Employment as Fiduciary Relationship

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

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INTRODUCTION

Are employees fiduciaries of their employers? The question seems largely
settled. The hoary “master–servant” doctrine holds that employees are agents of
their employers and owe the traditional fiduciary duties of loyalty and perfor-
mance.1 However, this blanket coverage of all employees has increasingly
disturbed labor and employment law academics, who have pointed out that the
fiduciary duties within the relationship seem fairly one-sided.2 Indeed, it seems

1. RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (AM. LAW INST. 2006) (“[A]n employee is an
agent . . . .”); id. §§ 8.02–8.06 (duty of loyalty); id. §§ 8.07–8.12 (duty of performance); RESTATEMENT
(SECOND) OF AGENCY § 2 (AM. LAW INST. 1958) (“A servant is an agent employed by a master . . . .”).
2. See, e.g., Ken Matheny & Marion Crain, Disloyal Workers and the “Un-American” Labor Law,
82 N.C. L. REV. 1705, 1726 (2004) (“Such duties are unidirectional: workers are required to be loyal to
their employers, but employers owe no reciprocal duty of loyalty.”).
jarring to juxtapose an agent’s selfless duties of loyalty and performance with an employer’s minimal obligations under employment at-will. After all, fiduciary duties are traditionally invoked to protect the vulnerable against depredations from those with power over them. The resulting critique has left the existence and strength of employee fiduciary duties open to question. The recent Restatement of Employment Law applies the traditional fiduciary duty of loyalty only to employees “in a position of trust and confidence.” Other employees have only a limited duty of loyalty with respect to trade secrets or a contractual duty of loyalty. As the Restatement commentary describes: “As a general matter, the duty of loyalty stated in this Section has little practical application to the employer’s ‘rank-and-file’ employees . . . .”

The debate over employee fiduciary duties is just the tip of a larger set of unresolved issues that make up the complicated fiduciary relationship between employees and employers. The traditional master–servant doctrine provides an obsolete and facile legal label for a much richer and entangled set of legal relations. The obligations between employer and employee do not, in fact, run all one way; the employee duty of loyalty is but one aspect of a multifaceted set of mutual commitments. The employer itself has myriad fiduciary and quasi-fiduciary responsibilities to employees that have not been recognized as such or have not been given their appropriate weight. As a result, it is appropriate to say that employers are fiduciaries, too. Recognized in the context of this more nuanced relationship, employee fiduciary duties become less threatening and more understandable. In a world of reciprocal fiduciary duties, employees and employers have multiple and interwoven responsibilities to each other that would appropriately structure the employment relationship.

This Article explores the complexities of the fiduciary relationship between employees and employers. It will support the traditional approach that employees owe fiduciary duties to their employers. However, it will also argue that employers owe fiduciary and quasi-fiduciary duties—some through common

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

4. RESTATEMENT OF EMP’T LAW § 8.01(a) (AM. LAW INST. 2015).

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

6. Id. § 8.01 cmt. a.

7. RESTATEMENT (SECOND) OF AGENCY § 2 (AM. LAW INST. 1958) (referring to the employer as “master” and the employee as “servant”).
law, many through statute—to their employees. We have seen the progression of these responsibilities grow over time: minimum wages, overtime, pension benefits, time for parental and medical leave, and, most recently, health insurance mandates. Although these duties are often categorized as regulatory, they are in fact better characterized as organizational and relational duties: duties that derive from the employer–employee relationship itself. The relationship between an employer and its employees is best seen not as an adjunct of the principal–agent relationship, but rather as a new and more appropriate organizational designation.

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

Part I of this Article explores the traditional fiduciary duties between employer and employee as set forth by the common law of agency and employment law. Part II examines the employment relationship from the perspective of the theory of the firm and argues that employment is critical to our conception of what distinguishes firms from markets. Exploring the legal aspects of the employment relationship, Part III sets forth the manifold common law and statutory duties that employers owe to employees, including what could be regarded as traditional fiduciary duties. Based on these existing legal responsibilities, it can be argued—as a positive matter—that employers are already acting as quasi-fiduciaries with respect to their employees. Part IV discusses prior theories of employer fiduciary duties and introduces a new approach firmly establishing employers as fiduciaries with respect to their employees. Finally, considering how this fiduciary relationship would play out in practice, Part V explains how the role of employees in the governance of the firm should shape the fiduciary duties that employers and employees owe. With stronger governance rights, employees would have less of a need for the protection of robust fiduciary duties. In this respect, the employment relationship presents the traditional tradeoff of governance rights for fiduciary duties in response to the opportunism problems that arise from incomplete contracts.

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

I. EMPLOYEES AS AGENTS

Under the traditional common law, employees have been defined as a subspecies of agent whose actions are particularly aligned with the principal. The Restatement (Second) of Agency defines a servant as “an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.”10 The so-called “control” test is the dominant standard for employment, both nationally and internationally. The basics of the control test are straightforward. A servant is one who is “under the duty of rendering personal services to the master or to others on behalf of the master.”11 In addition, “[t]he master must have the right to control the servant’s work,” which means “being entitled to tell the servant when to work (within the hours of service) and when not to work, and what work to do and how to do it.”12 This right of control is what separates master–servant from the principal–agent.

To a great extent, this traditional definition still holds in the law. The Supreme Court has made the common law control test the default definition for “employee” whenever used without further explanation in a federal statute.13 The Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA) define “employ” as “suffer or permit to work,”14 and the Supreme Court has recognized that the FLSA definition may extend to cover workers beyond the reach of the common law agency test.15 Outside of these statutory contexts, however, the Supreme Court has made it clear that the control test is to apply as the default rule. That is not to say, of course, that the control test is easy or straightforward to apply. The Restatement (Second) of Agency provides a ten-factor balancing test for determining whether the potential master or employer is exercising control.16 As the Restatement commentary acknowledges, this employment relationship is “one not capable of exact definition.”17
Because agency law has taken the lead in defining the legal meaning of “employee,” and because agency law has always treated employees as a subcategory of agent, the natural presumption has been that employees are agents. As agents, employees have traditionally owed the same fiduciary duties that agents owe to their principals. These duties can be roughly categorized into two types: duties of loyalty and duties of performance. The duty of loyalty is perhaps the more prominent; it requires the agent to “act solely for the benefit of the principal in all matters connected with his agency.” In other words, when acting within the scope of agency, the agent is to think of the principal’s interests rather than her own. Nested within this overall duty of selfless agency are the duties not to take business opportunities from the principal, not to deal with the principal on behalf of an adverse third party, not to compete with the principal during the agency relationship, not to use the principal’s property for the agent’s own purposes, and not to disclose the principal’s confidential information. As to duties of performance, the agent has the duty to exercise reasonable care, competence, and diligence, to follow instructions, to act reasonably and refrain from damaging conduct, to provide information, and to segregate the principal’s property. In contrast, the principal has only limited duties to the agent. Outside of contractual duties, the principal has a limited duty to indemnify the agent and a duty to provide information regarding potential for physical harm or pecuniary loss.

As a matter of fiduciary doctrine, employees appear to fit squarely within the category of agents. If an agent is one who acts on behalf of a principal and is

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18. See id. § 2 cmt. a (“A master is a species of principal, and a servant is a species of agent.”).
19. See id. § 1(1) (characterizing agency as a fiduciary relation); Restatement (Third) of Agency § 1.01 (Am. Law Inst. 2006) (same).
20. See Restatement (Third) of Agency §§ 8.02–8.12; see also Deborah A. DeMott, Disloyal Agents, 58 Ala. L. Rev. 1049, 1049 (2007) (“Within common law agency, an agent owes the principal fiduciary duties of loyalty as well as duties of performance.”).
21. Restatement (Second) of Agency § 387; see also Restatement (Third) of Agency § 8.01 (stating that the agent has “a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship”); Benjamin Aaron, Employees’ Duty of Loyalty: Introduction and Overview, 20 ComE Lab. L. & Pol’y J. 143, 144 (1999) (stating that the duty of loyalty in general “require[s] that the employee behave during the period of employment so as to enhance, rather than harm or hinder, the business interests of the employer”).
22. Restatement (Third) of Agency § 8.02.
23. Id. § 8.03.
24. Id. § 8.04.
25. Id. § 8.05.
26. Id. § 8.08.
27. Id. § 8.09.
29. Id. § 8.11.
30. Id. § 8.12.
31. See id. § 8.13.
32. Id. § 8.14.
33. Id. § 8.15. The Restatement (Third) frames this duty as part of the overall duty of good faith and fair dealing. Id.
subject to the principal’s control, then employees are agents-plus, or mega-agents—a special category of agents that are particularly tied to the principal. Although many agency relationships are temporary and task-oriented, employment is a wider-ranging and longer-lasting version wherein the employee is given greater discretion to act on behalf of the principal. Moreover, the employee shares the characteristics of the agent that have called forth a specific body of agency law—namely, that the agent is given particularized power to act on behalf of the principal. Because the agent has discretion to act on behalf of the principal, the principal is vulnerable to the agent’s use of this power. Similarly, employees acting on behalf of the interests of another entity (the employer) are agents and should be bound by the same set of fiduciary duties, including the duty of loyalty.

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

The second, more specific critique of the employment–agency paradigm calls into question the application of the agent’s traditional fiduciary duties to the

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34. Restatement (Second) of Agency § 2 cmt. b (Am. Law Inst. 1958) (“The word ‘servant’ is used in contrast with ‘independent contractor’. The latter term includes all persons who contract to do something for another but who are not servants in doing the work undertaken.”).

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

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

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


39. Miller, supra note 37, at 79.
employment relationship. An agent’s fiduciary duties, although somewhat vaguely defined, are fairly extensive. In particular, agents have the duty of loyalty to the principal—the duty to “act solely for the benefit of the principal in all matters connected with his agency.”40 This self-abnegation is a critical aspect of the agency relationship, because it balances out the agent’s power to step into the shoes of the principal and act on the principal’s behalf. But many scholars have criticized the duty as unfairly one-sided in the employment context. Under fiduciary law, only one of the two parties must be “loyal” to the other; the employer has no fiduciary duties with respect to the employee. As a result, employees are arguably made to be fiduciary dupes: they are loyal to an entity that owes no loyalty to them. This disparity plays out in the at-will presumption, which allows employers to fire employees at any time and for a variety of reasons having nothing to do with performance.41 The duty of loyalty seems particularly onerous when framed in terms of the “faithless servant.” According to this doctrine, an employee who violates the duty of loyalty must disgorge the entirety of her wages for the period of disloyalty.42 These doctrines work to disempower the employee.43 The employee can be let go at any time and for a variety of reasons, but the employee must always act in the interest of the employer.44 Although at-will employment and the employee’s duty of loyalty

40. Restatement (Second) of Agency § 387 (Am. Law Inst. 1958); see also Aaron, supra note 21, at 144 (stating that the duty of loyalty in general “require[s] that the employee behave during the period of employment so as to enhance, rather than harm or hinder, the business interests of the employer”).

41. See Restatement of Emp’t Law § 2.01 (Am. Law Inst. 2015) (“Either party may terminate an employment relationship with or without cause unless the right to do so is limited by a statute, other law or public policy, or an agreement between the parties, a binding employer promise, or a binding employer policy statement (§ 2.02).”). Numerous courts have used the phrase “for any reason or no reason at all” when describing at-will. See, e.g., Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 280 (Iowa 2000) (defining at-will to mean that “the employment relationship is terminable by either party ‘at any time, for any reason, or no reason at all’”) (quoting Phipps v. IASD Health Servs. Corp., 558 N.W.2d 198, 202 (Iowa 1997)).

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

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

44. Fisk & Barry, supra note 3, at 418–19 (“The employer owes no duty of loyalty to the employee and is free to pursue its self-interest by firing him to hire another for a lower wage or for better skills.
are not necessarily contradictory, they highlight a larger problem of employee vulnerability. If fiduciary law is justified as a protection for the vulnerable, as is often stated, then why does it protect employers and not employees? Even if an employee might hold discretionary legal power in her hands, is there any doubt about who holds the real power in the relationship?

