



INDIANA UNIVERSITY

MAURER SCHOOL OF LAW
Bloomington

Date: April 30, 2009
To: Members of the American Law Institute
From: Kenneth G. Dau-Schmidt, Chair, Labor Law Group
Re: Proposed Restatement of Employment Law

Dear ALI Member,

Enclosed please find an advance copy of Volume 13(1) of the *Employee Rights and Employment Policy Journal* in which we present the proceedings of the Labor Law Group and U.C. Hastings conference on the first three chapters of the American Law Institute's Proposed Restatement of Employment Law. As summarized in my introduction (pages 1-27), the conference proceedings include the reports of the Labor Law Group's Working Committees on each of the proposed chapters along with various written comments on these reports. Our purpose in constituting these Working Committees and conducting the conference was to evaluate this first effort in the Proposed Restatement of Employment Law according to the Institute's own criteria for restatement projects: whether the draft chapters simplify and clarify the principles of employment law by reflecting an informed consensus on what those principles are, or should be, in a way that is both internally consistent and consistent with the Institute's other restatements of law.

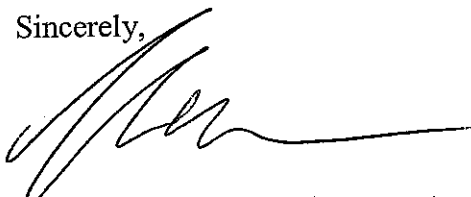
As a member of the American Law Institute, I hope you will take the time to carefully read the Working Committees' reports, or at least my summary introduction, in advance of the Institute's May meeting at which the first three chapters will be considered for final approval. Although we provided the reporters with advance copies of these reports, and they have made some changes to the Proposed Restatement in response, there is still a lot of work to be done on the draft Restatement before it is ready for final adoption by the Institute. At a minimum, the Proposed Restatement must be reworked to reflect a consistent and theoretically adequate basis for a separate restatement of employment law and to correct numerous remaining misstatements of precedent. Without a consistent rationale for a separate restatement of employment law, it is hard to see how the current draft can be made internally consistent, or consistent with the Institute's other projects in tort and contract. Without correction of the misstatements that remain, it is impossible to say that the draft reflects an accurate restatement of employment law. Our working Committees have had a brief opportunity to review the draft of the Proposed Restatement that will be considered at the May meeting and their comments on that draft and the changes that have been made are included as a loose addendum inside the back of the enclosed advance copy of the *Employee Rights and Employment Policy Journal*.

Kenneth G. Dau-Schmidt
Willard and Margaret Carr Professor of Law

The Labor Law Group stands ready to work with the American Law Institute to produce a restatement of employment law that meets the Institute's objective of an informed and consistent consensus on the current state of the law. The Group's Executive Committee was encouraged when the Institute's Director, Lance Liebman, invited me to act as an advisor on the project and to help him appoint two liaisons from the Group. Although we are willing to put aside our objections that the timing of the project may interrupt the further development of employment law, we feel that the project needs more balance in perspective and a reworking of the drafts of the first three chapters in order to be successful. Although they are all talented academics, we feel that the current staff of reporters on the Institute's Employment Law Project is unduly dominated by the employer perspective. Consistent with common practice in employment law, we feel that at least two new reporters should be appointed, one with work identified with employee interests and one clearly neutral, who are of equal authority with any of the reporters currently on the project. Such a balancing of perspective would undoubtedly improve the Proposed Restatement and its claim on being a consensus view of the law. We also feel that the reporters should be given time to rework their drafts to take account of the views of the new reporters and the comments of our Working Committees before they receive final approval by the American Law Institute. Without these changes and time for our views to have an effect, it is hard to see how the participation of an advisor and two liaisons from the Group will have a meaningful impact on the project.

We look forward to your careful consideration of the draft Restatement and the comments of our Working Committees before the Institute's May Meeting.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ken Dau-Schmidt', with a long horizontal flourish extending to the right.

Kenneth G. Dau-Schmidt, JD, PhD
Chair of the Labor Law Group
Willard and Margaret Carr
Professor of Labor and Employment Law