and 1980s and the increasing use of restrictive covenants as employees, willingly or involuntarily, become less tethered to a single employer for their careers.

Our decision was to focus on the common law of employment. This is what Restatements usually do. This is where some degree of national uniformity can be encouraged. And this is where the courts, at least with respect to open questions in their jurisprudence, may be influenced by the experience of other states. Statutes, by contrast, are often delimited by their particular terms and compromises. In theory they are enacted to overcome limits, perceived or actual, in the common law. There is thus less of a normative basis for expecting one state legislature to adopt the legislation of another state

⁴ Pub. L. No. 74–198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169).

⁵ Pub. L. No. 75–718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219).

⁶ Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

(notwithstanding the valiant efforts of the Uniform Law Commissioners⁷). In any event, legislative change would be outside the purview of what judges do.

But we did not ignore statutory developments in related areas. For example, the common law is closely intertwined with statutes in defining the critical term “employee.” Employment law regulates employer-employee relations, and “who is an employee?” is the first question in the scope of the field. Most statutes, federal and state, do not define who an employee is but speak either in conclusory terms (an employee is someone “employed by an employer”⁸) or assume the applicability of agency law.⁹ The Restatement of Employment Law defines in Chapter 1 who is an employee under the common law.¹⁰ A major effort of the chapter is to capture the contemporary issues surrounding the common-law definition and in particular the interaction between the common law and the variety of statutory contexts. While in theory each separate statute has its own purpose and thus could have its own definition of employees it seeks to cover, in practice the definitions are similar and often rely on common-law understandings. Chapter 1 should be of major help both for common-law courts and courts and agencies filling in the lacunae of statutory definitions of “employee.” In this symposium, one of us (Harper) has examined at some length the interplay between state and federal courts and statutes and the common law, using several examples from Chapter 1 and elsewhere in the Restatement.¹¹

The common law is particularly important in employment terminations, albeit with large statutory overlays. The Restatement covers both the contract law of terminations (Chapter 2) and tort law restricting terminations in violation of public policy (Chapter 5). The common law remains central in other employment torts, employee privacy law, employee benefits, and employee restrictive covenants; the Restatement devotes chapters to these areas as well.¹² We decided, however, that the Restatement would not cover areas that are dominated by statutes, particularly where the impetus of the statute

⁷ See UNIFORM L. COMMISSION, <http://www.uniformlaws.org/> (last visited Aug. 21, 2015).

⁸ See, e.g., OHIO REV. CODE ANN. § 3121.89(B) (West 2013) (defining “employee” as “an individual who is employed to provide services to an employer for compensation”).

⁹ See, e.g., *Fleece on Earth v. Dep’t of Emp’t & Training*, 923 A.2d 594, 597–99 (Vt. 2007) (explaining that Vermont workers’ compensation law presumes that a person who renders services for wages is an employee unless the employer can demonstrate the person is not an agent of the employer).

¹⁰ See RESTATEMENT OF EMP’T LAW § 1.01 (2015) (“Conditions for Existence of Employment Relationship”).

¹¹ Michael C. Harper, *Fashioning a General Common Law for Employment in an Age of Statutes*, 100 CORNELL L. REV. 1281 (2015).

¹² Chapters 6, 7, 3, and 8, respectively.

was to change rather than codify the common law. Thus, we do not cover laws governing labor unions, antidiscrimination laws, or workers' compensation laws, among other important statutory areas of employment law. Principles developed under those laws, however, have informed decisions in some areas, which the Restatement attempts to reflect.

"Freezing the Law"?

After a spurt of innovation in the 1970s and 1980s, state common law in the employment arena has sufficiently stabilized to permit a meaningful Restatement of the law. Employment common law has been relatively stable over the last quarter of a century, compared to the earlier period. In the twelve or more years of the Restatement of Employment Law process, drafts of various chapters have undergone significant change. But none of the changes have occurred because of major new developments in case law. Rather, the changes have arisen from reflection, recommendations from advisors or the Council, or a growing consensus that one approach is preferable to another.