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

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

45. See infra Part III.
46. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. g (AM. LAW INST. 2006) (“As agents, all employees owe duties of loyalty to their employers. The specific implications vary with the position the employee occupies, the nature of the employer’s assets to which the employee has access, and the degree of discretion that the employee’s work requires. However ministerial or routinized a work assignment may be, no agent, whether or not an employee, is simply a pair of hands, legs, or eyes.”).
47. Fisk & Barry, supra note 3, at 429–30 (“Not all employment relationships are fiduciary. Most low-level employment relationships are strictly contractual, in the sense that the employer has not put the employee in a position to affect its legal relations with third parties and need not trust the employee to exercise discretion on the employer’s behalf in order to get the benefit of the contractual relationship.”); Aline Van Bever, When Is an Employee a Fiduciary?, 18 CANADIAN LAB. & EMP. L.J. 39, 42 (2014) (“[I]t is not the existence of an employment relationship as such, but the concrete circumstances of the particular relationship, that put an employee in a fiduciary position.”).
48. See TalentBurst, Inc. v. Collabera, Inc., 567 F. Supp. 2d 261, 266 (D. Mass. 2008) (examining Massachusetts law to conclude that “the duty of loyalty does not extend to ‘rank-and-file’ employees under Massachusetts law, absent special circumstances indicating they held a position of ‘trust and confidence’”); Dalton v. Camp, 548 S.E.2d 704, 708 (N.C. 2001) (holding that the circumstances regarding the employment relationship in question were akin to “virtually all employer-employee
The third and most traditional approach to the imbalance between employer and employee fiduciary duties is to acknowledge the existence of employee fiduciary duties but to modify, weaken, or diminish their content. The duty of loyalty, for example, has been held to apply to employee competition with the employer only while the employee is still working there. The loyalty duty becomes essentially an implied covenant not to compete while one is still an employee. This contemporary version of the employee duty of loyalty provides that “employees can prepare to compete with their current employer, but they must not solicit business and, in some circumstances, employees prior to leaving their employment.” The exact parameters are a source of contention, particularly with respect to the extent to which employees may work together to prepare for their exit. But such a “narrowly circumscribed” duty does not appear particularly objectionable to courts or particularly threatening to employee advocates. Moreover, it appears to fit well within existing agency doctrine, which recognizes that the duty of loyalty varies “with the position the employee occupies, the nature of the employer’s assets to which the employee has access, and the degree of discretion that the employee’s work requires.”

There has also been a trend toward the elimination of the duty of loyalty for the average, rank-and-file employee. The new Restatement of Employment Relationships” and were therefore “inadequate to establish [the employee’s] obligations as fiduciary in nature”); Selmi, supra note 3, at 397 (“[M]any, though not all, courts have seen fit to treat the employment relationship as a principal-agent relationship.”). For a critique of the Dalton decision, see Bret L. Grebe, Fidelity at the Workplace: The Two-Faced Nature of the Duty of Loyalty Under Dalton v. Camp, 80 N.C. L. REV. 1815, 1815–16 (2002) (“Though relying on a traditional definition of the fiduciary relationship, the court applied that definition narrowly and in derogation to common law agency principles.” (footnotes omitted)).

49. RESTATMENT OF EMP’T LAW § 8.04(a) (AM. LAW INST. 2015) (restricting competition by current employees); id. § 8.05 (allowing former employees to compete in the absence of a covenant not to compete or trade secrets).

50. Selmi, supra note 3, at 397; see also id. at 399 (finding a “clear consensus that sees the duty serving a distinct but limited function relating to employees who leave for a competitor or to start a competing business”).

51. Many courts allow employees to plan their “escape” as long as they do not actively solicit clients for the new venture and do not use their time or the employer’s property in furtherance of the new venture. See, e.g., Eckard Brandes, Inc. v. Riley, 338 F.3d 1082, 1085–86 (9th Cir. 2003) (duty of loyalty violated when employee ran a competing pipe-repair business establishment while still employed by employer); Illumination Station, Inc. v. Cook, No. 07-3007, 2007 WL 1624458, at *4 (W.D. Ark. June 4, 2007) (refusing to dismiss a breach-of-loyalty claim against a sales representative who, while employed, diverted customer orders to a rival company); Augat, Inc. v. Aegis, Inc., 565 N.E.2d 415, 419–20 (Mass. 1991) (“An at-will employee may properly plan to go into competition with his employer and may take active steps to do so while still employed. . . . Such an employee has no general duty to disclose his plans to his employer, and generally he may secretly join other employees in the endeavor without violating any duty to his employer.”).

52. Selmi, supra note 3, at 403.

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

54. Leslie Larkin Cooney, Employee Fiduciary Duties: One Size Does Not Fit All, 79 MISS. L.J. 853, 854 (2010) (“[A]pplying the same agency principles to all employees regardless of their level of power or ability to exercise discretion or affect the employer’s interests generates an uncalled for advantage to the employer.”).
Law provides: “Employees in a position of trust and confidence with their employer owe a fiduciary duty of loyalty to the employer in matters related to their employment.” 55 Other employees may owe an “implied contractual duty of loyalty” based on the nature of their position, such as having access to certain accounts or critical information. 56 The agency relationship itself is insufficient, in the eyes of the Restatement of Employment Law, to create a duty of loyalty per se. 57 Those employees with a “relationship of trust and confidence” are further defined as “(1) employees who exercise substantial discretion and are not subject to close supervision in carrying out their managerial, supervisory, professional, or similar highly skilled work responsibilities; and (2) the employees who are entrusted with, and the employees who come into possession of, the employer’s trade secrets.” 58 The commentary makes clear that “[e]mployees falling outside either category do not owe a fiduciary duty of loyalty to their employer but may nevertheless owe an implied contractual duty of loyalty.” 59

Given the controversy over the duty of loyalty, it is perhaps not surprising that employees’ duties of performance have largely been ignored. The Restatement of Employment Law does not mention any such duties, and actions by employers against employees on performance grounds are largely nonexistent. 60 Although directors and officers owe their corporations a duty of care, these duties exist above and apart from the normal agency duties of performance. 61 The Restatement (Third) of Agency cites to employee cases with regard to the agent’s duty of good conduct. 62 However, the thrust of these cases is to provide

55. RESTATEMENT OF EMP’T LAW § 8.01(a) (AM. LAW INST. 2015).
56. Id. at cmt. b & illus. 3.
57. Id. at cmt. b ("Courts often point to the agency relationship between the employer and employee as the source of the duty of loyalty. But as the decisions make clear, labels from agency law or elsewhere are no substitute for a fact-sensitive analysis of whether the employee in question either occupies a position of trust and confidence sufficient to trigger the fiduciary duty of loyalty, assumes a limited fiduciary duty when coming into possession of the employer’s trade secrets, or is subject only to an implied contractual duty of loyalty arising from the nature or circumstances of the employment.”). An earlier version of the section provided more generally that “[e]mployees owe a duty of loyalty to their employer in matters related to the employment relationship.” RESTATEMENT OF EMP’T LAW § 8.01(a) (AM. LAW INST., Tentative Draft No. 4, 2011).
58. RESTATEMENT OF EMP’T LAW § 8.01(a) cmt. a (AM. LAW INST. 2015).
59. Id.
60. Such cases generally only arise in the context of corporate directors and officers, and even then are generally weak. See, e.g., Stephen J. Lubben & Alana J. Darnell, Delaware’s Duty of Care, 31 DEL. J. CORP. L. 589, 589 (2006) ("In short, the classic duty of care no longer exists in Delaware.”).
61. The Restatement (Third) of Agency illustrates the agent’s duty to comply with lawful instructions through an example involving a loan officer’s disregard of the bank’s lending limits. RESTATEMENT (THIRD) OF AGENCY § 8.09 cmt. c, illus. 4 (AM. LAW INST. 2006). The Reporter’s Notes cite to Omnibank of Mantee v. United Southern Bank, 607 So. 2d 76 (Miss. 1992), which specifically ascribes an agent’s duties to those of an officer. See RESTATEMENT (THIRD) OF AGENCY § 8.09 reporter’s note to cmt. c; see also Omnibank, 607 So. 2d at 84 (“By law, officer Gray owed USB two principal duties: a duty of care and a duty of loyalty and fair dealing. These duties differ in nature and content, though they doubtless intersect and overlap. The law demands these duties of bank officers the same as officers of other corporations . . .”).
62. RESTATEMENT (THIRD) OF AGENCY § 8.10 cmt. b & illus. 2–4.
employers with justification for terminating an employee without notice in violation of a contractual provision. 63 Such justifications are not necessary in the at-will context.

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

The doctrine behind employment as a fiduciary relationship is unsettled because the doctrine is unmoored from the nature of the relationship. Employees are not simply a type of agent; they have a unique relationship with the employer and their fellow employees. This relationship is best categorized as not simply an agency relationship, but rather an organizational relationship in which the parties have overlapping fiduciary duties to one another. To better understand this relationship, we begin with the economic theory of the firm and the role of employees within that economic concept.

II. EMPLOYEES WITHIN THE FIRM

The legal structure of the employment relationship originated in master-and-servant law, which was premised on a relationship quite unlike modern employment. Particularly under pre-industrial English common law, the master was an individual who ordered his servant or servants in a direct, person-to-person relationship. 64 In our modern economy, however, the employer is generally not a person but instead a business organization, such as a corporation, partnership, or LLC. This organization is a fictional “person” that represents the relationships between a handful, dozens, hundreds, or thousands of parties. These relationships between individuals for the purpose of carrying on a joint economic enterprise are known in economics as a “firm.” 65

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64. See 1 WILLIAM BLACKSTONE, COMMENTARIES *430 (“If an innkeeper’s servants rob his guests, the master is bound to restitution; for as there is a confidence reposed in him that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery . . . .”).

65. See, e.g., Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 AM. ECON. REV. 777, 783 (1972) (defining a classical firm as a “contractual organiza-
Because employees work for firms, we can best understand the nature and purpose of employment by examining employees’ roles within firms. Employees have been central to our economic conception of the firm from the start. In early neoclassical economics, the theory of the firm was quite rudimentary; it simply saw the firm as a “black box” that received inputs and produced outputs. Employees and capital assets were inside the black box, and customers and suppliers were outside. Ronald Coase revolutionized economic thinking about the firm by moving beyond this black box to inquire into the nature of the firm itself. Coase contrasted firms with markets by noting that outside of the firm, “price movements direct production,” whereas within firms, markets are replaced by the entrepreneur–coordinator. The reason for this replacement was that the price mechanism could be costly. In order to avoid the transaction costs of contracting, certain transactions would be more efficiently conducted within a firm rather than on an open market. The firm-based transactions described by Coase specifically involve the purchase of labor for a particular endeavor. In explaining these transactions, Coase stated: “If a workman moves from department Y to department X, he does not go because of a change in relative prices, but because he is ordered to do so.”

The relationship between the entrepreneur–coordinator and the employees is the primary distinction between the firm and the market. When Coase considered “whether the concept of a firm which has been developed fits in with that existing in the real world,” he determined “[w]e can best approach the question of what constitutes a firm in practice by considering the legal relationship normally called that of ‘master and servant’ or ‘employer and employee.’” Discussing the common law control test at length, Coase cited to its provision that “[t]he master must have the right to control the servant’s work, either personally or by another servant or agent.” Coase concluded: “We thus see that it is the fact of direction which is the essence of the legal concept of ‘employer and employee,’ just as it was in the economic concept which was developed above.”

68. See Coase, supra note 11.
69. Id. at 388.
70. See id. at 390–92.
71. See id.
72. Id. at 387.
73. Id. at 403.
74. Coase, supra note 11, at 404 (quoting BAT, supra note 11, at 6).
75. Id.
In an important response to Coase’s work, Armen Alchian and Harold Demsetz agreed that the employment relation is central to the concept of the firm. However, they argued that Coase’s focus on control, authority, and direction was misleading, particularly within an at-will relationship. Instead, they argued that the importance of the firm (as separate from the market) stems from the need to coordinate production in the midst of a variety of inputs—the need for a system of “team production.” Alchian and Demsetz defined team production as “production in which 1) several types of resources are used and 2) the product is not a sum of separable outputs of each cooperating resource.” The inability to measure individual contributions to productivity—a particular problem for employees—made the firm an efficient alternative to markets, but it also created the firm’s central governance problem. Alchian and Demsetz argued that a specialized, independent monitor was the best way of ensuring that the team members all contribute appropriately and are rewarded appropriately. That central monitor—the recipient of the residual profits—would be the firm.

Transaction costs, monitoring costs, and team production have remained central concepts within theory-of-the-firm literature. The transaction-cost model identified the types of contractual difficulties that are likely to lead to firm

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76. See Alchian & Demsetz, supra note 65, at 777 (“When a lumber mill employs a cabinetmaker, cooperation between specialists is achieved within a firm, and when a cabinetmaker purchases wood from a lumberman, the cooperation takes place across markets (or between firms).”).

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

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

Id.

78. Id. at 777–79.

79. Id. at 779.

80. Id. at 782–83.

81. Alchian and Demsetz seemed to believe that the firm would be represented by a central figure who has claim to the entire residual, and thus an interest in coordinating the firm most efficiently. See id. at 783. But they said nothing about who can appoint such a central figure, and they expressed skepticism about the ability of shareholders to perform the monitoring function. Rather than characterize shareholders as owners, they argued that shareholders should be viewed merely as investors, like bondholders, albeit “more optimistic” ones. Id. at 789 n.14. They asked:

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

Id.
governance, rather than market solutions.82 In situations where contributions and compensation can be difficult to define, the parties will be left with incomplete contracts that require a governance structure to prevent opportunism. This opportunism will be particularly problematic where one or both of the parties must invest significant resources in assets specific to the particular firm, project, or transaction. This asset specificity makes the parties susceptible to hold-ups from their contractual partners in the absence of a system of governance. Firms can be useful in providing the structures that deter opportunism.83

In the transaction-cost model, employees’ contributions must be recognized as assets of both the firm and the employee—often described as “human capital.”84 Some types of human capital are transferable, such as education or general skills, but other types are specific to the firm and generally worthless outside it. To the extent an employee has invested in firm-specific skills, she is subject to opportunistic behavior, because she has little leverage to receive the full value of those skills. In the transaction-cost model, employees may be precisely the vulnerable yet valuable contributors to the joint enterprise who are most susceptible to opportunistic behavior.85

The focus on assets has carried over into the “property rights” theory of the firm. This theory posits that firms are necessary as a repository of property rights for assets used in joint production. By owning the property outright, the firm prevents the problem of the commons (in which no one holds property rights over valuable assets) as well as the problem of the anticommons (in which property rights are dispersed among too many disparate actors). The property-rights model dictates that the firm should be owned by those who contribute the most valuable and asset-specific property to the joint enterprise.86 These contributors are not only most necessary to the firm’s success; they are also the most vulnerable to hold-up problems over time. Although the property rights discussed in the model are generally nonhuman assets, these assets are


85. Indeed, Margaret Blair offers the following critique: “The tendency in the transactions cost literature has been to recognize that firm-specific human capital raises similar questions, but then to sidestep the implications of these questions for corporate governance.” Margaret M. Blair, Firm-Specific Human Capital and Theories of the Firm, in EMPLOYEES AND CORPORATE GOVERNANCE 58, 66 (Margaret M. Blair & Mark J. Roe eds., 1999).

