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Publication Date
2006

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Public Law & Legal Theory Research Paper Series
Research Paper No. 06-38

REVISITING THE AT-WILL EMPLOYMENT DOCTRINE: IMPOSED TERMS, IMPLIED TERMS, AND THE NORMATIVE WORLD OF THE WORKPLACE

by

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Revisiting the At-Will Employment Doctrine

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I. Introduction

In the United States, the dominant form of the employment contract is at-will. The American at-will doctrine says that an employment contract of indefinite duration can be terminated by either party at any time for any reason. This means an employee can quit any time and the employer can fire her without giving warning or incurring any post-employment obligations. The at-will contract lasts only from moment to moment, at every moment completed and at every moment renewed.

Because the employment contract has no duration and imposes no obligations beyond the present moment, one might fairly question whether it is a contract at all. It is a contract with no duration; there is literally no discernible time period during which the contract is in effect. At every motion the contract is fully performed and at every moment there is a new contract.

Not only does the American at-will employment contract have no temporality, it also has no fixed or on-going terms. At any time an employer can change the terms prospectively. That is, it can change the wage, terminate benefits, cut back on vacations, and so on. At least in theory, then, the American employment relationship does not offer workers any dismissal protection, severance rights, reasonableness requirements, or even a reliable wage package unless the employee has a union contract that transforms the individual employment contract into a collective bargaining agreement. Hence, under the U.S. at-will rule, employees are vulnerable to arbitrary and sudden dismissal, intermittent work, on-call employment, occasional

employment, and sudden, unannounced cuts in pay and benefits. Further, the contract of employment imposes no justiciable right to fair treatment or protection of the workers' honor, dignity, or health. Some of those rights have been provided by statute, but they are not considered an intrinsic part of the employment contract.

Despite the de jure at-will regime, the actual contract of employment in the U.S. has some fixed terms and some limitations on termination and modification. In the 1930s, Congress enacted a minimum wage and an old age assistance program that imposed mandatory terms into employment contracts. In recent decades, some state legislatures have imposed additional mandatory terms, and some state courts have imposed dismissal protection in certain limited circumstances. These terms became part of all employment contracts, thereby placing some limits on the parties' freedom to terminate or alter the terms of an employment contract at will.

More recently, courts have upheld employers' attempt to impose other terms onto employment contracts. In particular, employers have argued, with success, that mandatory arbitration clauses and post-employment restrictive covenants extend beyond the life of the instantaneous at-will contract and bind employees over time. These later developments pose a theoretical problem for the at-will contract. If the contract is truly at-will, how can some terms bind the parties beyond the moment? And if some terms can be binding over time, which ones and why not others?

In this paper, I describe developments that have altered and modified the at-will doctrine in the United States. I argue that the courts are evolving a hybrid type of employment contract, in which the contract is moment to moment for purposes of dismissal but on-going for purpose of certain employer-imposed terms. I then argue that this new type of employment contract is

neither strictly at-will nor a general form of dismissal protection. Because the changing nature of the contract is not recognized or fully theorized, I argue that it needs a new articulation.[1]

II. The Historical Form of Employment Contracts in the United States

A. The Origin of the At-Will Doctrine

The American at-will doctrine had its origin in the late 19th century. Until the latter half of the nineteenth century, most workers in the U.S. were agricultural workers, hired for a specific harvest season. Under the then-current master-servant regime, those workers were subject to the "entire contract doctrine," which maintained that workers who quit their jobs or were dismissed before the end of the term of their employment contract forfeited any wages for the time worked. For example, if a worker was hired for a year and left after ten months, he would often find himself with no pay for the period worked. Even if the contract was for an unspecified term, courts would imply a time period, such as a harvest season or a year and thus impose a forfeiture on a worker who left prematurely. Most courts also imposed a forfeiture on workers who were fired, unless they found the dismissal to be without good cause.[2] For unskilled workers, the entire contract doctrine created considerable income insecurity.

In the latter half of the 19th century, employment contracts for an indefinite term became

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[1] In other work, I have argued that the contract of employment in the United States should permit the imposition of other terms which form part of the implicit understanding of the parties' employment relationship. In particular, I contend that the nature of work today embodies a number of implicit terms and assumptions that should be treated as part of the legally enforceable contract of employment. Katherine V.W. Stone, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (Cambridge Univ. Press 2004).

[2] For examples, see Karen Orren, BELATED FEUDALISM (1991); Robert Steinfeld, THE INVENTION OF FREE LABOR (1991).

commonplace. With the rise of mass production and the factory system after the Civil War, many rural Americans migrated, and many Europeans immigrated, to American cities to become factory workers. These workers were hired for indefinite terms and hence did not fit naturally into the entire contract doctrine. Because factory workers were not hired for a specified term, if they quit – or went on strike – they were not abandoning a contractual obligation that was fixed in time. Some courts nonetheless attempted to apply the entire contract doctrine and penalize workers who left their jobs, but others took a different tack. Beginning in the 1880s, a few state courts adopted the view that both parties to an employment contract of indefinite duration could terminate it at any time for any reason. This was termed the "at-will doctrine," and it quickly spread from state to state and became the overwhelmingly dominant common law.[3]

At its inception, the at-will doctrine was beneficial for unskilled workers.[4] In particular, the at-will rule mitigated the harshness of the 19th century entire contract regime. It provided that a worker hired for an indefinite term had the right to be paid for the time worked, up to the moment he quit or was fired. Because the rule made it easier for workers to quit, the at-will rule gave unskilled workers a degree of autonomy and freedom they had not theretofore possessed.[5] It also gave them income security, at least for the time they worked. What they lost, however,

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[3] For a discussion of the dissemination of the at-will rule from the Wood Treatise to the state courts, see Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 Am. J. of Legal History 118 (1976).