For example, one of the first chapters we drafted became Chapter 5, The Tort of Wrongful Discharge in Violation of Public Policy. This was the original title of Preliminary Draft No. 1 submitted to the Advisers in April 2005. In that draft, the Reporters' Notes cited some forty-three states as recognizing this tort. Later drafts were retitled as "Wrongful Discipline in Violation of Public Policy," and the black letter law was revised to include demotions, transfers, and other retaliatory discipline short of discharge within the basic tort. But over the course of considering this potentially broader scope, there were relatively few decisions dealing with the public-policy tort in the context of discipline short of discharge; the Reporters' Notes to the final Chapter 5 cite only four state supreme court cases, going both ways. The final Council Draft returned to the more established tort of wrongful discharge, and did not recognize the tort of wrongful discipline in violation of public policy. Section 5.01(a) expressly states, however, that the Restatement takes no position on whether the public-policy tort should be extended to employer retaliation short of discharge or constructive discharge.¹³

In many areas, the Restatement takes care to state that, while its provisions reflect the Reporters' best efforts to distill where most courts are on the subject, unless otherwise indicated, it expressly leaves open room for change. Thus, dealing again with the public-policy tort, section 5.02(f) ends with a residual category to protect

¹³ RESTATEMENT OF EMP'T LAW § 5.01(a) (2015).

employees from employer retaliation for “engag[ing] in other activity directly furthering a well-established public policy.”¹⁴ Similarly, section 2.02’s listing of exceptions to the employment at-will default rules includes, in subsection (e), “other established principles recognized in the general law of contracts [that] limit termination of employment.”¹⁵ This technique and the use of the word “including” in various listings appear throughout to give courts the benefit of the Restatement’s guidance without inadvertently or unnecessarily freezing the law’s development.

Privacy in employment law is probably the area that is most in flux of all the major topics covered by this Restatement. Social media, smart phones, and other technology are quite new, and common-law courts and legislatures are adjusting legal doctrine to new realities and concerns over privacy. We recognized that this area was new and evolving and therefore presented special challenges for a Restatement but nevertheless thought it was worthwhile to articulate a framework that would aid judges and advocates who are navigating this area. Chapter 7 (authored by Matt Bodie) builds on the privacy torts recognized in Restatement (Second) of Torts in a manner, we believe, offering that needed framework.

The Cornell Symposium

In November 2014 the *Cornell Law Review* hosted a dynamic and useful symposium assessing the Restatement. Prominent scholars presented papers: they included Deborah DeMott of Duke,¹⁶ Robert Hillman of Cornell,¹⁷ Michael Selmi of George Washington,¹⁸ Charles Sullivan of Seton Hall,¹⁹ and Steve Willborn of Nebraska.²⁰ Three highly regarded judges, each with a strong background in employment law, presented a roundtable assessment—Judge Marsha S. Berzon of the U.S. Court of Appeals for the Ninth Circuit, Justice Christine M. Durham of the Utah Supreme Court, and Judge Lee H. Rosenthal of the U.S. District Court for the Southern District of

¹⁴ *Id.* § 5.02(f).

¹⁵ *Id.* § 2.02(e).

¹⁶ Deborah A. DeMott, *Relationships of Trust and Confidence in the Workplace*, 100 CORNELL L. REV. 1255 (2015).

¹⁷ Robert A. Hillman, *Drafting Chapter 2 of the ALI’s Employment Law Restatement in the Shadow of Contract Law: An Assessment of the Challenges and Results*, 100 CORNELL L. REV. 1341 (2015).

¹⁸ Michael Selmi, *Trending and the Restatement of Employment Law’s Provisions on Employee Mobility*, 100 CORNELL L. REV. 1369 (2015).

¹⁹ Charles A. Sullivan, *Restating Employment Remedies*, 100 CORNELL L. REV. 1391 (2015).

²⁰ Steven L. Willborn, *Notice, Consent, and Nonconsent: Employee Privacy in the Restatement*, 100 CORNELL L. REV. 1423 (2015).

Texas.²¹ Three of us attended (and one of us, Michael Harper, presented a paper²²). These papers are now being published along with the judges' edited conversation. We are grateful to all for the careful attention they gave to the project just as it was being finalized. Indeed, while the Restatement in November 2014 was in the final copyediting process and substantive changes were not generally contemplated, several of the observations made by conference participants were so helpful (and manageable) that they made their way into the final document. This required great patience from the *Law Review's* editors. We thank everyone for their flexibility.

We are not inclined to give detailed responses to the papers in this symposium issue. The Restatement will stand on its own merits, and there will be time and space enough for the Reporters to respond if necessary. We note that the authors of the symposium papers are major figures in their academic specialties, and they have taken great care to give our handiwork a fair assessment. In due course, we will learn how the Restatement has fared in the courts; that will be its true test.

²¹ Judge Marsha S. Berzon, Justice Christine M. Durham & Judge Lee H. Rosenthal, *Panel: A Judicial Assessment of The Restatement of Employment Law*, 100 CORNELL L. REV. 1453 (2015).

²² Harper, *supra* note 11.