“the glue that keeps the firm together” and thus keep employees within the firm.87

Along these lines, the “access” model of power within the firm defines a firm “both in terms of unique assets (which may be physical or human) and in terms of the people who have access to these assets.”88 Access to the unique assets is what defines the power of the individuals within and outside of the firm. Access is defined as “the ability to use, or work with, a critical resource.”89 Examples of critical resources include machines, ideas, and people.90 Access gives the employee the ability “to create a critical resource that she controls: her specialized human capital.”91 “Control over this critical resource is a source of power.”92 Given the importance of access, the role of the firm is to allocate access efficiently among the firm’s agents.93

Recent scholarship has taken the role of human capital even further. One aspect of this capital—knowledge—has served as the basis for a new set of approaches to the firm.94 Knowledge is defined both as explicit sets of formal information as well as the ability to apply a repository of unspecified information in developing an answer or approach to a particular problem.95

87. HART, supra note 86, at 56. Hart posed the following hypothetical: If firm 1 acquires firm 2, what is to stop former firm 2 workers from quitting and forming a new entity? Id. at 56–57. Hart’s answer:

[T]here must be some source of firm 2 value over and above the workers’ human capital, i.e. some ‘glue’ holding firm 2’s workers in place. This source of value may consist of as little as a place to meet; the firm’s name, reputation, or distribution network; the firm’s files, containing important information about its operations or its customers; or a contract that prohibits firm 2’s workers from working for competitors or from taking existing clients with them when they quit. . . . But without something holding the firm together, the firm is just a phantom.

Id. at 57 (footnotes omitted).


89. Id. at 388.

90. Id.

91. Id.

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

93. See id. at 391.


Rather than emphasize the ownership of physical assets, which can be fungible and nonspecific, the knowledge-based theory focuses on the need to produce, distribute, and ultimately retain valuable knowledge-based assets within the firm. Knowledge-based theories provide an intersection for the economic, organizational, and sociological theories as to the nature of the firm. In fact, one set of scholars has examined the role of the firm as a “collaborative community” in which employees work together toward common goals.

The literature on the theory of the firm is diverse and evolving. But as the foregoing analysis indicates, theories of the firm have treated employees as part of the firm in ways that other stakeholders such as suppliers, customers, and lenders are not. If the firm is defined as an organization devoted to a continuing economic enterprise, then employees and equity holders are within the firm, and the other stakeholders are outside. This fits within our common conception of what a “firm” is; a company “is” its executives, its employees, and its shareholders, whereas it is not its lenders, suppliers, and customers. Indeed, this is the purpose of drawing the line between employees and independent contractors. Employees are part of the firm in ways that independent contractors are not. The traditional tests look to whether the employer has the right to control the work of the employee. Coase argued that this right to control removed employees from the market and brought them into the firm. Contemporary theories of employment have emphasized the degree to which employees are participants in the common economic enterprise of the firm, rather than independent businesspersons contracting with the firm. The critical insight shared by these theories

Érica Gorga and Michael Halberstam classify knowledge into three types: “knowledge embedded in physical assets,” “knowledge embedded in the organizational structure or the group of individuals that constitute the firm[,]” and “specialized knowledge embedded in the individual.” Gorga & Halberstam, supra note 94, at 1141–42. As they explain, “[t]he way a firm develops the knowledge it will use in its production process and the extent that the firm can bind this knowledge to its structure will influence its organizational structure.” Id. at 1140.

96. See Gorga & Halberstam, supra note 94, at 1137 (criticizing the property rights theory for failing to account for the importance of employees as assets). Along the same lines, a capability-based theory of the firm has focused on firm-specific knowledge and learning that can be translated into joint production. See Thomas F. McInerney, Implications of High Performance Production and Work Practices for Theory of the Firm and Corporate Governance, 2004 Colum. Bus. L. Rev. 135, 138.

97. See, e.g., Rajan & Zingales, supra note 88, at 424–25 (arguing that there is “ample opportunity for gains from trade” between economics and sociology, as sociologists have studied the role of power within organizations “in some detail”); D. Gordon Smith & Brayden G. King, Contracts as Organizations, 51 Ariz. L. Rev. 1 (2009) (comparing organizational theories to the traditional legal and economic theories of contract and firm).


100. See Coase, supra note 11, at 404.

101. RESTATEMENT OF EMP’L’R LAW § 1.01(b) (Am. Law Inst. 2015) (defining independent businesspersons as those who “exercise[] entrepreneurial control over important business decisions”); Bodie, supra note 9, at 705 (arguing that employment is defined as “participation in team production”).
is that employees are part of the firm—that in important respects, they are the firm.

The role of employees within the firm carries important ramifications for our understanding of the relationship between employer and employee. Unlike a traditional master–servant relationship where the master and the servant are each individual people, the employer is a firm: an economic entity representing a collection of people and relationships. The law instantiates the existence of a firm through a legal entity formed through state organizational law, such as a partnership, corporation, or LLC, and that legal person “becomes” the firm.102 So the master, principal, or employer is not an individual human, but a legal fiction representing the organization. Employers are not helpless principals that depend on their employees to carry out their actions; they are instead legal entities with power over the joint production of the business enterprise carried on by equity and labor. These legal entities are essentially governance mechanisms designed to coordinate joint production among a firm’s participants, including employees.

Although the role of employees within the firm is well recognized in the literature on the theory of the firm, American organizational law—particularly corporate law—has failed to appreciate the extent to which employees participate in the life of the firm. Instead, employees are treated as market participants who manage their relationship with the firm purely through contract.103 But this contractual account is incomplete. Our society has, in fact, imposed a series of significant duties upon employers with respect to the employment relationship. These default and mandatory terms substantially change the contractual environment within which employers and employees act. It is thus important to review these duties as a prelude to our reconsideration of the employment relationship. It is not simply contractual, and it is not simply a principal–agent relationship. Instead, as these primarily statutory duties suggest, we view the employment relationship as a unique one in which both employers and employees take on significant responsibilities when they undertake such an arrangement.

III. EMPLOYER DUTIES RELATING TO EMPLOYEES

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


relationship—one that requires significant responsibilities on the part of the employer.

A. EMPLOYER DUTIES TO EMPLOYEES

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

1. Duties of Workplace Safety

Employers have duties to protect employees within the workplace from a variety of sources. First, employers are liable for the torts of their employees—not only when the victims are third parties, but also when the victims are fellow employees. When one employee harms another as a result of tortious behavior, the employer is liable if that tort was committed within the employee’s scope of employment or if the employer later ratifies the conduct. The Restatement of Employment Law also provides for employer liability if a supervisor or manager commits a tort against an employee even outside the scope of employment, unless the employer took reasonable care to prevent the conduct and the employee failed to take advantage of this care. This latter extension of respondeat superior tracks the Supreme Court’s defense against vicarious liability under Title VII for sexual harassment. Indeed, federal antidiscrimination statutes can be likened to torts, and an employer also has legal responsibility for a hostile work environment created by a supervisor with authority over the employee. Employers also have a common law duty to exercise care in selecting, retaining, and supervising their employees, and they are liable for harm to employees caused by their failure to exercise reasonable care in these

105. Id. § 8.15. The Restatement (Third) frames this duty as part of the overall duty of good faith and fair dealing. Id.
106. Restatement of Employment Law § 4.03(a), (b).
107. Id. § 4.03(c).
108. Id. § 4.03 cmt. g.
110. See 42 U.S.C. § 2000e–2 (2012) (prohibiting employers from discrimination based on “race, color, religion, sex, or national origin”); Burlington Indus. v. Ellerth, 524 U.S. 742, 764–65 (1998). A similar duty has been found in tort. See, e.g., Ford v. Revlon, Inc., 734 P.2d 580, 584–85 (Ariz. 1987) (en banc) (holding that a company’s failure to investigate a complaint of sexually abusive treatment is independent of the abusive treatment itself and that a company may be liable for failing to stop the abusive treatment regardless of whether the treatment itself rises to the level of an actionable tort).
111. Restatement of Employment Law § 4.04.
Employers also have a common law duty to provide a reasonably safe workplace for employees and to provide warning of dangerous working conditions. This duty dates back to master–servant law, whereby “[a] master is subject to a duty that care be used either to provide working conditions which are reasonably safe for his servants and subservants . . . or to warn them of risks of unsafe conditions . . . [that] they may not discover.” However, modern interpretation has held that the provision of a warning does not obviate the need to provide a reasonably safe workplace. The common law duty has been supplemented and expanded by the federal Occupational Safety and Health Act (OSHA), under which employers similarly have a general duty to provide safe working conditions. In addition to this general duty, OSHA provides for a complex regulatory framework as established through promulgated occupational safety and health standards.

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

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

113. RESTATEMENT OF EMP’T LAW § 4.05. The duty has been recognized in all U.S. jurisdictions. See id. at reporters’ notes to cmt. a.


115. RESTATEMENT OF EMP’T LAW § 4.05 cmt. g.


117. See id. § 654(a)(1) (requiring employers to “furnish to each of his employees employment and a place of employment which are free from recognized hazards”).

118. See id. § 654(a)(2).


120. See Shauhin Talesh, Insurance Law as Public Interest Law, 2 U.C. IRVINE L. REV. 985, 1001 (2012) (“[T]he workers’ compensation system emerged from a desire to create a new, workable, and predictable mode of handling accident liability that balanced the interests of labor and management.”). Workers’ compensation systems are largely described as strict liability, but there are exclusions in some states based on employee fault. See MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES 865–69 (8th
2. Duties of Workplace Privacy

The common law of torts provides protection against privacy invasions such as intrusions into private locations or the public disclosure of private facts. These protections apply within the workplace as well. Even though the employer generally provides the physical locations and electronic resources that employees use for their work, employees can develop expectations of privacy in these locations and resources. Thus, for example, an employer can be liable to an employee for opening an employee’s locker or reading an employee’s email, even when the employer provides the locker and email. Employers also assume a duty to prevent third parties, including certain other employees, from accessing confidential employee information. The Restatement of Employment Law considers employee information to be confidential “if the employer has promised, by words or conduct, to keep the information confidential or if the employer is required by law to maintain confidentiality.” In some contexts, employers may be considered information fiduciaries with respect to health data or other personal information that the employer has collected through the employment relationship.

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123. RESTA TEMENT OFEMP’T LAW § 7.03 (AM. LAW INST. 2015).


126. RESTA TEMENT OFEMP’T LAW § 7.05.

127. Id. § 7.05 cmt. b.

128. Employers do not currently have specific federal statutory duties of confidentiality. See Peter A. Winn, Confidentiality in Cyberspace: The HIPAA Privacy Rules and the Common Law, 33 RUTGERS L.J. 617, 634 (2002) (arguing that a federal obligation is necessary to “address the threat to health care confidentiality created by employer access to protected health information”). Employer-sponsored plans do have certain limits on disclosure to the employer. See 45 C.F.R. §§ 164.504(f), 164.512(b)(v) (2001); Winn, supra, at 670 (“Under the [HIPAA] Rules, health plans maintained by employers are covered entities with similar duties to protect the confidentiality of personal health information.”). However, federal regulations have been used to create a common law duty of confidentiality. See Ilene N. Moore et al., Confidentiality and Privacy in Health Care from the Patient’s Perspective: Does HIPAA Help?, 17 HEALTH MATRIX 215, 231 (2007) (“Because HIPAA places an affirmative duty on employers to properly train their employees, employees’ failure to comply may lend support to plaintiffs’ invasion of privacy or breach of confidentiality claims against employers.”). For a theory of employer fiduciary duties in the context of health insurance, see Margaux J. Hall, A Fiduciary Theory of Health Entitlements, 35 CARDozo L. REV. 1729, 1754–71 (2014).
3. Duties Regarding Wage or Income Compensation

Under federal law, employers must provide a minimum wage to all employees.129 The same statute provides that employees must receive one-and-a-half times their hourly wages for all hours worked above forty hours per week.130 The federal requirements are supplemented by state and local minimum wage laws, many of which go well above the federal minimums.131 Employers also have duties as to when and how often they must pay their employees. Along with employer wage-payment duties under the common law,132 federal and state statutes require timely wage payments and divisible portions.133 These mandatory rules displace contractual arrangements upon which the parties might otherwise have settled.134

4. Duties Regarding Benefits

Apart from wage and income compensation, employers have generally not been required to provide specific benefits to employees as part of employment. One exception is the unpaid leave required under the Family and Medical Leave Act of 1993 (FMLA).135 Employers must provide their employees with up to twelve weeks of unpaid leave each year for family or medical leave and allow the employee to return to an equivalent position.136 The Obama Administration expanded paid medical leave for federal employees137 and proposed paid sick

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130. Id. § 207.
132. RESTATEMENT OF EMP’T LAW §§ 3.01–3.05; see, e.g., id. § 3.01(b) (“Whether compensation has been earned is determined by the agreement on compensation between the employer and employee or any relevant binding employer promise or binding employer policy statement on compensation.”).
133. In the nineteenth century, employers would often hire employees for a term but then pay them only at the end of the term, and only if the employee completed the term. No recovery for partial performance was permitted under contract, and employees were left with a quantum meruit claim that was only intermittently successful. See, e.g., Stark v. Parker, 19 Mass. (2 Pick.) 267, 292 (1824) (denying recovery under quantum meruit); Britton v. Turner, 6 N.H. 481, 486, 493 (Super. Ct. 1834) (permitting recovery under quantum meruit). Modern wage payment schemes require that employees be paid regularly and that they be paid for all time worked, regardless of the length of term. See RESTATEMENT OF EMP’T LAW § 3.01 cmt. b (“Many states have wage-payment laws that determine the mode and frequency of payment.”).
134. In some countries, a smaller set of minimum wage protections have been extended to “dependent contractors” who work separately from the buyer but are dependent on the buyer (and the buyer’s industry) for their livelihoods. See Brian A. Langille & Guy Davidov, Beyond Employees and Independent Contractors: A View from Canada, 21 COMP. LAB. L. & POL’Y J. 7, 22–29 (1999) (discussing dependent contractors in Canadian law).
136. Id. §§ 2612(a)(1), 2612(c), 2614(a)(1).
leave for all U.S. workers.  