[4] Although in theory, an at-will employee should have an unfettered right to strike, the common law courts were not willing to be so permissive. They reasoned that while an individual worker had a right to quit, collective action that harmed the employer was an actionable conspiracy. See e.g., Vegalahn v. Guntner,167 Mass. 92 (1896).

[5] For a discussion of the progressive potential of the at-will revolution in employment law, see Karen Orren, BELATED FEUDALISM.

was employment security, but that was not something they had enjoyed in the first place.[6]

B. The 'De-Casualization' of Labor in the Early Twentieth Century

Soon after the at-will rule became the dominant form of employment contract, major employers in the U.S. instituted a series of practices that diminished its impact. Large employers, influenced by the teachings of the scientific management and personnel management theorists of the early 20th century, began to restructure their work forces into arrangements that are today termed "internal labor markets."[7] In internal labor markets, jobs were arranged into hierarchical ladders in which each job provided the training for the job on the next rung up. Employers who utilized internal labor markets hired only at the entry level, then utilized internal promotion to fill all of the higher rungs. The human resource policies that accompanied internal labor markets were designed to encourage employee attachment. Employers wanted employees to stay a long time, so they gave them implicit promise of long-term employment and of orderly and predictable patterns of promotion. Consistent with internal labor market job structures, employers structured pay and benefit systems so that wages and benefits rose as length of service increased.

Those firms that utilized internal labor markets gave employees implicit promises of job security despite the then-prevailing at-will regime. For reasons that I have explored elsewhere,

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[6] See Stone, WIDGETS TO DIGITS, Chapter 1.

[7] See, Peter Doeringer and Michael Piore, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS, (1971). For a discussion of the history of internal labor markets in American industry, see Katherine Stone, *The Origin of Job Structures in the Steel Industry,* in LABOR MARKET SEGMENTATION (Richard C. Edwards, et. al., eds., 1975) 27 - (hereinafter, *Stone, Job Structures*).

by the mid-20th century, most large firms and many mid-sized firms utilized internal labor markets for the bulk of their workforce.[8] Hence for much of the 20th century, the at-will rule was the de jure employment contract, but an implicit contract for job security and orderly promotional opportunity was the norm for many American workers. Throughout the twentieth century, then, employees in the primary sector enjoyed relatively stable work life experience. This was due to two mutually reinforcing factors. First, they were the beneficiaries of employers' implicit promises of job security that induced employees to keep them on the job even as demand conditions fluctuated. And second, many of them had unions that negotiated contracts with job security provisions such as just cause for dismissal clauses and protection for senior employees during layoffs. As a result of these factors, until the early 1980s, considerably more than half of all male workers over the age of 40 had been on their jobs for 10 years or more.[9]

There were, of course, many who did not benefit from the internal labor market job structures in large manufacturing firms. It was an employment system that provided job security and relative prosperity to many, but there were many who were left out. Those who worked in small firms or in sectors that did not utilize internal labor markets were left out, and locked out, of the primary sector. There thus emerged a dual labor market, comprised of insiders – usually white, blue collar men in unionized firms – and outsiders – usually women, minorities, migrant workers and rural Americans. The outsiders remained subject to the unmediated at-will rule, lacking job security, promotional opportunities, and for the most part, lacking job-related

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[8] See, Katherine V.W. Stone, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (Cambridge Univ. Press, 2004).

[9] Bureau of Labor Statistics, 2004 Employee Tenure Survey, Table 2.

benefits.[10]

III. Four Changes in the Nature of the Employment Contract

In the 1980s and 1990s, there were four significant changes in the individual contract of employment in the United States. The changes were not mutually consistent – some reinforced the de jure at-will regime and some tended to undermine it. Thus the net effect of the changes has not yet crystallized, leaving the employment contract in an unsettled state.

A. The Development of Unjust Dismissal Protection

First, in the 1970s and 1980s, many states in the United States revised their at-will doctrines so as to place restrictions on employers' right to fire employees. Many states adopted a common law tort of unjust dismissal, in which a court imposes tort liability when an employer discharges an employee for a reason that violates public policy. Instances in which courts found an employer liable were when an employer fired an employee for serving on a jury or for refusing to commit perjury.[11] In addition, a small number of states adopted an implied covenant of good faith and fair dealing into employment contracts, thus finding that an employer breached an employment contract by discharging an employee in a situation that demonstrated egregious bad fath. The prototype situation in which a court found an employer liable for breaching an implied covenant was when an employer discharged a salesman just before a large commission

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[10] See Doeringer & Piore, *supra.*, DUAL LABOR MARKETS AND MANPOWER ANALYSIS.

[11] See, e.g., Needs v. Hocks, 536 P.2d 512 (Oregon, 1975) (jury duty); Petermann v. International Bhd. of Teamsters,174 Cal. App. 2d 184 (1974) (refusal to commit perjury).

on a sale he had completed became due and payable.[12]

These two modifications of the at-will doctrine begin to redefine the contract of employment. Both the tort of unjust dismissal and the covenant of good faith and fair dealing impose on employers obligations that cannot be waived. However, not all states have adopted either doctrine, so their application has been of a patchwork character. In many states, courts have limited those exceptions to cases of extremely abusive employer conduct, so that there have been relatively few cases in which employers were found liable either for unjust dismissal or breach of an implied covenant of good faith and fair dealing.

