

# Addendum

Responses of the  
Working Committee Members  
to the  
American Law Institute  
Restatement of Law Third  
Employment Law  
Tentative Draft No. 2  
(April 3, 2009)

In this addendum I present summaries of the responses of the members of the Working Committees to the most recent draft of the Proposed Restatement of Employment Law. I have had a chance to talk or correspond with all of the members of the Working Committees regarding the current draft and the extent to which it responds to the comments of the Working Committees in their reports to be published in the *Employee Rights and Employment Policy Journal*. Suffice it to say that, although the members were gratified to see that some changes had been made in response to their comments, to a person they felt that significant work still needed to be done. In particular, it was argued that as of yet there was no well conceived, underlying theory of the need for a separate restatement of employment law in the Proposed Restatement that would allow it to be constructed in a manner that was not only internally consistent, but also consistent with the ALI's other restatements of law in tort and contract. It was also universally felt that there were real misstatements of the law or omissions of significant cases and doctrine even in this latest draft of the Proposed Restatement, many of which are outlined in the comments below. The conclusion of the members of the Working Committees was that substantial further work was necessary to make the first three chapters of the Proposed Restatement an accurate and consistent informed consensus of American employment law.

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# Comments on the Current Chapter 1

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## Generally

Chapter 1 continues the categorical exclusion of volunteers, prisoners, and owners from employee status, even though the notes reflect many cases that include them. There is no categorical exclusion; one must do the analysis of employee status in each case. Chapter 1 should add that non-citizens working, though not authorized to do so under their immigration status or lack thereof, are nevertheless legal employees for purposes of employment law. Chapter 2 continues to omit reference to the Foley-Scott-Gilbert line of cases on employment contracts implied in fact; it should approve those cases. Chapter 4 continues the confusing concept of "preclusion" of tort remedies, where it clearly means to refer to the much narrower concept of statutes that by their terms constitute the "exclusive remedy."

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## Introductory Note:

The current version is essentially unchanged from the September 2008 draft the Working Committee considered. Specifically, there is no response to three particular points we made:

1. The definition of "employee," when used to define the coverage of a statute, might vary depending on the purpose of the legislation at issue.

2. Employment law has been in ferment the last few decades, especially regarding employment-at-will, and the Restatement's formulation of existing law should not foreclose desirable future common-law or statutory developments.

3. The Note should emphasize that the derivation of the definition of "employee" from cases concerned with restricting vicarious liability could lead to an improper limitation on the scope of the term when the very opposite -- broad coverage -- should be the goal, as in employee-protection and antidiscrimination legislation.

In fairness, I should mention that some of our ideas may be implicit in the Introductory Note. But not every reader will see that, and these are sufficiently important points that they ought to be expressed.

#### Section 1.01 Blackletter:

There are only minor changes in the currently proposed blackletter text. This is the one section that the Working Committee found generally satisfactory.

#### Comments on Section 1.01:

The drafters have done reasonably well in responding to our critique of the handling of Section 220 of Restatement 2d of Agency and Section 7.07 of Restatement 3d of Agency, particularly regarding a reference to Comment f to Section 7.07. Again, however, there is no explicit acknowledgment that deriving the definition of "employee" from the Agency Restatements' definitions, which go back ultimately to "master and servant" days, runs the risk of narrowing excessively the coverage of employee-protection statutes.

#### Illustrations:

We urged the deletion of Illustration 16, which seems to equate union "salting" techniques with a job applicant's "misrepresentations." The facts of the Illustration do not even constitute outright misrepresentation, since the employees involved simply did "not disclose" their union organizing purposes. More important, of course, the Illustration implicates significant labor law policies that are not even mentioned (either here or in a cross-referenced Comment to Section 1.04). In any event, the Illustration has NOT been omitted, and its facts have not been changed to make a possible "misrepresentation" any more palpable.

#### Reporters' Notes:

1. We suggested that citations to states supporting a broader multi-factor test for employment be broadened geographically to include some cases from the East and the Midwest, to avoid the notion that this might be a peculiar position of the Far West. This was done, citing the very cases we gave as examples. Similarly, a citation to an ancient version of Arthur Larson's famous treatise on Workers' Compensation Law was supplemented by the citation of a more modern edition, which we had recommended. (But the drafters stuck stubbornly to the citation of that older, generally unavailable, and anachronistically titled text on Workmen's Compensation Law....)