For the most part, the law has not imposed duties to provide other specific employee benefits, but has rather required employers to provide them in a certain way, if they are to be provided at all. The Employee Retirement Income Security Act of 1974 (ERISA) does not require employers to provide pension or welfare benefits. It does, however, provide mandatory standards for these benefits if they are provided, particularly in the pension context. The Supreme Court has interpreted ERISA to borrow principles from the law of trusts with respect to fiduciary obligations. Specifically, the administrator of an ERISA plan has the same responsibilities as a trustee when it comes to administering the plan.

This means that the officials must abide by their fiduciary responsibilities when making decisions on behalf of the beneficiaries. The statutory scheme provides for four primary fiduciary duties: the duty of loyalty to plan participants, the duty of prudence, the duty of prudent diversification of plan assets, and the duty to follow plan terms. In addition, there are specific requirements about the operation of the plan, such as vesting. If the employer provides benefits through a defined benefit plan, the plan must be funded appropriately as defined through a complicated series of requirements. If the employer provides benefits through a defined contribution plan, it still owes the employee-beneficiaries duties of loyalty and following instructions.

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138. See Healthy Families Act, H.R. 1286, 113th Cong. § 5(a)(1) (2013) (requiring employers to permit each employee to earn at least one hour of paid sick time for every thirty hours worked).


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


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

143. Plan administrators need not follow the duty of loyalty when making decisions as a trust settlor, as opposed to a trust administrator. See Sweeney v. Kroger Co., 773 F. Supp. 1266, 1269 (E.D. Mo. 1991) (“If the employer is acting in his capacity as a settlor of the plan, his conduct as to business decisions in implementing the plan are not regulated by the fiduciary duties outlined in the ERISA statute.”).


145. Id. § 1104(a)(1)(B).

146. Id. § 1104(a)(1)(C).

147. Id. § 1104(a)(1)(D).

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


The upside of this complicated regulatory scheme is a set of tax savings for both employer and employee. However, these tax savings are only available if the employer offers the benefits to a sufficiently broad number of employees. This nondiscrimination principle incentivizes the employer to provide benefits broadly to all employees; the tax savings are lost if the plans are limited only to the fortunate few.

Until recently, health insurance plans were regulated primarily by state law, with ERISA providing only framework protections. However, the Affordable Care Act (ACA) created a new set of incentives and requirements for employers with respect to such insurance. The ACA employer mandate requires employers of a certain size to purchase health insurance for their employees or provide funding for employees to buy insurance on state exchanges. If employers fail to do so, they must pay a tax penalty. Some commentators have predicted that the high cost of insurance will lead employers to stop providing health benefits and instead pay the tax. Thus far, however, most employers appear not to have dropped coverage in light of the ACA mandate.

§ 502(a)(2) (29 U.S.C. § 1132(a)(2)) “authorize[s] recovery for fiduciary breaches that impair the value of plan assets in a participant’s individual account”); see also Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2463 (2014) (discussing fiduciary duties of an employee stock ownership plan trustee as fiduciary in nature, similar to those of an ERISA trustee).

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

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


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

157. See DON McCANNE, IMPACT OF ACA ON EMPLOYERS AND THEIR EMPLOYEES, PHYSICIANS FOR A NATIONAL HEALTH PROGRAM BLOG (May 15, 2015), http://pnhp.org/blog/2015/05/15/impact-of-aca-on-employers-and-their-employees/ [https://perma.cc/T4BX-TU82] (“Ninety-four percent of all surveyed organizations continue to provide health care coverage for all full-time employees in 2015 and, among that group, nearly all plan to continue coverage in 2016.” (citing study by the International Foundation of Employee Benefit Plans)).
5. Duties Regarding Discipline and Termination

The “employment at will” doctrine frames that relationship as terminable at any time, with or without cause.\(^{158}\) Protections within that relationship are largely contractual.\(^{159}\) However, the common law of tort does render an employer liable for “wrongful discharge in violation of public policy.”\(^{160}\) The employer has a duty not to fire an employee because the employee refused to violate the law in the course of employment\(^{161}\) or because the employee abided by professional codes of ethics or conduct.\(^{162}\) The protections also extend to employees who report employer wrongdoing, either up the chain within the employer or directly to outsiders such as government agencies or media members.\(^{163}\) The wrongful discharge tort is a societal imposition on the flexibility of the at-will doctrine: that doctrine cannot be used to discharge employees when they are acting in the public interest. It thus forges an alliance between employees and the public against the employer when the employer engages in harmful conduct.\(^{164}\) Employer discretion is also bounded by numerous antidiscrimination statutory schemes that apply to employer termination or discipline. Federal law protects employees from discrimination based on race, ethnicity, sex, religion, age, and disability.\(^{165}\) State and local laws provide additional protections for these categories and others, such as sexual orientation.\(^{166}\)

When employees are discharged otherwise lawfully, state law provides for unemployment compensation for a set period of time.\(^{167}\) These laws were

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\(^{158}\) Restatement of Emp’t Law § 2.01 (Am. Law Inst. 2015).

\(^{159}\) See, e.g., id. § 2.02 (providing for contractual exceptions to employment at-will); id. § 2.03 (explaining cause requirements for terminating contractual agreements for employment as to a definite term); id. § 2.05 (explaining the role of employer policy statements within the employment agreement); id. § 2.07 (discussing the implied duty of good faith and fair dealing within the employment relationship).

\(^{160}\) Id. § 5.01.

\(^{161}\) Id. § 5.02(a).

\(^{162}\) Id. § 5.02(e).

\(^{163}\) See id. § 5.02 cmt. f (indicating that “[a]n employee must act reasonably in reporting illegal conduct” and should report concerns internally first before an external communication).

\(^{164}\) For a discussion of the employee’s bifurcated loyalty between firm and polity in the context of wrongful discharge doctrine, see generally Orly Lobel, Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations, 97 Calif. L. Rev. 433 (2009).

\(^{165}\) See, e.g., 42 U.S.C. § 2000e-2(a) (2012) (making it unlawful to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”); 29 U.S.C. § 623(a)(1) (2012) (providing similar protections against age discrimination within the employment relationship); 42 U.S.C. § 12112(a) (providing similar protections against disability discrimination within the employment relationship).

\(^{166}\) See 1 Michael B. Snyder, Compensation and Benefits § 8:4 (2016) (“Nearly every state has a fair employment practice (FEP) law, and most states also have their own administrative agencies to investigate charges of discrimination and enforce these FEP laws. Almost 200 local jurisdictions also have FEP laws and companion enforcement agencies.”).

\(^{167}\) See Mark A. Rothstein & Lance Liebman, Employment Law 1051 (7th ed. 2011) (“Fifty states, the District of Columbia, and Puerto Rico have individual unemployment insurance (UI) programs determining the length of unemployment insurance benefits and their amounts for qualifying recipients.”). For an overview of the federal-state unemployment insurance program, see State Unemploy-
originally designed to provide disincentives for employers from firing workers by making them responsible for post-termination remuneration.\textsuperscript{168} Although states manage their own systems, they generally require employers to pay into an unemployment insurance fund\textsuperscript{169} and provide compensation when an employee is terminated unless the employee has quit or has engaged in significant malfeasance.\textsuperscript{170} Thus, unemployment insurance only kicks in if the employee is not deemed (at least in part) responsible for her termination.

6. Duties to Bargain and Allow Collective Representation

The National Labor Relations Act (NLRA)\textsuperscript{171} is the closest that labor and employment regulation comes to addressing the management and governance of the employer. Under the NLRA, the employer (whatever its organizational form) must bargain with its employees’ chosen representative over the employees’ terms and conditions of employment.\textsuperscript{172} A complex array of subsidiary obligations flow from this central one, such as the prohibition against employer discipline or discharge because of an employee’s protected concerted activity.\textsuperscript{173} The employer need not agree to any specific set of terms, but it must bargain in good faith and abide by the complex system of federal labor law for managing this bargaining relationship.

Unlike other duties imposed upon employers within the employment relationship, the duty to bargain does not require minimum employment terms or impose substantive obligations on the employer’s business. Instead, the NLRA makes employers negotiate with employees as a group and prohibits employers from contracting individually with employees outside of collective bargaining.\textsuperscript{174} Framers of the NLRA intended to introduce a form of “industrial

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\textsuperscript{168} See John A. Garraty, Unemployment in History: Economic Thought and Public Policy 213 (1978) (discussing a 1932 Wisconsin law that required a reserve fund with payouts to terminated workers).

\textsuperscript{169} See State Unemployment Insurance Benefits, supra note 167 (“In the majority of States, benefit funding is based solely on a tax imposed on employers. (Three (3) States require minimal employee contributions.”)). However, the federal government has provided significant funding for unemployment compensation, particularly in the wake of the 2008 financial crisis. See Rothstein & Lieberman, supra note 167, at 1051.

\textsuperscript{170} See State Unemployment Insurance Benefits, supra note 167 (“You must be determined to be unemployed through no fault of your own (determined under State law), and meet other eligibility requirements of State law.”).


\textsuperscript{172} Id. § 158(a)(5) (“It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . .”).

\textsuperscript{173} See id. § 158(a)(1), (3) (“It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .”).

\textsuperscript{174} See J. I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944) (“The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.”).
democracy” into the business world and provide employees with a voice in workplace governance. Labor and management would work together in a form of self-regulation to set the course for the business. In fact, employers have exemptions from certain ERISA responsibilities when they are in a collective bargaining relationship or have arrived at a collective bargaining agreement. The idea is that when employees have power within the organization, there is less of a need to impose worker-friendly terms from the outside.

B. EMPLOYER DUTIES ON BEHALF OF EMPLOYEES

In addition to duties owed to their employees, employers also have duties to third parties on behalf of their employees. The oldest and best known of these duties are the employer’s responsibilities under respondeat superior. An employer is civilly liable for acts its employees commit within the scope of employment. Although many different justifications for the doctrine have been given, most focus on the employer’s responsibility for, or control over, the employee. U.S. common law used to follow the “fellow servant” rule, in which the employer was absolved of liability to an employee for an injury caused by a fellow employee. However, workers compensation statutes have rendered this rule obsolete, and it would likely not remain the law if reconsidered today. Employers may also be criminally responsible for the misdeeds of
their employees if committed within the scope of employment.\textsuperscript{181} In order to satisfy the \textit{mens rea} requirement, courts have required that the employee acted with the intent to benefit the business entity.\textsuperscript{182}

Firms are also given responsibility for their employees when it comes to taxes. Employers must withhold their employees’ taxes\textsuperscript{183} and must pay a share of Social Security and Medicare (FICA)\textsuperscript{184} and unemployment (FUTA) taxes.\textsuperscript{185} The IRS defines employees based on the common law control test.\textsuperscript{186} Employer withholding is extremely important to the public treasury; payroll taxes alone make up 33\% of all federal revenues.\textsuperscript{187} Moreover, the consequences of an employer misclassification can be extremely costly, because the business is then subject to the mandatory back-tax formula.\textsuperscript{188}

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

\textsuperscript{181} See \textit{N.Y. Cent. & Hudson River R.R. v. United States}, 212 U.S. 481, 494–95 (1909). Although \textit{respondeat superior} has faced steady criticism over the years, it has become “firmly entrenched as, more or less, the across-the-board rule of enterprise liability for all manner of crimes.” \textit{Samuel W. Buell, The Blaming Function of Entity Criminal Liability}, 81 \textit{Ind. L.J.} 473, 475–76 (2006); see also \textit{Jennifer Arlen, The Potentially Perverse Effects of Corporate Criminal Liability}, 23 \textit{J. Legal Stud.} 833, 836 (1994) (stating that “[t]he existing legal regime” closely approximates “a rule of pure strict vicarious liability” (internal quotation marks omitted)).