In the 1980s, courts developed a third type of modification of the at-will doctrine, an implied-in-fact contract exception. In these cases, courts imposed contractual liability on employers who engaged in arbitrary dismissals after giving verbal promises of lifetime employment and fostering a corporate culture that assured its employees that they would not be fired unfairly.[13] For example, in 1984, the Supreme Court of Washington held that when an employer puts promises of fair treatment and limitations on its powers of arbitrary dismissal in an employee handbook, the employer is obligated to act in accordance with those promises. [14] The court explained:

> [T]he employer's act in issuing an employee policy manual can lead to obligations that govern the employment relationship. . . . While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the

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[12] Foley v. National Cash Register Co., 364 N.E. 2d 1251 (Mass. 1977).

[13] See, e.g., Pugh v. See's Candies, 171 Ca. Rptr. 917 (Ca., Ct. App. 1981), *overruled in part on other grounds by* Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317 (2000).

[14] Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash.,1984).

> employee the peace of mind associated with job security and the conviction that he will be treated fairly.... It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices ... [the policies] established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "*instinct with an obligation.* " . . . It would appear that employers expect, if not demand, that their employees abide by the policies expressed in such manuals. This may create an atmosphere where employees *justifiably rely* on the expressed policies and, thus, justifiably expect that the employers will do the same. Once an employer announces a specific policy or practice, especially in light of the fact that he expects employees to abide by the same, the employer may not treat its promises as illusory. Therefore, we hold that if an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises *of specific treatment in specific situations* and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship.[15]

Unlike the tort and implied covenant approaches, the implied contract exception to the at-will rule applies to an employer's personnel policies that are communicated to an employee at the time of hire. As a result of the implied contract exception, many employers who made promises of job security either explicitly in their employment handbooks or implicitly in their corporate cultures found themselves bound by them when they tried to dismiss long-term workers.[16] However, because the job security term is deemed to be contractual in origin, courts have found that it is a term that can be waived. Thus increasingly, employer manuals and other forms today inform employees in unambiguous terms that their employer is at-will and that the employer has the right to dismiss them at any time.[17]

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[15] Id. at 1087-89.

[16] Some of the other cases in which courts have found and enforced an implied contract for long-term employment are: Fletcher v. Wesley Med. Ctr., 585 F. Supp. 1260, 1263–64 (D. Kan. 1984); Salimi v. Farmers Ins. Group, 684 P.2d 264, 265 (Colo. Ct. App. 1984); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980); Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1268 (N.J. 1985).

[17] Max Schanzenbach, *Exceptions to At-Will Employment*, 5 Am. L. & Econ. J. 470, 478 & n.3 (2003).

B. Legislatively-Imposed Terms

In addition to the changing common law of employment dismissal, in the 1970s and 1980s many state legislatures and the federal government enacted laws that mandated certain individual employees rights as part of their employment relationship. There have long been laws establishing a mandatory minimum wage, overtime pay, social security, unemployment insurance, and workers compensation. But in the 1970s and 80s, state legislatures added new mandatory terms, many of which involved job security protections for individual employees. For example, twenty-two states make it unlawful to dismiss an employee in retaliation for filing a workers' compensation claim.[18] Thirty-four states have given legislative protection for whistle-blowers, and forty-two states regulate the administration of employment-related lie detector tests.[19] The state of Montana has adopted a Comprehensive Unjust Dismissal law that gives workers protection against wrongful dismissal.[20]

The trend of state protection of individual employment rights went beyond dismissal protection. Many states have protected the privacy of workers by restricting the use of drug testing in the workplace.[21] Some states have adopted more stringent protection for the employment rights of minorities than has the federal government, some have adopted more stringent safety and rest break requirements, and some have used their criminal laws to police

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[18] 9A Individual Employment Rights, Lab Rel Rptr (BNA) 64-592 (1991).

[19] Id. Of these, statutes in nine states give protection only to public employees.

[20] Mont. Code Ann §§ 39-2-901 to 39-2-914 (1991).

[21] See Neil E. Reichenberg, Drug Testing in the Workplace: An Update (1990).

industrial health and safety violations that the federal authorities have been unwilling to remedy.[22] In addition, some states legislatures enacted statutes to protect employees in the event of corporate takeovers.[23] Some states legislatures and state courts created rights to protection for privacy on the job, rights to be free of lie detector tests, rights not to be defamed in job references, and so forth.[24]

In addition to state laws, the federal government enacted laws regarding protection from lie detector tests, requiring prior notification of plant closings, mandating unpaid family and medical leave, enhanced protection against employment discrimination, and protection for federal whistle-blowers. The mandated terms alter the employment contract in that they impose minimal terms of employment, not only for dismissal protection but also to ensure employees an acceptable level of dignity, safety, and economic benefit.

C. Employer-Imposed Terms

In addition to standard state-imposed mandatory terms, employers have also imposed

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[22] See, for example, S. Douglas Jones, *Prosecutions for Safety-Related Crimes in the Workplace: Can D.A.'s Succeed Where OSHA Has Failed?,* 79 Ky L J (1991);Jolene Dutzman, *State Criminal Prosecutions: Putting Teeth in the Occupational Safety and Health Act,* 12 Geo Mason U L Rev 737 (1990); Rebecca S. Webber, *The OSH Act and State Criminal Law: A Prosecutor's Brief,* 25 Crim L Bulletin 234 (May/Jun 1989).