2. Our recommendation for a cleaning up of the description of the Lauritzen case has been adopted, but of course this is a matter of small potatoes in the larger scheme of things.

3. In our critique, we pointed out that the Reporters in Comment d (p. 25) were apparently in error in citing 29 USC 312(d) as excluding any individual having the "status of an independent contractor" from the definition of employee under the Social Security Act. We noted that the Social Security Act currently defines "employee" as a person who would be considered an employee at common law. See 42 USC 410(j) (2006). The Reporters have now tried to correct the citation to justify their original notion of "employee" as excluding any individual having the "status of an independent contractor" by citing 42 USC 1301(a)(6). But the latter provision deals with the definition of "Secretary [of Health and Human Services]," NOT "employee." Well, I suppose we can treat this as another small matter, of interest mainly to lawyers and their clients, and I won't bother pursuing it further.

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Summary: The current draft of the Proposed Restatement reflects few positive changes in response to my prior work analyzing sections 1.02-1.04. Indeed, there have been a few additional changes that have made the draft worse by involving new areas of unfavorable commentary. If I rewrote my report in light of the new draft the core of my critique would remain the same and only a few modifications or deletions would be necessary.

Section 1.02:

The latest revision of the Restatement draft does not alter the appropriateness of the core of the previously prepared critique regarding Comment a.

The revision continues to baldly assert, without justification, that volunteers "have not made the same kind of commitment to an employer" and, without explanation, use that as a rationale for not providing volunteers with the same protections as employees.

The revision has made minor adjustments by using the word 'principal' instead of 'employer' when speaking of those receiving a volunteer's services and by dropping the reference to the undefined term 'true volunteer'.

The revised Notes do not respond to the previous critique's observation that the Rubenstein article, which the revision continues to cite without analysis or discussion, contends that the case law is unsettled respecting what Comment a asserts is the black letter rule. Nor do the Notes respond to the previous critique's recitation of Rubenstein's explanations as to why employee protective statutes should be construed to cover volunteers whenever possible. Moreover, the revised Notes are unresponsive to the critique's explanations as to why the cases it continues to cite in support of its broad

assertion respecting the unprotected status of volunteers in fact reflected the courts' reactions to specific requirements of the statutes involved in those cases.

Revised Comment b expands the explanation of what can constitute material consideration to the extent of recognizing payments to third party beneficiaries. However, it continues to have a narrower approach than the relevant provisions of the Restatement of Contracts or case holdings cited by the previous critique in that the revision does not recognize as a material inducement benefits to parties to whom the individual has a legal obligation or emotional tie or consideration in the form of a forbearance or the creation, modification, or destruction of a legal relationship.

The revised Notes add a new case authority in support of the assertion that "volunteers who receive no pay or significant benefits . . . are not treated as employees." That case involved an ADA and ADEA suit by an employee of a nonprofit organization that governs use and operation of a community access television channel to citizens and local organizations that sponsor community interest events or produce programs whose content may be of interest to the local community. In order for the claimant to show that his employer had the statutory threshold number of employees, he had to convince the court that either the members of the non profit's board of directors or those producing programs broadcast on its channel should be counted as employees. Citing *Clackamus*, the court held that the volunteer members of the self-perpetuating, self-governing board are independent of the organization and independent of each other in exercising their responsibilities and, therefore, are not employees. Although the court cited to the minimal material benefits received by the board members for their service, it did not hold that the lack of pay or material benefits was determinative in finding that they are not employees. Similarly, in holding that the program producers cannot be counted as employees, the court noted that they are independent and that the broadcaster does not have the power to hire, fire or supervise them, as well as the fact that they are not paid a salary nor are entitled to employee benefits. Nothing in the decision suggests that the latter factors are determinative. Therefore, as noted in the critique with respect to the other cases relied on in this comment, the court's ruling does not support the revised draft's broadly stated assertion that "volunteers who receive no pay or significant benefits . . . are not treated as employees." Finally, the revised draft continues to ignore those cases and statutes, cited in the critique, that provide some employee protections to volunteers.

Comment d of the revised draft continues to state that "students who render uncompensated services to satisfy bona fide education or training requirements . . . generally are not treated as employees" without acknowledging case law, statutes or reasons cited in the critique in support of the contrary conclusion. Similarly, the revised draft continues to rely on a thin line of authority, offer no rationale for its position, and ignore the challenges to the proposition that student-athletes in sports that generate significant revenue should be treated as students when suffering work related injuries.