\textsuperscript{182} See, e.g., \textit{Standard Oil Co. of Tex. v. United States}, 307 F.2d 120, 127–28 (5th Cir. 1962) (describing the requirement as an element of liability taken from civil tort law).


\textsuperscript{184} Id. § 3111.

\textsuperscript{185} Id. § 3301.

\textsuperscript{186} See id. § 3121(d)(2) (defining an employee as, among other definitions, “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee”); 26 C.F.R. § 31.3121(d)-1(c)(2) (2012) (finding an employment relationship “when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished”); see also 26 U.S.C. § 3306(i) (stating that “the term ‘employee’ has the meaning assigned to such term by section 3121(d)”); Rev. Rul. 87-41, 1987-1 C.B. 296, 298–99 (laying out a twenty-factor test to aid in “determining whether an individual is an employee under the common law rules”).


IV. EMPLOYERS AS FIDUCIARIES

This Part explores potential theories for a set of fiduciary obligations flowing from employers to their employees. It first addresses why the contractual duty of good faith is not sufficient to handle the relational aspects of the employment contract. Second, it discusses other academic proposals for the creation of employer fiduciary duties. Finally, it argues for the recognition of a reciprocal fiduciary relationship by drawing on insights from fiduciary theory and the theory of the firm.

A. THE CONTRACTUAL DUTY OF GOOD FAITH IN THE EMPLOYMENT RELATIONSHIP

Given that employees and employers have a contractual relationship, it may seem fruitful to explore a robust version of the duty of good faith before looking to fiduciary duties. Indeed, good faith has been characterized as “halfway between a fiduciary duty (the duty of utmost good faith) and the duty merely to refrain from active fraud.”189 Good faith in performance is typically recognized as an implied term in all contracts under the common law.190 The sense of the good faith duty is that contractual partners owe obligations of performance that go beyond the simple black letter of the agreement. Although these obligations do not have exact definitions,191 several distinct threads have been noted.192 The Uniform Commercial Code characterizes good faith as “honesty in fact and the observance of reasonable commercial standards of fair dealing.”193 One common expansion upon this definition is the notion of good faith as an obligation to effectuate the reasonable intentions of the parties—the spirit, rather than the letter, of the contractual terms.194 Somewhat more rarely, the duty has been used to ensure that “a party does not violate community standards of decency,


191. See Northwest, Inc., 134 S. Ct. at 1431 (“[I]t does not appear that there is any uniform understanding of the doctrine’s precise meaning.”).

192. See Restatement (Second) of Contracts § 205 cmt. d (“A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.”).


194. See Northwest, Inc., 134 S. Ct. at 1431 (“[S]ome States are said to use the doctrine to effectuate the intentions of parties or to protect their reasonable expectations . . . .” (citation and internal quotation marks omitted)).
fairness, or reasonableness.” Courts could use good faith to ensure employers live up to the reasonable expectations of the parties when it comes to the employment relationship, or to police businesses to make sure they treat workers according to norms of fairness and decency. Such a programme of good faith enforcement might mitigate or obviate the need for additional employer fiduciary duties.

Ultimately, however, the doctrine of good faith in the employment contract does not serve the same role as a fiduciary relationship. First, purely as a doctrinal matter, good faith has had a fraught history within employment. Many jurisdictions refuse to recognize a duty of good faith when the underlying employment agreement is at-will. Their refusal stems from the complete discretion that at-will termination provides to the employer. In their view, it is nonsensical to impose a duty of good faith when the contract explicitly allows the employer to fire the employee for any reason at all. If the employer has complete freedom to fire under the express terms of the contract, the argument goes, then one cannot impose an implied good faith obligation that would entail some duty to follow societal norms or “reasonable expectations.” There was a push within legal circles, especially in California, to use the duty of good faith to weaken the at-will presumption and create something closer to a “good cause” standard for termination. However, that movement has gradually

195. Id. (citations and internal quotation marks omitted).
196. See James J. Brudney, Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law, 32 COMP. LAB. L. & POL’Y J. 773, 773 (2011) (“In the employment setting, however, the covenant has not fared nearly so well.”).
198. See, e.g., Cweklinsky v. Mobil Chem. Co., 837 A.2d 759, 768 (Conn. 2004) (“Employment at will grants both parties the right to terminate the relationship for any reason, or no reason, at any time without fear of legal liability.” (citation omitted)); Morriss v. Coleman Co., 738 P.2d 841, 851 (Kan. 1987) (implied covenant of good faith and fair dealing “should not be applicable to employment-at-will contracts”); Sanchez v. New Mexican, 738 P.2d 1321, 1324 (N.M. 1987) (“[T]here is no contract of employment upon which the law can impose the stated duty to exercise good faith and fair dealing. Sanchez was an ‘at will’ employee who could be dismissed for any or no reason.”); Darrow v. Integris Health, Inc., 176 P.3d 1204, 1210 (Okla. 2008) (“Employers are free to discharge at-will employees in good or bad faith, with or without cause.”).
199. See Jenkins v. Boise Cascade Corp., 108 P.3d 380, 390 (Idaho 2005) (“The covenant of good faith and fair dealing does not alter the right to fire an at-will employee; that is, the covenant does not create good cause as a requirement.”); cf. Brudney, supra note 196, at 775 (“It is not surprising that state courts are reluctant to impose norms of fairness on job security arrangements when employers’ residual authority to act in summary, arbitrary, or malicious fashion toward their employees remains legislatively undisturbed.”).
200. See Cleary v. Am. Airlines, Inc., 168 Cal. Rptr. 722, 729 (Ct. App. 1980) (“Termination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts. As a result
disappeared from the scholarship, and California ultimately rejected good faith as a vehicle for undermining at-will.201

A number of jurisdictions, as well as the Restatement of Employment Law, have carved out a limited role for good faith and fair dealing in the employment context. The duty applies only when the employer is proactively using its termination power (or other power) to deprive the employee of some benefit that has already been earned under the contract. The duty is violated if the employer “prevent[s] the vesting or accrual of an employee right or benefit”; if the employer retaliates against the employee because of an earned right or benefit; or if the employer retaliates because the employee performed his or her obligations under the employment contract itself or under the law.202 When it comes to compensation and benefits that have been earned under the contract, the employer is not permitted to use its termination power to pressure the employee into foregoing them.203 For example, in Fortune v. National Cash Register Co., a salesman was fired soon after securing a big deal that would have earned him a large bonus; the purpose of the termination was to deprive him of that bonus.204 The court held that the employer violated the duty of good faith by firing him to deprive him of the benefits of the bonus structure.205 This definition of good faith fits well within the historical ambit of the doctrine as it goes beyond the explicit text of the agreement to prevent one party from opportunistically acting to deprive the other party of the benefit of the bargain.206 But it is also carefully cabined to a limited set of specific circum-

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

202. Restatement of Emp’rt Law §§ 2.07(c), 3.05(c) (Am. Law Inst. 2015).

203. Id. § 3.05(c)(2).


205. Id. at 1257–58 (“Where the principal seeks to deprive the agent of all compensation by terminating the contractual relationship when the agent is on the brink of successfully completing the sale, the principal has acted in bad faith and the ensuing transaction between the principal and the buyer is to be regarded as having been accomplished by the agent.” (citing Restatement (Second) of Agency § 454 & cmt. a (Am. Law Inst. 1958))).

206. See Restatement of Emp’rt Law § 2.07 cmt. c (“[T]he employer’s duty to cooperate means that once an employee has substantially performed, unless there is independent cause for termination, the employer cannot use its right to terminate without cause for the purpose of depriving the employee of the benefit of the contract.”); Steven J. Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv. L. Rev. 369, 387 (1980) (“Bad faith performance consists of an
stances. There must be an effort by the employer to prevent the employee from receiving a specific benefit that has already vested or been earned under the contract. This generally accepted definition of good faith in the employment context, although offering well-justified protection, does not evidence the type of mutual, fiduciary-based relationship to which this Article is pointing. It is simply an employment version of the contractual duty of good faith.

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


207. Cf. RESTATEMENT OF EMP’T LAW § 2.07 cmt. b (“[T]he implied duty of good faith and fair dealing serves as a supplementary aid in implementing the parties’ reasonable expectations and should not be read as a means of overriding the basic terms of, or otherwise undermining the essential nature of, their contractual relationship.”).


209. Id. at 1488.

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

211. See infra Section IV.C.

212. See Bodie, supra note 9, at 665.

213. For example, the Seventh Circuit interpreted the duty of good faith and fair dealing to potentially require an employer to inform its employee about an upcoming merger. Jordan v. Duff & Phelps, Inc., 815 F.2d 429 (7th Cir. 1987). The court held that “an avowedly opportunistic discharge is a breach of contract” under the duty of good faith and fair dealing. Id. at 438. In addition, the employee was a shareholder in the employer, which was a closely held company, and the court held that “[c]lose corporations buying their own stock, like knowledgeable insiders of closely held firms buying from outsiders, have a fiduciary duty to disclose material facts.” Id. at 432, 435. For contrasting views on the import of the court’s decision in Jordan, compare Marleen A. O’Connor, Restructuring the Corporation’s Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers, 69 N.C. L. REV. 1189, 1249–50 (1991) (arguing that Jordan created “an implied fiduciary duty that the stock would not be bought back in an opportunistic fashion”), with Deborah A. DeMott, Beyond Metaphor: An Analysis of Fiduciary Obligation, 1988 DUKE L. J. 879, 887 (“[T]he employer’s ability in Jordan to terminate the plaintiff’s employment and thereby oblige him to sell his shares to the corporation is irrelevant to the employer’s obligation, as fiduciary, to disclose information to the selling shareholder.”); see also Aline
Suggested theories for the creation of employer fiduciary duties range from specific, particularized duties to a broader set of responsibilities. Those advocating for particular duties often point to a preexisting employer responsibility and build a fiduciary duty around that responsibility. For example, Margaux Hall argued that employers act as fiduciaries when they make health care coverage decisions on behalf of their employees as part of an employer-provided plan. Although many employers have long provided health care benefits to their employees, this responsibility was heightened through the ACA’s “employer mandate.” Because employers are so integral to employees’ health care decisions, they play a unique role in managing choices that go to the core of employees’ personal and family lives. Hall proposed that employers be considered employee “health fiduciaries” that make health care-related decisions in the interests of their employee-beneficiaries. Under this fiduciary relationship, employers would need to “(1) pursue employees’ sole interest in making discretionary coverage decisions; and (2) refrain from acting in a self-interested manner.” Although the specifics of these duties raise difficulties that require hammering out, the creation of a fiduciary relationship here “clarifies the underlying entitlements and interests,” “helps bound otherwise unlimited discretion around formative duties,” and “illuminates the deeper structural role that employers play in this space.”

Employers have also been targeted for obligations related to their handling of private employee information. Scott Fast has argued that employers should owe a duty of confidentiality to their employees similar to that owed in other fiduciary relationships. Pointing to the sensitivity of employee information on job performance, personal health, and financial records, Fast argued that employers have a confidential relationship with their employees. Employers

Van Bever, An Employer’s Duty to Provide Information and Advice on Economic Risks?, 42 INDUS. L.J. 1, 1 (2013) (considering “whether the implied duty of trust and confidence has developed so as to impose the employer a duty to inform, advise and warn his employees on economic risks”).

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

214. See Hall, supra note 128, at 1759.
215. Id. at 1750–52.
216. Id. at 1759–65.
217. Id. at 1763.
218. Id. at 1768; see also Lauren R. Roth, The Collective Fiduciary, 94 Neb. L. Rev. 511, 539–41 (2016) (discussing employer and insurer duties when deciding whether to grant health benefits under health insurance plans).
219. See Scott L. Fast, Comment, Breach of Employee Confidentiality: Moving Toward a Common-Law Tort Remedy, 142 U. PA. L. REV. 431, 433 (1993) (“[C]ourts could provide a common-law remedy for disclosures to third parties in much the same way that they recognize the confidentiality of physician-patient or attorney-client relationships.”).
220. See id. at 456–59.
would be liable for disclosing confidential employee information to third parties under a tort theory similar to fiduciary duties.\textsuperscript{221} The Restatement of Employment Law has adopted at least part of this approach by noting that “[a]n employee has a protected privacy interest in personal information related to the employee that is provided in confidence to the employer.”\textsuperscript{222} The employer is liable in tort for providing such confidential information to third parties without consent if such disclosure is highly offensive.\textsuperscript{223}

Progressive corporate law scholars have called for the imposition of fiduciary duties on corporations that would extend to corporate stakeholders beyond shareholders.\textsuperscript{224} In some instances, employees have been given a special role among stakeholders. Some of these calls for fiduciary duties to employees are designed to mirror similar existing duties from the corporation to shareholders. Kent Greenfield has argued that “workers should have some kind of representation on the board of directors or have some role in electing directors, and . . . directors of companies should be held to have some kind of fiduciary duties to workers in the employ of their firm.”\textsuperscript{225} Greenfield has also advocated for a federal statutory prohibition against fraud in the context of the employment relationship.\textsuperscript{226} These reforms are based on a common critique of current law: shareholders have been given specially protected status within the corporation, and other stakeholders—especially employees—deserve similar protections.