[23] In the 1980's, more than half of the states enacted statutes which permitted corporate directors to consider the effect of takovers or mergers on employees. For a list of these stakeholder statutes, see Appendix, 21 Stetson L Rev 279 (1991). See generally Steven M.H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties,* 21 Stet L Rev 163, 163-65 (1991) (describing statutes); David Millon, *Defining Corporate Law,* 24 Ind L Rev 223 (1991).

[24] See generally, Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism*, 59 Chi.L.Rev. 575 (1992).

terms on the employment contract that they intend to survive beyond the moment-to-moment duration of the at-will contract. In recent years, there are two kinds of terms that employers frequently impose: arbitration clauses and post-employment restrictive covenants. Employers present these terms in employment handbooks or other personnel policy materials, and they are often accompanied by a proviso informing employees that while these terms bind them for as long as they work for the firm, their contract of employment is in all other respects at-will. When courts enforce these clauses – and they almost invariably do – a court is implicitly agreeing that the clauses have an afterlife that extends beyond the momentary life of the at-will contract and that therefore bind employees over time. Hence the enforcement of these clauses stands in tension with the fundamental assumption of the at-will contract that neither party to an at-will contract has obligations that extend beyond the moment.

1. Arbitration clauses

The use of arbitration in non-union employmenet received a major boost from the 1991 Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[25] There the Supreme Court held that an employer could require an employee to bring charges of unlawful age discrimination to the employer's own private arbitration system rather than to a court. Since 1991, the lower federal courts have interpreted *Gilmer* expansively to mandate arbitration of nonunion employees' claims involving allegations of race, sex, religion, and national origin discrimination, as well as claims arising under the ERISA, and the federal Employee Polygraph

[25]. 500 U.S. 20 (1991).

Protection Act.[26] In the wake of the *Gilmer* decision, employers frequently require employees to agree to a pre-dispute arbitration procedure as a condition of employment. Indeed, nonunion arbitration is one of the fastest growing human resource practice in the United States. A study by the General Accounting Office in the late 1990s found that approximately 10 per cent of American workers were covered by such compulsory arbitration agreements, and employers of another 8 percent are intending to institute them.[27] Indeed, the number of workers covered by nonunion arbitration has surpassed the number covered by union contracts, and it is still growing.

In recent years, the *Gilmer* decision has come under intense attack. Many scholars and labor relations experts have argued that employment arbitration systems fall far short of the due process protections that one would expect from a court. For example, they often contain features such as raising the employees' burdens of proof, limiting the ability to call witnesses, eliminating the possibility of discovery, or preventing arbitrators from awarding punitive or compensatory damages.[28] Also, courts have required employees to arbitrate in cases in which they not only failed to agree to arbitrate future employment disputes, but were not personally notified that the

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[26] See, e.g., Maye v. Smith, Barney, Inc., 897 F. Supp. 100 (S.D.N.Y. 1995) (race discrimination); Scott v. Farm Family Life Ins. Co., 827 F. Supp. 76 (D. Mass. 1993) (pregnancy discrimination); Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430 (N.D. Ill. 1993) (race, sex, and religious discrimination; Albert v. NCR Co., 874 F. Supp. 1328 (S.D. Fla. 1994) (sex, race, and national origin discrimination); Pritzker v. Merril Lynch, Pierce, Fenner, and Smith, Inc., 7 F.3d 1110 (3d Cir. 1993) (ERISA); Saari v. Smith, Barney, Inc., 789 F. Supp. 155 (D.N.J. 1992) (polygraph protection).

[27] General Accounting Office, EMPLOYMENT DISCRIMINATION: MOST PRIVE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION, GAO/HEHS-95-150 *Employment Discrimination* (1995).

[28] See, Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENVER UNIV. L. REV. 1017, 1034 (1996).

employer had such a policy.[29] By requiring employees to accept an arbitration system as a pre-condition for employment, employers are effectively requiring employees to waive their employment rights. They are also imposing a term on the employment contract that lives beyond the moment to moment nature of the at-will relationship. Indeed, some courts have held that the arbitration promise lives beyond the life of the employment altogether.

2. Restrictive Covenants

Another modification of the at-will contracts results from the increasing use and enforcement of restrictive covenants in employment contracts. Increasingly, employers are requiring prospective employees to sign covenants not to compete in order to obtain employment. And as with pre-dispute arbitration agreements, restrictive covenants are terms in the at-will contract that courts enforce as an ongoing obligation despite the at-will nature of the underlying employment relationship.

The use of restrictive covenants has grown because firms today place great value in employee knowledge, skill, and innovation. In the information-based workplace, employees bring knowledge and capabilities to their jobs and expect that their jobs will further increase their human capital, whether by providing experience and learning on the job, or by providing more formal training opportunities. Employees assume that whatever skills and knowledge they acquire on one job "belongs" to them in the sense that they take it with them when they depart. Employers, on the other hand, believe that if they have imparted valuable skills or knowledge to

[29] For example, in Lang v. Burlington Northern RR Co., 835 F. Supp. 1104 (D. Minn. 1993) an employer adopted an arbitration policy unilaterally and notified its employees by mail. The court enforced the policy despite the fact that the employee who brought a legal action claimed never to have received any notice, no less agree to be bound by the procedure.

employees, they should "own" that human capital in the sense of being able to ensure that it is utilized on their firm's behalf. While they cannot compel an employee to remain with their firm, employers can and do attempt to prevent former employees from using knowledge obtained in their employ on behalf of a competitor. Thus increasingly, employers are requiring employees to accept covenants not to compete and covenants not to disclose confidential information at the outset of an employment relationship.