Comment e of the revised draft introduces a rationale (where none was previously offered) for not extending employee protective laws to prisoners (it could undermine

discipline central to the prison relationship). The draft makes no effort to explain this rationale based on any empirical findings relating to prison practices in other countries or the impact of the expansion in recent decades of a variety of other opportunities for prisoners to assert their human rights interests. Moreover, the draft continues to lack any examination of countervailing arguments presented in the authorities cited in the critique (other than add a reference, without comment, to Prof. Zatz's article) and does not take account of those situations in which courts, administrative agencies, and other authorities have provided some legal protection to injured inmate workers.

The Notes to the revised draft adds a citation to a recent 7<sup>th</sup> Circuit decision that it characterizes as standing for the proposition that the FLSA coverage rule for prisoners also applies to the civilly committed. This appears to be an attempt to refute the critique's suggestion that it is inconsistent, on the one hand, not to apply the FLSA to prison workers when, on the other hand, Department of Labor regulations "grant employment protections to patients who perform work within the institution if it 'is of any consequential economic benefit to the institution,'" As is so often the situation in the draft's reliance on case authority, the cited case provides little support for the revised draft's assertion. In the cited recent 7<sup>th</sup> Circuit decision a claimant who was confined civilly as a sexually violent person sued to recover minimum wages for work done at his place of incarceration. Neither the 7<sup>th</sup> Circuit nor the courts whose decisions it relied on, all of which cases were litigated *pro se*, made any reference to the above quoted Department of Labor regulation. Further, the claimant in each of these cases was involuntarily committed for criminal misconduct or was committed as a sexually dangerous person and was treated by the respective court as the functional equivalent of a prisoner, not a patient. On that basis each court ruled that the claimant should be given the same FLSA treatment as a prisoner.

#### Section 1.03:

The revised draft expands the exclusion of employee protections beyond that provided in the October 2008 draft by treating control of any part of an enterprise as sufficient to remove someone with an ownership interest from employee protections. (The earlier draft excluded those who control all or a significant part of the enterprise.) On the other hand, Comment a of the revised draft introduces a criteria not contained in the October 2008 draft by adding the requirement that to exclude an individual from employee protections, his or her ownership interest be accompanied by "control of the significant economic and operational decisions of all or part of an enterprise" While this is an appropriate restriction on the criteria for excluding a working owner from employee status, there is no reason why it should not be reflected in the black letter rule itself. Moreover, by dropping the requirement that control reach a significant part of the enterprise, Comment a would exclude as an entrepreneur someone whose ownership interest reaches operational and economic decisions affecting aspects of his or her own immediate area of work, but that does not involve direction of the enterprise as a whole and thereby significantly affects the individual's economic destiny. Thus, for example, a partner who, within a specified budget, hires his own secretary, decides on that person's remuneration and his own expenditure of travel funds, entertainment activities, and furnishings, within the budget, may be excluded from employee protections even though

that individual may have little or no control over such core enterprise decisions as the purchase or disposal of property, the expansion or contraction of the enterprise's areas of specialization, the location of its facilities, its marketing strategy, the schedule of fees for services, and the like.

The revised draft offers a more cautious reading of *Clackamus* than the October 2008 draft but continues to mischaracterize the Court's approach by emphasizing the ownership characteristics rather than the employment characteristics of the relationship. Thus, while the Court looked to the extent to which an individual has the characteristics of an employee who is dependent on the entrepreneurial decisions of others, the revised draft asserts that the decision excludes from employee status an owner who has entrepreneurial control over a part of an enterprise in her own interest. As illustrated in the above paragraph, contrary to the focus of the *Clackamus* holding, this could leave a worker-owner without employee protections even though others in the enterprise control the worker's overall economic and operational destiny.

Moreover, the Notes to Comment a, as well as the Comment itself, still do not call attention to the inconsistencies in the Supreme Court's approach to construing who is a covered employee when that term is undefined in a federal statute and ignore state court decisions that, when construing such laws, often give particular weight to the legislative goal of protecting the public interests or extending social welfare benefits to all workers who are vulnerable to economic misfortunes or abuses of managerial control.

Comment a of the revised draft does improve upon the October 2008 draft by offering an explanation for not applying *respondeat superior* rules when defining who is an employee for employment law purposes. However, that explanation, and the inclusion of excerpts from the Court's decision in *Whitaker*, falls short of justifying the Comment's approach that equates economic and operational control of any part of the enterprise as sufficient to remove a worker-owner from employee protections.