There have also been specific suggestions for limited extensions of corporate fiduciary duties to employees in particular contexts. Marleen O’Connor has proposed that corporate directors should owe a duty to employees during fundamental corporate changes.\textsuperscript{227} Although flexibly defined, the essence of the duty would require that “directors take the actions that are necessary to compensate employees for their investments in the corporation.”\textsuperscript{228} Drawing in part from corporate constituency statutes, which gave directors the freedom to act on behalf of all corporate stakeholders when making decisions as to transformative

\textsuperscript{221} See id. at 460.  
\textsuperscript{222} RESTA TEMENT OF EMP’T LAW § 7.05(a) (AM. LAW INST. 2015).  
\textsuperscript{223} Id. §§ 7.05(b), 7.06.  
\textsuperscript{224} For example, Margaret Blair has argued that boards of directors should take into account the effects of their decisions on all of the corporation’s stakeholders, not just shareholders. See MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY 16 (1995).  
\textsuperscript{226} See Kent Greenfield, The Unjustified Absence of Federal Fraud Protection in the Labor Market, 107 YALE L.J. 715, 786 (1997) (“This statute would make actionable employer misrepresentations and material omissions in connection with those things that workers consider important in deciding between jobs: job security, employee benefits, and the terms and conditions of the employment relationship.”). Greenfield framed his proposal as similar to Rule 10b-5, a federal regulation promulgated by the Securities and Exchange Commission that prohibits fraud in the context of the sale of a security. Id. at 785–86 (proposing a model rule based on the text of Rule 10b-5).  
\textsuperscript{227} See O’Connor, supra note 213, at 1247–59.  
\textsuperscript{228} Id. at 1253.
transactions, this duty would up the ante by making directors responsible for defending employee interests during these transactions as well. O’Connor justified this duty on the basis of employee “investments of time and human capital,” in conjunction with their “trust and confidence” in directors “to manage their [investments] on their behalf.” In particular, O’Connor believed that the fiduciary duty “should include an obligation for the directors to safeguard pension plan assets during hostile battles for control and internal recapitalizations.”

In a similar vein, Katherine Stone argued for fiduciary duties that are owed to all stakeholders but would be enforceable by employees. These duties would stem from corporate constituency statutes and would protect employees “from major corporate restructuring decisions that threaten to expropriate those investments.”

These arguments for corporate director fiduciary duties to employees all have in common a “stakeholder” model of the corporation. They are contraposed with the “shareholder primacy” model of the corporation, under which shareholders govern the company and have the sole right to enforce fiduciary duties against its directors. At the risk of giving short shrift to this debate, it is more about the legal structure of the corporation and of corporate governance than it is about the relationship between employer and employee. Although much of the nation’s business is conducted through public corporations, many businesses use different entities (such as partnerships and LLCs) as their organizational structure.

Establishing a corporate director’s duty to employ-


230. O’Connor, supra note 213, at 1252.

231. Id. at 1254.


233. Stone, supra note 232, at 48. But see Jonathan R. Macey, An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties, 21 Stetson L. Rev. 23, 25 (1991) (“[N]onshareholder constituency statutes fail to recognize that fiduciary duties are owed to residual claimants and residual claimants alone because this is the group that faces the most severe set of contracting problems with respect to defining the nature and extent of the obligations owed to them by officers and directors.”).

234. See, e.g., Del. Code Ann. tit. 8, § 211 (West 2009) (providing for shareholder voting rights); Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984) (“The derivative action developed in equity to enable shareholders to sue in the corporation’s name where those in control of the company refused to assert a claim belonging to it.”).

235. Grant Hayden and I have engaged in this debate as well. Grant Hayden & Matthew T. Bodie, Shareholder Democracy and the Curious Turn Toward Board Primacy, 51 Wm. & Mary L. Rev. 2071, 2120 (2010) (arguing for “a reexamination of the scope of the corporate franchise” to include other stakeholders).

236. Corporations earn less than two-thirds of all business revenue, leaving a substantial portion to other business entities. See Andrew Lundeen & Kyle Pomerleau, Corporations Make Up 5 Percent of
ees does not address whether similar duties would be owed by members of an LLC or managing partners in a partnership—and if not, why not. Although commentators have recognized this, they have not developed a corresponding set of duties to employees within these other business organizations. This Article takes a different approach. By discussing duties owed by employers to employees, the particular type of business organization becomes irrelevant to the analysis. Further, the duties owed by the employer stem directly from the specific employer–employee relationship—not from the mix of stakeholders in a particular type of business enterprise.

C. EMPLOYERS AS FIDUCIARIES UNDER AGENCY AND FIDUCIARY THEORY

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

Employees are agents because they have discretion over the interests of the employer, and they receive delegated authority to act in the interests of the employer. But this analysis is missing half of the equation. Both employees and the employer have a set of mutual interests that differentiate employment from other contractual relationships. And the employment relationship gives both employees and the employer discretion over aspects of the relationship that allow for opportunism. The employer—as legal entity, and as aggregate of the individuals who comprise the employer—has relational responsibilities similar to fiduciary duties. Therefore, it makes sense to characterize the employment relationship as a whole as fiduciary, and the employer as a fiduciary of its employees.

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

Other courts have shunned a categorical or status-based approach and instead treated each particular relationship at issue as potentially fiduciary under a fact-based approach. The indicia of fiduciary status vary from court to court. Common law courts have at various times looked at the following factors: the ability of the fiduciary to exercise discretion in carrying out its tasks; the vulnerability of the beneficiary to the fiduciary's exercise of power and potential opportunism; the trust and confidence reposed in the fiduciary by the beneficiary; and the reasonable expectations of the parties. These factors support the categorization of employers as fiduciaries.

Many of the most prominent fiduciary theorists place the primary emphasis on discretion. Paul Miller has defined the fiduciary relationship as “one in which one party (the fiduciary) enjoys discretionary power over the significant practi-

242. See Deborah A. DeMott, Relationships of Trust and Confidence in the Workplace, 100 CORNELL L. REV. 1255, 1261 (2015) (“Most fiduciary relationships ‘are treated as such as a matter of status or convention.’” (quoting Andrew S. Gold & Paul B. Miller, Introduction to PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, supra note 37, at 1, 2)); Paul B. Miller, A Theory of Fiduciary Liability, 56 MCGILL L.J. 235, 241–43 (2011) (stating that courts “determine whether the category is conventionally recognized as fiduciary”).

243. See Miller, supra note 242, at 241–43 (“[N]ew categories of relationship are recognized as fiduciary simply by virtue of having been found sufficiently similar to a paradigmatic category . . . .”).

244. See id. at 243–47.

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

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


248. See DeMott, supra note 242, at 1261 (finding that “courts impose ad hoc or fact-based fiduciary duties when although the parties’ relationship was not categorically fiduciary, its characteristics nonetheless justified one party’s expectation of loyal conduct from the other”).
cal interests of another (the beneficiary).”

Gordon Smith has stated that: “fiduciary relationships form when one party (the ‘fiduciary’) acts on behalf of another party (the ‘beneficiary’) while exercising discretion with respect to a critical resource belonging to the beneficiary.”

And Larry Ribstein has argued that fiduciary duties should apply “where an ‘owner’ who controls and derives the residual benefit from property delegates open-ended management power over property to a ‘manager.’” Discretion in fiduciary relationships forms the cornerstone of many fiduciary theories.

The employment relationship fits this paradigm. An employee is a fiduciary of the employer because the employee exercises discretion in performing the duties of employment. However, an employer also exercises discretion over the employees’ practical interests and critical resources. The employer—the legal entity that employs the employees—controls the employees’ employment as well as the fruits of the employees’ labor. The joint production accomplished by employees working together with the capital provided by equity contributors is what constitutes the firm. And the controllers of the firm should therefore have a fiduciary responsibility to employees over the management of that joint production. Framing this in Miller’s “practical interests” terms, the employees’ significant practical interests include: the terms and conditions of their employment, the structure of employment, the opportunities for promotion or termination, the distribution of responsibilities within the employer, the ongoing success of the joint enterprise, and the distribution of resources within the employer. The employer has discretion over all of these. And using Smith’s “critical resource” theory, the employer (again, the legal entity) controls the

249. Miller, supra note 242, at 262 (emphasis omitted); see also Miller, supra note 37, at 69.

250. Smith, supra note 208, at 1402; see also D. Gordon Smith & Jordan C. Lee, Fiduciary Discretion, 75 Ohio St. L. J. 609, 610 n.6 (2014) (“The most commonly cited scholarly works in the canon of fiduciary law emphasize the importance of discretion in fiduciary relationships.” (emphasis omitted)).


252. The amount of discretion afforded to an individual employee may in fact vary widely based on the circumstances. See Robert C. Bird, Employment as a Relational Contract, 8 U. Pa. J. Lab. & Emp. L. 149, 154 (2005) (“Most employment relationships permit the employee at least some discretion in performing tasks.”); DeMott, supra note 242, at 1256 (“[A]lthough a firm’s employees share a common employer, the nature of their work spans a broad spectrum, ranging from responsibilities that necessarily involve exercising substantial discretion to closely monitored and highly specified tasks.”).

253. Alchian & Demsetz, supra note 65, at 794 (defining the firm to include “joint input production” and “several input owners”).

254. Terms and conditions include not only wages, but also short-term and long-term benefits such as health care coverage. See generally Hall, supra note 128 (discussing employer control over health care).
critical resource of the employer’s ongoing business. Employees cannot individually take that business and operate it for themselves; the employer controls the business as well as the relationships, contracts, property, goodwill, and other legal and economic assets of the business. The employer exercises discretion in making business decisions on behalf of those who participate in the business—namely, the equity investors and the labor contributors (employees). The employer’s ongoing business is a critical resource for employees. Even Ribstein’s notion of property ownership would apply if we use the Alchian and Demsetz model of the firm that includes all firm inputs, such as capital and labor, as part of the firm’s property interests.

A foreseeable objection to this approach is to argue that employees are not the beneficiaries of the employer with respect to the business enterprise. Instead, the owners of the employer (in whatever organization form it takes) are the beneficiaries. Thus, in a corporation, shareholders would arguably be the beneficiaries of the corporation’s exercise of its discretion over the critical resource of the corporation’s business. However, although shareholders have an interest in the employer-corporation’s business, employees are also beneficiaries who are interested in that business. Shareholders are not traditional “owners” of the corporations in many respects; they at best have ownership interests in the corporation’s designated profits. Although shareholders are invested in the corporation and its business, employees are also invested. They have invested their human capital in their employment and have acquired varying degrees of firm-specific capital through their jobs. Their reputation capital may

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255. See Bainbridge, supra note 84, at 661 (making the assumption in his model that “managers have substantial expertise in running large organizations and, accordingly, are properly vested with almost unfettered discretion”).

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

257. Alchian & Demsetz, supra note 65, at 794.

258. This distinction matters more to Smith’s formulation, which requires that the critical resource “belong” to the beneficiary. See Smith, supra note 208, at 1402. Miller’s formulation only requires that the beneficiaries’ significant practical interests be at stake. Miller, supra note 37, at 69.

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

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

Smith, supra note 208, at 1444.
be largely internal to the firm. Shareholders’ funds may be uniquely vulnerable, and their returns are more contingent and less defined than those provided to employees.\(^{260}\) However, the average employee arguably has more invested in the business enterprise that the average shareholder.\(^{261}\) Workers have invested their ongoing time and labor in the enterprise; they may also invest their careers and their vocational aspirations, as well as their personal character and identity.\(^{262}\) They invest in firm-specific capital that by definition is not alienable, unlike most stock investments.\(^{263}\) Along with the equity investors, they are the co-participants in the economic life of the firm.\(^{264}\)

Vulnerability is also a critical feature of fiduciary relationships. The beneficiary is vulnerable to the power and discretion of the fiduciary, which is what triggers fiduciary duties on the exercise of this power.\(^{265}\) If the beneficiary were able to protect itself through contract, it would not need the fiduciary duty. However, the open-endedness of the relationship subjects the beneficiary to the fiduciary’s potential opportunism.\(^{266}\) Vulnerability is often characterized as dependency: the beneficiary is dependent on the fiduciary’s discretion or good graces to get what they need or deserve.\(^{267}\) This link between power/discretion and vulnerability/dependency is a critical justification for the fiduciary relationship.\(^{268}\) Vulnerability thus echoes the “trust and confidence” factor: beneficia-
ries are vulnerable in part because they must trust their fiduciaries to manage resources and make decisions in their interest without sufficient information and oversight to provide true accountability after the fact.