The conflicting perspectives of employees and employers about the ownership of human capital have generated an increasing number of legal disputes. Frequently employers sue their former employees at the end of an employment relationship to enjoin them from taking knowledge acquired on the job to use on behalf of a competitor. Indeed, disputes over ownership of human capital are becoming the most major source of employment litigation in the United States.

The law of post-employment restraints has always involved a murky intertwine of conflicting interests – employees' interest in job mobility, employers' interest in protecting their business secrets, society's interest in a free and competitive labor market, and judicial commitment to enforcing contracts.[30] Historically, courts have only enforced restrictive covenants when they were no broader than necessary to protect a *legitimate* interest of the employer, and must be reasonable in duration and geographic scope.[31] In addition to these

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[30] One judge described the area of law as a "sea--vast and vacillating, overlapping and bewildering [out of which] [o]ne can fish out of it any kind of strange support for anything, if he lives so long." Arthur Murray Dance Studios of Cleveland, Inc.v. Witter, 105 N.E. 2d 685 (Common Pleas, Ohio, 1952).

[31] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(a) (1981) (stating that a covenant not to compete is only enforceable if "the restraint is [no] greater than is needed to protect the promisee's

factors, courts traditionally required that the covenant not unduly burden the employee or unduly harm the public.[32] But recently courts have expanded enforcement of restrictive covenants in employment contracts through judicial reinterpretation of the meaning of reasonableness in time and space, as well as through an expansion of what constitutes a *legitimate* employer interest.

Judicial enforcement of covenants not to compete is particularly harsh for at-will employees. An at-will employee who is subject to a restrictive covenant and is fired unfairly is left without a job and unable to take another one.[33] To avoid these harsh consequences, some courts have imposed stricter requirements for enforcing noncompete covenants against at-will employees than they do against employees on fixed term contracts. For example, some courts have attempted to protect at-will employees from oppressive covenants is by refusing to enforce a covenant if a dismissal was unfair.[34] These courts inquire into the circumstances of the dismissal, and only enforce a post-termination covenant when they find that the dismissal was justified. This approach is a major departure from an at-will regime. However, most courts continue to enforce covenants against at-will employees, notwithstanding the circumstances of

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legitimate interest") (emphasis added); *see also* Edward T. Ellis et al., *Protection for an Employer's Investment in its Key Employees: Recent Caselaw on Covenants Not to Compete and Trade Secrets, in* 3 CURRENT DEVELOPMENTS IN EMPLOYMENT LAW, ALI-ABA COURSE OF STUDY 1324 (1998).

[32] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(a) & (b) (1981); *see also* Edward T. Ellis et al., *Protection for an Employer's Investment in its Key Employees: Recent Caselaw on Covenants Not to Compete and Trade Secrets, in* 3 CURRENT DEVELOPMENTS IN EMPLOYMENT LAW, ALI-ABA COURSE OF STUDY 1324 (1998).

[33] See,e .g., Aero Kool Corp. v. Oosthuizen, 736 So. 2d 25, 27 (Fla. Dist. Ct. App. 1999).

[34] .*See, e.g.*, Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 37 (Tenn. 1984); Insulation Corp. of Am. v. Brobston, 667 A.2d 729, 738 (Pa. Super. Ct. 1995).

their dismissal.[35]

Like arbitration clauses, the enforcement of post-employment covenants is a departure from the moment-to-moment nature of the at-will employment contract. Those courts that impose some job security in exchange for the restrictive covenant are in fact acknowledging that the presence of the covenant alters the at-will nature of the relationship. However, most courts have not recognized the way in which the enforcement of such terms is in tension with the notion of an at-will employment contract.

D. The New Psychological Contract and the Re-Casualization of Work

The three developments discussed above all involve the imposition of terms on the at-will relationship, thereby transforming the at-will employment contract into a contract with fixed rights and obligations. However, there has been another development in recent years that has had the opposite effect on employment contracts. Beginning in the late 1980s, human resource theorists and consultants urged firms to reject de facto long term employment contracts and adopt instead a free agency model of employment. Whereas in the past many employers masked the de jure at-will contract of employment by a de facto implicit regime of long-term attachment and job security, today employers are reverting to the stark at-will regime that has ere been lurking in the shadows. As a result, employers have dismantled their internal labor market job structures and abandoned the implicit promises that went along with them.[36] In its place,

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[35] Examples of cases in which a court looks to see whether the at-will employee was fired unfairly are Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 37 (Tenn. 1984) Insulation Corp. of Am. v. Brobston, 667 A.2d 729, 738 (Pa. Super. Ct. 1995).

[36] *See, e.g., The Future of Work: Career Evolution*, ECONOMIST, Jan. 29–Feb. 4, 2000, at 89; *see also* PETER F. DRUCKER, MANAGING IN A TIME OF GREAT CHANGE (1995); ROSABETH

employers are creating new types of employment relationships which do not depend upon, or encourage, longevity. Employers make these changes in order to gain the flexibility to cross-utilize employees and make quick adjustments in production methods as they confront increasingly competitive product markets.