Finally, as previously critiqued, the black letter statement of § 1.03 continues to be misleading because it does not accurately summarize the core focus and varied approaches to deciding when worker-owners are not entitled to look to employee protective laws.

Comment b further reveals the ease with which, under the language of the revised draft, employee protections can be lost even though a worker-owner lacks effective control over the enterprise's entrepreneurial destiny. Thus, according to Comment b's discussion of professional corporations, an owner-worker who controls only her own remuneration and activities does not have the protections of employee status despite lack of control over any economic and operational decisions of the enterprise that provides her work opportunities and environment.

#### Section 1.04:

Comment c of the revised draft improves upon the October 2008 draft to the extent of removing some of the previously critiqued inconsistencies in the statement of the

operative test—thereby mooting a small portion of the critique of that Comment. The amended language does this by asserting that the § 1.01 independent contractor standard determines whether any or all of the principals are in an employment relationship with the worker. However, the revised Comment rejects the possibility of an employment relationship with a supplier that “merely supplies” workers but does not direct their work **and** *pay them*. Similarly, it rejects the possibility of an employment relationship with a user that does not have the power to control their work **or** *set their compensation*. This introduces some new inconsistencies within the text of the Comment (see the two sets of emphasized terms, above), perpetuates inconsistencies both with the more flexible approach of § 1.01 as stated in the draft and with the greater flexibility § 1.01 should have as noted in the critique of that section, and continues to conflict with, and not account for, numerous case decisions that apply broader alternative tests, including many case decisions read too narrowly in the draft’s Notes. It is also inconsistent with at least one of the Illustrations (No. 4). Moreover, the revised Comment c fails to offer a rationale that is responsive to the explanations stated in the critique in support of criteria that provide greater scope of employee protection.



## Comments on the Current Chapter 2

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I critiqued sections 2.02 and 2.03. I sent an email on Saturday stating that the revised Restatement did not include any revisions to the text of sections 2.02 and 2.03. Based on that fact, I suggested that any revisions likely would not adequately address the problems raised by our critiques. I now have read the Comments, Reporters' Notes and Illustrations. The following are the revisions that I found:

### 2.02 REVISIONS

1) Comment a: The parenthetical "in the sense of obligations parties can assume but are not imposed by law, other than the implied covenant of good faith and fair dealing, sec. 2.05."

I suppose this was added to take into account our criticism that 2.02 ignores implied contracts. This seems a most inadequate "fix."

2) Reporters' Notes Comment b: New last sentence: "For a case holding enforceable individual employment agreements between the employer and union-represented employees providing greater protections than the operative collective-bargaining agreement, see . . . ." I do not think this change is responsive to our critique.

### 2.03 REVISIONS

1) Comment d: Sentence deleted (second sentence of Comment): "Certain employer statements (discussed in sec. 2.04) may give rise to binding obligations even in the absence of consideration or bargained-for exchange of a showing of detrimental reliance by the employee." I do not see this as responsive to my critique of 2.03, but it may respond to the critique of section 2.04.

2) Comment e: New comment on unilateral contract analysis used by some jurisdictions to enforce contracts without new consideration being given by employee. It does not seem that this addition is responsive to my critique of section 2.03.

3) Reporters' Notes, Comment c: New last sentence: "for conflicting applications of the Statute of Frauds to agreements for an indefinite term, . . ." I do not think this is responsive to my critique of section 2.03.

4) Reporters' Notes, Comment d is new: This is about unilateral contract analysis to enforce promises in handbooks or manuals. This is not responsive to my critique of section 2.03. It may respond to the critiques of sections 2.04 or 2.05.

5) Reporters' Notes Comment f: Deleted an authority—citation of Mark Pettit article, *Modern Unilateral Contracts*. I do not know the reason for this change.

6) Reporters' Notes Comment g: Adds several sentences to end of former Comment f, discussing implied contracts. This seems to be an attempt to respond to the critiques of sections 2.02 and 2.03 that they almost ignore implied contracts. This change adds little.

7) Reporters Notes Comment h: Several sentences added to end of second paragraph of former Comment g. Discussion of *Shebar v. Sanyo Business Corp.*, a case that we cited in footnote 24 of the critique of section 2.03.

The foregoing are the only changes I found in the Comments, Illustrations, and Reporters' Notes to sections 2.02 and 2.03. It seems that these minor changes fall far short of supporting the proposition that the revisions address the problems raised by the critiques.