Employees are unquestionably vulnerable to their employers with respect to their livelihoods and their connection to the ongoing business enterprise.269 Employees are vulnerable to the employer’s control over the business enterprise to steer a greater share of the firm’s profits back to equity owners and away from employees.270 Similarly, employees must place trust and confidence in their employers to look out for their interests and manage the joint enterprise in which they participate; they trust that the employer (and those who run it) will utilize their labor with care and competence to create a successful business.271 For at-will employees, investments in their career and in the employer’s business can vanish in an instant.272 Contracts cannot adequately manage this vulnerability because employees forfeit their past contributions to the business if they leave and they lack adequate governance mechanisms to make up for the incompleteness of the contract. In fact, critics of employee fiduciary duties have used the “vulnerability” point to argue that employees should not owe fiduciary duties to their employer.273 Although the employer is vulnerable to employee opportunism as a result of the discretion afforded to those employees,274 it is hard to foreswear the vulnerability that employees have as a class to their employers.

The parties’ reasonable expectations are yet another justification for a fiduciary relationship—one that is more contractual in nature.275 Because contracts

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269. See Frank Tannenbaum, A Philosophy of Labor 9 (1951) (“We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. . . . For our generation, the substance of life is in another man’s hands.”).

270. See Gregory Dow & Louis Puttermann, Why Capital (Usually) Hires Labor: An Assessment of Proposed Explanations, in Employees and Corporate Governance 17, 37 (Margaret M. Blair & Mark J. Roe eds., 1999) (“It is unclear why equity investors have a greater need for safeguards against managerial abuse than employees.”).

271. See Bainbridge, supra note 84, at 666 (“Both the livelihood and much of the wealth of employees is thus dependent upon the firm’s survival.”).

272. See Greenfield, supra note 225, at 302 (noting that firm-specific skills “make a worker more valuable to her present employer, but also make her more vulnerable to a firm’s opportunistic behavior”).

273. See Fisk & Barry, supra note 3, at 419 (“The employer owes no duty of loyalty to the employee and is free to pursue its self-interest by firing him to hire another for a lower wage or for better skills. Yet the employee’s ability to pursue her own self-interest by seeking better opportunities is limited [under a duty of loyalty].”).


275. See Easterbrook & Fischel, supra note 189, at 427 (“The duty of loyalty replaces detailed contractual terms, and courts flesh out the duty of loyalty by prescribing the actions the parties
in certain types of relationships are substantially incomplete, there is need for a gap-filler to manage the incompleteness in a flexible way. The fiduciary duty should thus be based on the parties’ reasonable expectations—an off-the-rack legal form, like the corporation, that best suits the underlying interests of the parties involved. Employees are assigned fiduciary duties to the employer under this theory because the employer cannot dictate every aspect of the job in the contract. Because the employee is charged with managing the employer’s business, the employer and employee would want the employee to act in the interests of the employer in carrying on the business. Fiduciary duties ameliorate that concern. However, employees confront a similar problem of opportunism vis-à-vis employers as well. Employers make a myriad of decisions that affect employees—both those that directly involve employees (like decisions to hire, fire, and set the terms and conditions of employment) and those that indirectly but significantly affect employees (like the decision to start a new product line or subcontract out certain work). These decisions cannot be reduced to specific contractual provisions at the outset of the relationship. Given the resulting incompleteness, fiduciary duties are justified to balance out the expectations of the parties.

The economic justification for the fiduciary law of agency is the reduction of agency costs—the costs that a principal must incur in monitoring an agent. In the simple framework of principal–agent or master–servant, the one-person principal or beneficiary must expend monitoring costs on the agent or fiduciary, some of which are mitigated by the fiduciary duty. However, employees also incur agency costs in ensuring that the employer abides by its contractual promises, allocates the responsibilities for the enterprise fairly, and allocates the returns to the business equitably. As to the latter, the employer may favor equity investors over employees, may favor one group of employees over

276. Easterbrook & Fischel, supra note 189, at 426 (“[T]he duty of loyalty is a response to the impossibility of writing contracts completely specifying the parties’ obligations.”).

277. Bainbridge, supra note 84, at 664 (“Because employees and employers cannot execute a complete contract under conditions of uncertainty and complexity, many decisions must be left for later contractual rewrites imposed by employer fiat.”); see also Greenfield, supra note 225, at 317 (“Workers and management thus face significant barriers to contracting, in that they face huge transaction costs in reducing to writing all the implicit understandings necessary to reach the outcome best for both parties.”).

278. Judge Easterbrook himself penned an opinion that gave potential protections to employees against employer opportunism effectuated by withholding confidential information. See Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 431–42 (1987). Although this opinion was based on the duty of good faith, it nevertheless showed the depth of the relationship between employer and employee, and the concern for employer opportunism. Id. at 438 (“Employment creates occasions for opportunism.”).

279. Greenfield, supra note 225, at 299 (“Employees in a firm, in fact, must bear certain monitoring costs—‘agency costs’—associated with making sure that the firm’s management is keeping their interests at heart.”).

280. See id. at 300.
another, or may unfairly deprive one employee of reasonable compensation.\textsuperscript{281} Individual employees generally have no way of monitoring these decisions, other than through their own personal experience and the evidence they can glean from other employees.\textsuperscript{282} Employees have no right to know each other’s pay, and social norms generally impede the free flow of such information.\textsuperscript{283}

Unions address these vulnerabilities in certain respects: they can represent a group of employees, bargain in good faith with the employer, and require the employer to disclose the employees’ terms and conditions of employment.\textsuperscript{284} But unions can only insist on bargaining; they cannot provide any legal remedies for opportunism that are not otherwise prohibited by law. Although often treated as a panacea in incomplete contracting literature,\textsuperscript{285} labor unions fail to play the same role that imposing fiduciary duties would. Moreover, less than 7% of private-sector employees are represented by unions.\textsuperscript{286}

The steady decline in unionism has had an important impact on the role of employees in governance. Unions provide a vehicle for workers to participate in the governance of the employer. By choosing a collective representative, work-

\begin{itemize}
\item \textsuperscript{281} Lilly Ledbetter provides one example of the need for monitoring costs. Ledbetter spent nineteen years as a manager and executive at Goodyear Tire & Rubber and assumed that she was being paid a fair income. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621 (2007); \textit{id.} at 643 (Ginsburg, J., dissenting). However, at the end of her tenure she discovered (through an anonymous office note) that male employees in similar positions were making significantly more money than she was. Pay Equity Pioneer Lilly Ledbetter Addresses the DNC, PBS \textsc{NewsHour} (Aug. 26, 2008), http://www.pbs.org/newshour/bb/politics-july-dec08-ledbetter_08-26/ [https://perma.cc/ZL8R-UYYD] [hereinafter Ledbetter Speech] (transcript of Lilly Ledbetter’s speech at the 2008 Democratic National Convention). By the time she retired, “Ledbetter was paid $3,727 per month; the lowest paid male area manager received $4,286 per month, the highest paid, $5,236.” Ledbetter, 550 U.S. at 643 (Ginsburg, J., dissenting). Ledbetter sued for sex discrimination under Title VII. \textit{id.} at 621 (majority opinion). Her lawsuit was originally found to be time-barred but ultimately led Congress to change the statute of limitations to allow for suits like hers. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009). However, Ledbetter would never have known to bring a suit if it were not for the secret informant. Ledbetter Speech, \textit{supra} (“I began to suspect that I wasn’t getting paid as much as men doing the same job. An anonymous note in my mailbox confirmed that I was right.”).

\item \textsuperscript{282} Even a duty of care would be important to employees, as their human-capital investments in the firm will only pay off if management does not manage the business poorly. See Greenfield, \textit{supra} note 225, at 300 (“Like shareholders, workers depend on the care, skill and good faith of the management. If the managers do not take care, or are stupid, or look after themselves only, both the shareholders and the workers will be harmed.”).


\item \textsuperscript{285} See, \textit{e.g.}, Benjamin Klein, Robert G. Crawford & Armen A. Alchian, \textit{Vertical Integration, Appropriable Rents, and the Competitive Contracting Process}, 21 \textsc{J.L. & Econ.} 297, 315–16 (1978) (describing how unions can stifle employer opportunism).

\end{itemize}
ers can have a voice in the affairs of the workplace. But workers should not be dependent on unions for such a voice; instead, they should be incorporated into the governance mechanisms of the firm. Otherwise, employees are vulnerable to the firm’s decision makers in ways that make them less like fiduciaries and more like beneficiaries.

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

V. EMPLOYER DUTIES AND EMPLOYER GOVERNANCE

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

The critical factor, from a fiduciary perspective, should be whether employees participate in the governance of the employer-firm. If they do not, as is common at most American workplaces, the employer will owe stronger fiduciary duties to employees in order to address the employer’s untrammeled discretion (vis-à-vis employees) and the potential for coercive opportunism. However, if employees do participate in the governance of their employer, the employer will be less akin to a remote fiduciary and more akin to a participatory democracy. The firm will coordinate joint production among employees and equity investors and allow them to manage the business together. In such a relationship, employees will have duties to themselves and other participants akin to the duties that partners owe to one another. There would be less need for fiduciary duties if employees were represented within the “firm” itself.

A. EMPLOYER FIDUCIARY DUTIES WITHOUT EMPLOYEE PARTICIPATION IN GOVERNANCE

In considering the nature of employer fiduciary duties, it is first important to consider the nature of the employer. In all cases outside of a sole proprietorship, the employer is a firm. It is a group of people working together in a joint business enterprise. Like a partnership, it is an entity and an aggregate—a fictional person representing the interests of the collective. Employees participate in the business of the firm—but do they participate in its governance? In

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287. See Kenneth G. Dau-Schmidt, Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform, 94 MARQ. L. REV. 765, 804 (2011) (“The organization of workers in unions was also viewed as beneficial because it would give them a greater say in the running of the workplace, and perhaps the country.”).
most cases, they do not. Employees are not a meaningful category when it comes to corporate law. They are simply one group of the many stakeholders who form contracts with the corporation. Although individual states have their own corporate law regimes, states uniformly delineate the roles of directors, officers, and shareholders in governing the entity. The relationships between these three groups constitute the purpose and function of corporate law. Shareholders select the directors at the annual shareholders meeting. The board manages the firm and may bind the corporation through contracts and transfers of property. Directors are bound to act in the interests of the firm through common law fiduciary duties of care, good faith, and loyalty. Officers are the titular heads of the corporate hierarchy, with authority to manage the company unless and until the board replaces them. This structure—shareholders selecting the directors, who select the officers, who in turn manage the corporation—is the internal engine of corporate governance. Employees are not included.

Corporations are not alone in their exclusion of employees. A labor provider may in some cases qualify as a partner if she is part of a group that meets the partnership definition: “an association of two or more persons to carry on as co-owners a business for profit.” But workers-as-employees are excluded from partnership governance, which is controlled by partners, either as a whole or through a designated sub-group. Limited partnerships and LLPs are managed by general partners, and LLCs have a flexible governance structure.

290. See, e.g., Del. Code Ann. tit. 8, § 211(b) (West 2009).
291. See, e.g., id. § 141.
292. See, e.g., Emerald Partners v. Berlin, 787 A.2d 85, 90 (Del. 2001) (“The directors of Delaware corporations have a triad of primary fiduciary duties: due care, loyalty, and good faith.”). The Delaware Supreme Court has since characterized the duty of good faith as part of the duty of loyalty. Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 369–70 (Del. 2006) (“The failure to act in good faith may result in liability because the requirement to act in good faith ‘is a subsidiary element[,] i.e., a condition, of the fundamental duty of loyalty.’” (citation omitted)).
293. See Clark, supra note 289, at 113–23 (discussing the powers and duties of officers).
294. Employees may be corporate shareholders through an employee stock ownership plan or through an individual § 401(k) retirement account. But employees are not included in their role as employees.
295. Unif. P’Ship Act § 101(6) (Nat’l Conference of Comm’rs on Unif. State Laws 1997); see, e.g., Holmes v. Lerner, 88 Cal. Rptr. 2d 130, 141–42 (Ct. App. 1999) (finding that a partnership was created informally, without a governing document, when parties agreed to build business together and share profits).
296. Unif. P’Ship Act § 401(f); Larry E. Ribstein & Jeffrey M. Lipshaw, Unincorporated Business Entities 431 (4th ed. 2009) (“A hallmark of the partnership form is the co-equal right of every partner, absent a contrary agreement, to participate in the management of the enterprise.”).
that nevertheless defaults to governance by its “members.” Members are designated within the LLC, and membership does not extend to employees as a category.

U.S. business organizational law has been remarkably successful in separating employment from ownership. Under our current system, employees hand over their labor, good will, and personal capital to the firm, at which point the firm—established as a corporation, partnership, or LLC—directs those assets to the ultimate benefit of the governance participants, who are generally equity investors. “Shareholder primacy” in corporate law is the most familiar instantiation of these mechanics. The justification for shareholder primacy generally proceeds as follows: because shareholders are the most vulnerable, they are given control over governance rights, including voting rights and the ability to seek redress for violations of fiduciary duties. The end result is that all other stakeholders, including employees, are fenced out from participation in governance.

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

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298. Ribstein & Lipsaw, supra note 296, at 432 (“Most LLC statutes provide that, in the absence of contrary agreement, the LLC is managed directly by members.”).

299. See Daniel S. Kleinberger, “Magnificent Circularity” and the Churkendoose: LLC Members and Federal Employment Law, 22 Okla. City U. L. Rev. 477, 484–91 (1997) (describing LLCs and their characteristics, including alienability of member shares, and discussing whether LLC members may also be considered employees if they have overlapping roles).