Not only are employers changing the nature of their employment contract with their "regular" workers, they are also increasingly using non-permanent employees such as temporary employees and independent contractors. These trends in employment signify an important change in the de facto nature of the employment contract. As described above, large employers throughout most of the twentieth century implicitly promised employees long-term employment contracts despite the de jure regime of the at will contract. However, the new employment practices signify a retreat from long-term contracts and rise of free agency model, a return to the at will regime and the re-casualization of work.

1. The Changing Employment Contract of the Regular Employee

Management theorists and industrial relations specialists describe the emerging relationship between regular employees and their firms as a "new psychological contract,"[37] or a

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KANTER, ON THE FRONTIERS OF MANAGEMENT 190 (1997); RICHARD SENNETT, THE CORROSION OF CHARACTER 23 (1998). See generally, Katherine Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. Rev. 519 (2001) (hereafter, *Stone, New Psychological Contract)*.

[37] See e.g., Sandra L. Robinson & Denise M. Rousseau, *Violating the Psychological Contract: Not the Exception But the Norm*, 15 J. ORGANIZATIONAL BEHAV. 245, 246 (1994); Neil Anderson & René Schalk, *The Psychological Contract in Retrospect and Prospect*, 19 J. ORGANIZATIONAL BEHAV. 637, 637 (1998); Marcie A. Cavanaugh & Raymond A. Noe, *Antecedents and Consequences of Relational Components of the New Psychological Contract*, 20 J. ORGANIZATIONAL BEHAV. 323, 323 (1999).

"new deal at work."[38] In the new deal, the long-standing assumption of long-term attachment between an employee and a single firm has broken down. It has been replaced by other implicit and explicit understandings of the mutual obligations of employees and the firms that employ them.

While the new employment relationship does not depend upon long-term employment, attachment, or mutual loyalty between the employee and the firm, it also does not dispense with the need for engaged and committed employees. Indeed, firms today believe that they need the active engagement of their employees more than ever before. They want not merely predictable and excellent role performance -- they want employees to commit their imagination, energies, and intelligence on behalf of their firm. Thus they seek to elicit behavior that goes beyond specific roles and job demands, and gives the firm something extra. Organizational theorists characterize this something extra as organizational citizenship behavior, or "OCB."[39]

Much of current human resource policy is designed to resolve the following paradox: Firms need to motivate employees to provide the OCB and the commitment to quality, productivity, and efficiency while at they same time they are dismantling the job security and job ladders that have given employees a stake in the well-being of their firms for the past 100 years. Hence managers have been devising new organizational structures that embody flexibility while also promoting promote skill development and fostering organizational citizenship behavior.

A new employment relationship is emerging through such theoretical and experimental

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[38] PETER CAPPELLI, THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORK FORCE 217 (1999).

[39] *See* Dennis W. Organ, ORGANIZATIONAL CITIZENSHIP BEHAVIOR: THE GOOD SOLDIER SYNDROME 4-5 (1988).

programs as total quality management (TQM), competency-based organizations, and high performance work practice programs.[40] Despite differences in emphasis, the various approaches that comprise the new employment relationship share several common features.[41] First, employers no longer implicitly offer employees long term job security. Rather they explicitly disavowing a promise of job security. In its stead, employers give their employees implicit promises and understandings "employability security" – i.e. opportunities to develop their human capital so they can prosper in the external labor market.[42]

Another feature of the new employment relationship is that it emphasizes the value of the worker's intellectual and cognitive contribution to the firm. Unlike scientific management that attempted to diminish or eliminate the role of workers' knowledge in the production process, today's management theories attempt to increase employee knowledge and harness their knowledge on behalf of the firm.[43]

The new employment relationship involves compensation systems that peg salaries and wages to market rates rather than internal institutional factors. The emphasis is on offering employees differential pay to reflect differential talents and contributions. It also involves firms

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[40] *See*, Edward E. Lawler, III, THE ULTIMATE ADVANTAGE: CREATING THE HIGH-INVOLVEMENT ORGANIZATION,at 156 (1992) (on compntency based organizations). See Joshua G. Rosett & Richard N. Rosett, CHARACTERISTICS OF TQM (NBER Working Paper No. 7241, 1999); Eric E. Anschutz, TQM AMERICA (1995) (on Total Quality Managemenet). See generally, Stone, *The New Psychological Contract*, 48 UCLA L. Rev. at 565-568.

[41] MARK ROEHLING ET AL., THE NATURE OF THE NEW EMPLOYMENT RELATIONSHIP(S): A CONTENT ANALYSIS OF THE PRACTITIONER AND ACADEMIC LITERATURES 2 (Ctr. for Advanced Human Res. Studies, Working Paper No. 98-18, 1998).

[42] ROSABETH MOSS KANTER, E-VOLVE 192 (2001).