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The revised version of the draft Restatement makes no substantive changes to sections 2.04 and 2.05 (unilateral policy statements). Here is a brief summary of the modifications to these two sections:

1) Language is added to the comment to 2.04 that attempts a better explanation of why unilateral contract and promissory estoppel principles do not provide an adequate justification for unilateral policy enforcement. The comment continues to espouse "general estoppel principles."

2) The Reporters' Notes to 2.04 add numerous case citations in an attempt to better document those jurisdictions that enforce handbooks on a) unilateral contract theory, b) estoppel theory, and c) those that do not enforce handbooks at all.

3) Proposed Restatement section 2.05 adds the word "advance," so as to now state that an employer may "modify or revoke its binding policy statement by providing reasonable 'advance' notice." I believe that the addition makes no substantive change as the comment continues to state that an employer ordinarily may modify or revoke by giving the same notice as gave rise to the original policy statement. The comment does not mention any required period of "advance" notice.

4) The comment to 2.05, which previously stated that a "roughly equal" number of jurisdictions permit unilateral employer modification as compared to mutual assent jurisdictions, now (correctly) states that a "substantial" number of jurisdictions adopt the former approach, while a "smaller" number of jurisdictions adopt the latter approach.

In short, the new draft did really nothing to alleviate the concerns expressed in my earlier critique.

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First, the redraft of section 2.06 attends to none of the criticism leveled against it. One criticism, for example, was that the draft neglected to attend to the law in those jurisdictions that take a more open-ended approach to the obligation of good faith and fair dealing, i.e., Alaska and Montana (before even broader protection was statutorily afforded). These jurisdictions still pass without notice.

## Comments on the Current Chapter 4

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4.01 never was as problematic as the other sections. The basic concept -- that there is a tort of wrongful discipline and discharge -- is uncontroversial, and the Restatement does extend it to discipline (not just discharge). Our criticism was in the details, and many of those problems remain, though the reporter did fix the most glaring problems in the Notes especially. Our most significant criticism was that the Restatement did not give sufficient guidance to courts in deciding when the existence of a statutory remedy counseled courts against allowing a common law tort, and that the Restatement relied heavily on federal preemption doctrine to create a rule of implied preclusion of common law remedies. Those problems remain.

The revisions do provide a bit more guidance, though I think it does not do enough. While the redraft does list some of the factors we identified as relevant in deciding whether there should be a common law claim, and does make clear that the list is not exclusive, it still gives courts little direction about when a common law claim does or does not supplement a statutory remedy. For example, comment d. says that "Comprehensive antidiscrimination statutes present a clear example of the reluctance of courts to recognize a supplementary tort for wrongful discipline" and that "These statutes often do not expressly preclude common law or other claims, and in some cases expressly disclaim such preclusion. Nevertheless ... courts generally decline to recognize a common law action ...." Neither the comment nor the Reporter's Note explains why there should be no common law remedy. And the statement that "courts generally decline to recognize a common law action" is in tension with the cases cited in the Note, many of which do NOT decline to recognize a common law action.

Some of our objections were addressed: the language stating that reinstatement and backpay are presumptively adequate remedies is gone; the suggestion that an arbitration agreement had something to do with waiver of tort claims is gone.

Some of our small objections were not addressed: The confusing and offensive example of Mrs. Murphy's boardinghouse from the legislative history of the Civil Rights Act of 1964 is still there. The suggestion that section 301 preemption involves a two-step test is still there. The idea that social shunning is not an actionable adverse employment action (failing to invite someone for drinks) is still there.

Some new concepts have appeared in the Reporter's Note that may give rise to confusion -- there are some recent cases cited for the proposition that a statutory regime that recognizes a right not recognized at common law does not give rise to a common law tort claim but that a statutory regime that provides remedies for violation of a right recognized at common law may not preclude the creation of a common law claim. This is new, and it does not appear to be a general rule (one California intermediate appellate

court decision is cited), and it may generate all kinds of confusion. But since it's in the Reporter's Note and not in the comments or the text, perhaps it's not a big deal.

In sum, 4.01 would not alone be a reason to oppose the adoption of Chapter 4. But it's also not going to be a major step forward in the law.

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Speaking solely from the standpoint of Section 4.03, although cases have been added and some language clarified, the new text does not address some of the more substantial issues of this section including the meaning of when source of law has become "clearly established" and whether international law should play some role as a source of law in a public policy tort.