301. See supra note 234 and accompanying text.


304. Robert Bird proposed that employment contracts include an “implied covenant of the employment relation” that would address some of the relational opportunism concerns discussed here. Bird, supra note 252, at 200 (“Thus, a covenant of the employment relation would be satisfied if the employer did not engage in relational opportunism towards its employees.”).

305. See Smith & Lee, supra note 250, at 635.
pursuit of self-interest from the inappropriate pursuit of self-interest.”306 In the case of employer fiduciary duties, self-interest would be the firm’s pursuit of its individual interests and the interests of its owners at the expense of employees’ interests.

This robust-sounding fiduciary duty may scare traditionalists, who might see the corporate world turned upside down. But this duty complements, rather than replaces, the rule of shareholder primacy, and would apply to every employer, regardless of the business-organizational form. The rule would sit within the existing common law and statutory protections for employees that treat the employer as something of a fiduciary already. Many of the labor and employment protections discussed in Part III are responses to employer opportunism.307 Minimum wages protect against employers using their market power to force substandard remuneration on employees—remuneration less than what we deem to be societally acceptable for labor. Required benefits such as family and medical leave or health insurance coverage force each employer to provide a basic level of care for all employees. Fiduciary responsibilities under ERISA prohibit an employer from underfunding a plan or succumbing to a conflict of interest. Employers cannot take advantage of employees by providing unsafe workplaces and must bear responsibility for injuries that workers suffer in the scope of employment. Covenants not to compete are subject to a reasonableness test, and terminations cannot be carried out in bad faith or in retaliation for protected conduct. Perhaps the most meaningful set of quasi-fiduciary or governance rights are the employees’ rights to choose a bargaining representative and require the employer to bargain in good faith. The bargaining representative can fight employer opportunism against employees by collecting information about employees and their terms and conditions of employment, forcing the employer to justify those terms and conditions through a process of negotiation, providing rights for employees to work together and even strike, and establishing a grievance-arbitration system for the resolution of individual employee concerns about mistreatment or opportunism.308 But whatever their strengths, these labor and employment protections do not obviate the need for common law fiduciary duties toward employees. Instead, they provide further evidence for the concerns underlying such duties as well as support for a fiduciary approach.

So what would change if employers were recognized as fiduciaries? The fiduciary duty would counteract opportunism; it would “distinguish the appropriate pursuit of self-interest from the inappropriate pursuit of self-interest.”309 Such protections could have varying degrees of robustness. Starting incremen-
tally, a minimalist employer fiduciary duty would include the existing duty of good faith, such that the employer could not fire an employee to prevent the accrual of a bonus nor conceal business information to mislead an employee.\[^{310}\] Expanding this outward, courts could develop norms—based both on industry standards and social policy—defining the sorts of conduct that unfairly take advantage of employees and reek of opportunism.\[^{311}\] In addition, employers would take on a duty to act in the interests of employees when making decisions regarding employee interests, such as pension and health insurance plans.\[^{312}\] Pursued more aggressively, employer fiduciary duties could be used to examine the structure of the employment relationship and compare the relative returns to employees and the employer. An employer using its contractual power to extract huge profits from its business enterprise while sharing only paltry amounts with employees could conceivably be subject to the duty against opportunistic behavior.\[^{313}\] Finally, the employer’s fiduciary duty could endeavor to prevent an employer’s efforts at structural opportunism by subcontracting, restructuring, or other forms of workplace “fissuring” in which employees are cut loose from the firm and cut out of their share of the pie.\[^{314}\]

Finding employers to be fiduciaries does not mean the end of employment at-will. The at-will rule does render employees vulnerable to the employer’s

\[^{310}\] See supra Section IV.A (discussing Restatement of Emp’l Law §§ 2.07, 3.05 (Am. Law Inst. 2015)).

\[^{311}\] In their discussion of fiduciary duties, Smith and Lee place an emphasis on the role of social norms and industry customs in developing these duties. Smith & Lee, supra note 250, at 638. However, they also recognize that “some industry customs and social norms may be undesirable from a societal standpoint.” Id. Fiduciary duties may, in fact, be designed to counteract inappropriate norms that have developed over time within a particular context.

\[^{312}\] Margaux Hall’s argument for specific fiduciary duties in the context of health insurance coverage provides a nice application of this principle. See generally Hall, supra note 128.


\[^{314}\] For a discussion of new ways in which employees are sliced, diced, and minced out of the modern firm, see generally David Weil, The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done To Improve It (2014).
discretion, and such discretion should not be used opportunistically. However, the at-will rule is not itself per se opportunism. In fact, employees as a whole may benefit from the at-will rule, as it allows the firm to shed a shirking employee—who may herself be an opportunist—while expending a smaller set of administrative and transaction costs. But an employer fiduciary duty to employees would require employers to refrain from opportunistic firings. The definition of opportunism could be fleshed out over time, but would likely include efforts to deprive employees of their fair share of the firm’s resources through untimely termination, wholesale subcontracting, or political vendettas.315

It may seem objectionable to saddle the employer with such a significant and potentially ambiguous responsibility for the interests of its employees, who (under current law) are deemed contractual partners looking after themselves. But a purely contractual model of the employment relationship is outdated; it is blind to the many common law and statutory responsibilities that society has already placed upon employers.316 These responsibilities have all come from an environment in which employees participate in the ongoing life of the firm yet do not participate in the governance of that firm. As a result, we have regulated employer opportunism predominantly through a series of mandatory statutory regimes that impose particular requirements within the employment contract. There is a way out of this paradigm—a way in which employees depend less on the law to regulate their employers and take more responsibilities upon themselves. However, this would require giving employees meaningful governance rights within the employer itself.

B. EMPLOYER FIDUCIARY DUTIES UNDER A PARTICIPATORY GOVERNANCE MODEL

If employees participate in the governance of the employer, the fiduciary relationship changes. No longer are workers simply subject to the whims of a separate entity that controls the underlying business enterprise. Instead, they have a voice in the decision-making mechanisms of that enterprise. They have a role to play in the employer’s exercise of its discretion. They are not as vulnerable to opportunism. Employees would take on the role of co-participants in governance, and as such, would have the rights and responsibilities of participants, not powerless beneficiaries. Because fiduciary duties serve the purpose of managing discretion and vulnerabilities within the employment relationship, such duties could be changed—diminished—if employees had participatory rights in firm governance.317

315. Courts have already used the duty of good faith to police overt employer opportunism against individual employees. See supra Section IV.A; see, e.g., Fortune v. Nat’l Cash Register Co., 364 N.E.2d 1251, 1257 (Mass. 1977).
316. See supra Part III.
317. An extensive discussion of employee participation in management is beyond the scope of this Article. Such an approach would be more consonant with employees’ participatory role within the firm. See Bodie, supra note 288, at 100, 102. For an argument that participatory management may be an adaptive market response but should not be made mandatory, see generally Bainbridge, supra note 84.
As participants in the firm, employees would no longer be able to view the “employer” as simply an “us-against-them” relationship. Employees would have duties to each other and to the other participants through their own fiduciary duties to the employer. This approach provides a much stronger foundation for the traditional employee fiduciary duties to the firm. The employees as a group would be committing to refrain from opportunism that would harm their fellow employees. An employee would not be harming a nameless, faceless “employer” by stealing business opportunities or disclosing confidential information. Instead, the employee would be harming the ongoing business enterprise, represented by the firm, in which his fellow employees were still participating. So instead of being tribute paid to a master, the duty of loyalty would be a pact among equals not to engage in opportunism. Similarly, intellectual property doctrines that seem to harm employees, like the shop right doctrine or the work-for-hire doctrine, could be seen instead as agreements among employees to share the fruits of their common labors with the collective, rather than efforts by corporate overlords to squeeze economic value out of their subjects.

An employer that provided for employee participation in governance would more closely resemble those business relationships with default rules of equal participation, such as partnerships. Partners owe fiduciary duties to the partnership as a separate entity as well as to their fellow partners in the aggregate. Employees would have similar duties within the context of the employer. If

For arguments in favor of worker participation, see generally Greenfield, supra note 225. For an argument that employee participation in governance only works when workers are homogenous, see Henry Hansmann, The Ownership of Enterprise 91–98 (1996).

318. The shop right doctrine provides that employers have a license to use an employee’s patent, even if the employee owns the patent. See Catherine L. Fisk, Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property, 1800–1930 118 (2009).


320. Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership § 6.07(a) (2004); see also Smith, supra note 208, at 1458. Modern partnership law is engaged in an ongoing debate as to whether a partnership is simply a collective of individuals (aggregate theory) or is an entity unto itself (entity theory). This divergence reflects a similar tension in the role of employees who participate in the firm’s governance.

321. Larry Ribstein has argued that in fact, partners should not all have fiduciary responsibilities to each other; only those who have open-ended managerial discretion should owe fiduciary duties. Ribstein, Are Partners Fiduciaries, supra note 251, at 215. According to Ribstein, governance rights are not themselves sufficient to create fiduciary duties; there must be some discretionary, managerial power over other owners to justify the imposition of such duties. See id. at 237–40. The duties that partners would owe to each other under Ribstein’s approach follow the duties that co-owners—co-participants in governance—owe to each other. In fact, he raised concerns about the denigration of governance rights if fiduciary duties were also imposed on top of the governance rights. See id. at 233. Ribstein’s approach to nonmanaging partners would have similar resonance as to employees with governance rights. On the other hand, employees with managerial discretion would owe fiduciary duties, given the entrustment of the firm in their hands. See Tamar Frankel, Fiduciary Law in the Twenty-First Century, 91 B.U. L. Rev. 1289, 1293 (2011) (discussing the concept of entrustment).
employees did have governance rights, individuals and smaller groups of employees would still need protection against opportunities by the voting majority to behave opportunistically and deprive the minority of its fair share. But such duties would resemble the shareholder “minority oppression” doctrine rather than an agent’s fiduciary duties.322 Under this doctrine, courts have equitable power to adjust decisions made by controlling shareholders (or shareholder blocs) that unfairly target minority shareholders and deprive them of their proportional shareholder value.323 Minority oppression includes not only conduct such as unfair buybacks or dividend distributions, but also disproportionate employment salaries for majority owners or decisions to terminate the employment of minority shareholders.324 It is a holistic doctrine designed to root out decisions that violate the boundaries of fairness and the reasonable expectations of the parties.325 A similar doctrine could apply to employees to ensure a majority bloc within the employer did not use its power to disadvantage a minority bloc of employees unfairly.326

322. Minority shareholder oppression occurs when the majority group in a closely held corporation uses its power over the corporation to deprive minority shareholders of certain fruits or expected returns from the business. See Douglas K. Moll, Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective, 53 VAND. L. REV. 749, 750 (2000) (“The doctrine of shareholder oppression protects the close corporation minority stockholder from the improper exercise of majority control.”). For example, majority shareholders may terminate a minority shareholder’s employment by the company, depriving that shareholder of the expectations of a continued salary. See, e.g., Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662 (Mass. 1976) (describing one type of shareholder oppression as “to deprive minority stockholders of corporate offices and of employment with the corporation”). Some courts have characterized the minority oppression doctrine in the language of fiduciary duty. E.g., Donahue v. Rodd Electrotype Co. of New Eng., 328 N.E.2d 505, 515 (Mass. 1975) (“Because of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation, we hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another.”).

323. See Moll, supra note 322, at 759–61 (describing oppression doctrine and the avenues of relief available to courts).

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

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

326. As with the minority oppression doctrine, the courts would need to walk a fine line between the rights of the minority to minimum standards and the rights of the majority to manage the business enterprise as it saw fit. See Benjamin Means, A Voice-Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation, 97 GEO. L.J. 1207, 1211 (2009) (“Rather than insisting upon strained comparisons to public corporation or partnership models of governance, courts should minimize deterrents to minority investment by preventing majority shareholders from taking unfair advantage of their power while also recognizing the majority shareholders’ right to benefit from control in order to encourage their investment.”). This is the work that a vague word like “unfair” must take on within the doctrine.
If employees participate in governance, the employer would not need to have a general, overarching duty against the use of its discretion to take undue advantage of employees as a group. Instead, the governing group as a whole—whether it be employees, equity holders, or some combination thereto—would need to agree not to unfairly target minority interests within the firm. On some level, these democratically structured rights and duties would provide employees a voice and control, and would diminish the need for fiduciary protection. For those looking to free the workplace of many of the employment and labor law regulatory encumbrances, employee governance participation provides a way to reduce these regulations without rendering employees unduly vulnerable.

CONCLUSION

Employee fiduciary duties sit uneasily within agency doctrine: they are required by traditional doctrine, but their justifications have become harder to defend. When considered within a more holistic approach to the employment relationship, these duties are justified as a set of protections for one’s fellow employees and the other participants in the firm. But these duties must be balanced against responsibilities from the firm itself not to take opportunistic advantage of employees. This Article argues for a reconstructed employment relationship in which employers and employees owe fiduciary duties as part of an incomplete, relational arrangement. Employer duties could be muted if employees participate in the governance of the entity. But in the absence of such democratic rights, courts must balance the equation by prohibiting employers from inappropriately pursuing their organizational self-interest at the expense of their employees through the imposition of fiduciary responsibilities.