[43] THOMAS A. STEWART, INTELLECTUAL CAPITAL: THE NEW WEALTH OF ORGANIZATIONS, at ix (1997); THOMAS O. DAVENPORT, HUMAN CAPITAL: WHAT IT IS AND WHY PEOPLE INVEST IN IT 152-56 (1999).

giving employees contact with the firm's constituents in order to get them to be familiar with and focused on the firm's competitive needs, and at the same to raise the employees' social capital so that they can find job elsewhere. Hence firms today are encouraged to provide employees with opportunities to interact with a firm's customers, suppliers and even competitors. The new relationship also involves a flattening of hierarchy and the elimination of status-linked perks.[44]

An important feature of the new relationship is a new emphasis on procedural justice at work.[45] Researchers have found that employees who perceive their employer as unfair reduce their OCB, triggering a downward cycle in which the employees' diminished OCB leads the supervisor to withdraw informal types of affirmation, causing the employee to experience additional feelings of unfairness and to further decrease her OCB.[46] Accordingly, employers have attempted to devise procedures fostering a perception of fair treatment. They have instituted a wide range of dispute resolution procedures designed to address employee complaints including open door policies, ombudsmen, management appeals boards, peer review, mediation, and arbitration.[47]

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[44] *See* Janice Klein, *The Paradox of Quality Management: Commitment, Ownership, and Control*, *in* CHARLES HECKSCHER, THE POST-BUREAUCRATIC ORGANIZATION, 178 - 182.

[45] *See* JERALD GREENBERG, THE QUEST FOR JUSTICE ON THE JOB 32–39 (1996). See generally, Jason Colquitt, et. al., *Justice at the Millenium: At Meta-Analytic Review of 25 years of Organizational Justice Research,* 86 J. of App. Psych. 425, 435-36 (2001).

[46] *See* Organ & Konovsky, *supra* note ___, at 76–77, 162. *See also* Robinson et al., *supra* note ___ at 149 (finding that citizenship may result from employees' perceptions of the company's performance of its obligations under the psychological contract).

[47] *See* Lisa B. Bingham & Denise R. Chachere, *Dispute Resolution in Employment: The Need for Research*, *in* EMPLOYMENT DISPUTE RESOLUTION, *supra* note 93, at 103–13 (discussing the growth of ombudsmen, mediation, and arbitration programs amongst nonunion firms); Alexander James Colvin, *Citizens and Citadels: Dispute Resolution and the Governance of Employment Relations* 126–44 (1999) (unpublished Ph.D. dissertation, Cornell School of Industrial and Labor Relations) (on file with author) (discussing the development of peer review, open door policies, management appeal boards, mediation,

It is understandable that employees would focus on procedural fairness when they lack promises of long-term employment because in this new employment relationship, employees are required to bear many of the risks that were previously borne by the firm. Because employees increasingly have to bear the consequences of firm failure or market fluctuations, they at least want to be confident that the incidence of the risks are fairly applied.

One result of the new employment relationship is that employees today expect to have a series of employment experiences, sometimes as regular employees, sometimes as temporary workers, and sometimes as independent contractors. Another result is that employees expect benefits other than job security from their jobs. They expect to have an opportunity to learn portable skills, to network with clients and competitors, and to gain knowledge and experience that will help them manage their own careers and thrive in the new boundaryless workplace. And they also expect fair treatment at work.

2. The Employment Contract of the Atypical Worker

Just as the employment contract for "regular" employees is changing, there has also been an explosion in new types of workers who are not "employees" in any conventional sense. A survey of firms in all industries and of all sizes conducted by the Upjohn Institute found that 78 per cent of all private firms used some sorts of flexible staffing arrangements.[48] Atypical workers – temporary workers, leased workers, part-time workers, trainees and apprentices, and "dependent" independent contractors – are a growing portion of the labor force. In 2005, the

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and arbitration at TRW in the 1990s).

[48] Susan Houseman, *Why Employers Use Flexible Staffing Arrangements,* 55 Indus. & Labor Rels. Rev. 149 (Oct. 2001).

Department of Labor classified 16.2 million people – 12.1 per cent of the workforce – as contingent workers. Of these, there were an estimated 10.3 million independent contractors. 2.5 million on-call workers, 1.2 million temporary help agency workers, and 813,000 workers for contract work companies out of a total full time workforce of 139 million.[49] In addition, in 2003 the Department of Labor found that there were over five million involuntary part-time workers – those who want but do not have regular employment.[50]

Atypical workers are workers without employers. Some work under at-will employment contracts and some have no employment contracts at all. Temporary workers move from firm to firm, often dispatched for short term assignments by a temporary help agency. On-call workers are either retained by a specific employer to work on an as-needed basis, or placed on-call by a temporary help agency are required to be available for work without knowing their next place or hours of work. "Independent contractors" have none of the rights of employees, even though they often resemble employees in every respect. Many are unskilled workers who face shape-ups in ad hoc hiring halls on street corners every morning.[51] Neither atypical workers nor independent contractors have a reasonable expectation of long term employment with a particular employer, even though they can spend years in the labor force doing the same kind of

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[49] U.S. Dept. of Labor, Bureau of Labor Statistics, *Contingent and Alternative Work Arrangements – February, 2005* (USDL 05-1433, Gov't Printing Office, July 27, 2005). See also, Sharon R. Coheny, *Workers in Alternative Working Arrangements*, 4-6 Monthly Labor Rev. Nov. 1998.

[50] U.S. Dept. of Labor, Bureau of Labor Statistics, A Profile of the Working Poor, 2003, Table 1, p. 6 (Gov't Printing Office, Report 983, March, 2005). See also, Chris Tilly, HALF A JOB: BAD AND GOOD PART-TIME JOBS IN A CHANGING LABOR MARKET (Temple University Press, 1996). Writing in 1996, Rebecca Blank estimated that between 4.6 and 8.5 per cent of the workforce is in contingent or part-time work involuntarily and would prefer regular, full time employment instead. See Rebecca M. Blank, *Contingent Work in a Changing Labor Market*, in GENERATING JOBS, (Richard Freeman and Peter Gottschalk, eds. 1998).

[51] See, e.g., Jennifer Gordon, SUBURBAN SWEATSHOP (2005).

work in the same geographic area. Atypical workers receive significantly less pay than their regular employee counterparts and are less likely to receive health insurance or pensions from their employers. They also have very limited rights under the labor laws.[52]

IV: The Contract of Employment for Workers in the United States Today

As we have seen, the employment contract in the United States is undergoing a significant transformation, despite the fact that it has been, and remains, nominally at-will. Courts and legislatures are weaving job security rights out of common law and public policy threads. But as fast as these rights are woven by day, they are unwoven at night by employers, who like Homer's Penelope, are attempting to avoid attachments in order to preserve their freedom. That is, employers' new employment practices are emerging in spite of and sometimes in response to the changes in the judicial and legislative modifications to at-will employment. By restructuring their employment practices, firms avoid giving their employees any de facto or de jure longevity rights.

At the same time, we have seen that employers today desire to impose terms of employment that extend beyond the life of the at-will contract, and courts are acquiescing. This trend marks a significant but *sub silentio* retreat from the extreme at-will form of the employment contract, and it raises the question whether other terms can be imported into the contract of employment and bind parties over time. The question of which new terms should be

[52] See, Katherine V.W. Stone, *Employment Rights for Atypical Employees*, ___ Berkeley J. of Empl. & Lab. Law ___ (2006); Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective on Contingent Work*, 24 Berkeley J. of Emp. & Lab. Law 153, 164 (2003); Patricia Ball, *The New Traditional Employment Relationship*, 43 Santa Clara L. Rev. 901, 909-913 (2003).

imported requires serious consideration.

In other writing, I have argued that courts should impose terms that are attendant to the new set of expectations that employers have created in the wake of their repudiation of job security. Thus, for example, if employers implicitly promise employees an opportunity to gain valuable knowledge and develop one's human capital on the job, then courts should rebuff employers' efforts to enforce restrictive covenants when doing so would negate that promise.[53] Furthermore, when employers promise employees fair treatment and require employees to utilize an in-house arbitration system, then courts should police those procedures to make sure that the treatment is in fact fair and that the arbitration system adequately protects their rights.[54] I would go further, however, and argue that courts should impose other implied terms and obligations of the new employment relationship. Just as some courts enforced the implied term of job security in the at-will employment contracts of the 1980s and 90s even in the absence of an express implied-in-fact promise, I would suggest that courts today imply other terms into the contract of employment – terms to ensure workers with training, retraining, employability, networking, and transition assistance.

One type of term that courts could imply is currently under discussion in Europe. This is the proposal for "social drawing rights" as advocated by Alain Supiot or, to put it in familiar American terminology, a "workplace sabbatical." A workplace sabbatical is a right, accrued by time spend in the labor force, to paid leave for the purpose of retooling, retraining, and repositioning oneself in the labor market. This right should be made a part of the contract of

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[53] See Katherine V.W. Stone, *Knowledge at Work,* ___ Conn. L. Rev. ___ (2002).

[54] Katherine V.W. Stone, *Dispute Resolution in the Boundaryless Workplace,* 16 Ohio St. J. of Disp. Resol. 467 (2001).

employment similar to a right to unemployment compensation. The workplace sabbatical right envisioned here would not be an implied in fact term of the contract of employment – that is, it would not depend upon an implicit employer promise and it could not be disclaimed or waived. Rather, the right to a workplace sabbatical should be an implied-in-law term that it grows out of the recognition that workers today are vulnerable to changing technological demands, and need opportunities to change and develop their human capital as they face a lifetime of job transitions. The justification for imposing such a term is that it tracks the normative as well as practical reality of today's workplace.

I further suggest that we go one step further, and impose onto the contract of employment a "right of fair treatment," a right that inheres in all employment relationships regardless of what kind of treatment has been promised. Such a right would extend beyond those termed "employees" to all who perform work for an employer. It would obviate the factually dense problem of ascertaining the implicit and explicit promises of the employment relationship, and would also extend protection to atypical employees and dependent independent contractors. A right of fair treatment is already embodied in many of today's human resource approaches, so to create such a right would track existing practices in many cases. However, as with the right to a workplace sabbatical, the right of fair treatment is also an implied-in-law term that reflects the vulnerabilities that the new workplace has shifted onto workers and the need for new types of social protection. While it would obviously require elaboration on a case-by-case basis, the creation of such a right would go a long way toward bringing fairness to the experiences in the labor market of atypical as well as regular employees.

Conclusion

The at-will employment relationship is in flux in the United States as a result of legislative intervention, judicial interpretation, and contemporary workplace practices. Now is a time in which the seemingly simple and entrenched at-will regime need to be re-theorized and reconceived. I have proposed that we recognize the current instability in the doctrine and treat it as an opportunity to consider what types of terms we believe should be imposed on the contract of employment. To do so will enable us to design our employment law doctrines around the contingencies, vulnerabilities, and possibilities of work in the modern era. Such an undertaking on the U.S. side of the Atlantic would be an appropriate counterpart to the ambitious and important project initiated in the United Kingdom by Mark Freedland in his recent book, THE PERSONAL CONTRACT OF EMPLOYMENT.[55]

[55] Mark Freedland, THE PERSONAL CONTRACT OF EMPLOYMENT (Oxford, 2004).