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EMPLOYERS SHOULD OWE A DUTY OF LOYALTY TO
THEIR WORKERS

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INTRODUCTION

On seemingly countless occasions, we have had to advise potential clients that apart from abiding by particular laws—mainly anti-discrimination and retaliation statutes—employers are typically free to treat (and mistreat) employees as they wish. Courts have repeatedly emphasized that there is no “general civility code” for the workplace.¹

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¹ *E.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998).

Employees likewise have limited protections from mass layoffs. Employers may generally fire their “at-will” employees at any time for any reason—including a bad reason, a nonsensical reason, or no reason at all.² Simply put, employers may act against employees’ interests. Their conduct is typically bounded only by the dog-eat-dog “morals of the market place.”³ In this context, discerning a viable claim, even where an employee has been seriously mistreated, can be like trying to fit a round peg into a square hole.

Paradoxically, the law holds employees to a higher standard than their employers. Derived from feudal law governing the master-servant relationship, an employee’s overarching legal commitment to his or her employer is commonly known as the “duty of loyalty” and bears the anachronistic stamp of its age.⁴ Under this doctrine, employees have strict and affirmative obligations to act in the best interests of their employers at all times; some courts have described a trusted employee’s obligation as one of “uberrima fides”—or utmost good faith.⁵ Employees have also often been characterized as owing a fiduciary duty to their employers.⁶

The consequences of an employee’s breach of these duties are severe. Generally, an employee who breaches the duty of loyalty is liable for any actual damages or harm, including monies received, which are deemed to rightfully belong to the employer as principal.⁷ However, under New York’s “faithless servant” doctrine, the employee must also forfeit and disgorge all compensation received during the period of

² See, e.g., *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 89–90 (N.Y. 1983) (noting that at-will employment “may be freely terminated by either party at any time for any reason or even for no reason”; and declining to recognize a common law exception for abusive or wrongful discharge).

³ *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

⁴ See generally Marian K. Riedy & Kim Sperduto, *At-Will Fiduciaries? The Anomalies of a “Duty of Loyalty” in the Twenty-First Century*, 93 NEB. L. REV. 267, 271, 296–99, 311 (2014).

⁵ *Mar. Fish Prods., Inc. v. World-Wide Fish Prods., Inc.*, 474 N.Y.S.2d 281, 286 (App. Div. 1984); see also, e.g., *W. Elec. Co. v. Brenner*, 360 N.E.2d 1091, 1094 (N.Y. 1977) (citation omitted) (internal quotation marks omitted) (“[A]n employee is to be loyal to his employer and is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties.”); *Poller v. BioScrip, Inc.*, 974 F. Supp. 2d 204, 227 (S.D.N.Y. 2013) (collecting cases on an employee’s duty of good faith and loyalty under New York law).

⁶ Variations in the duty of loyalty between jurisdictions are explored by Riedy and Sperduto. Riedy & Sperduto, *supra* note 4, at 271–83.

⁷ See RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. (d)(1) (2006) (“An agent’s breach subjects the agent to liability for loss that the breach causes the principal.”); see also *id.* at cmt. (e) (noting that fiduciary duties, including the duty of loyalty, apply to employees); Riedy & Sperduto, *supra* note 4, at 278–79 (noting the various remedies available to employers for breach of the duty of loyalty).

disloyalty, regardless of whether his or her conduct has caused the employer *any* injury or harm.⁸

This lopsided duty of loyalty exacerbates the inordinate power that employers possess over their workers.⁹ Despite the enactment of various employee rights and protections, the employment relationship remains essentially undemocratic.¹⁰ Today, workers are heavily dependent on their employers for their livelihood and well-being. Even with programs such as Social Security and Medicare/Medicaid, much of the social safety net is tied up in one's employment.¹¹ Employees also spend a significant portion of their time in the workplace, and their employment takes on a dominant role in their lives.¹² Employers often encroach on their workers' private lives, sometimes directly (*e.g.*, by monitoring employees' physical activities)¹³ and sometimes indirectly (*e.g.*, by imposing on-call scheduling or irregular shifts that throw workers' lives into disarray).¹⁴

⁸ *See, e.g.*, Phansalkar v. Andersen Weinroth & Co., 344 F.3d 184, 200–05 (2d Cir. 2003) (*per curiam*). Under such types of doctrines, employer claims against employees have significantly increased in recent years. *See generally* Matthew P. Holt, *When the Hand that Feeds Bites: Exploring Claims by Employers Against Employees*, 43 N.M. L. REV. 491 (2013).

⁹ *See* Riedy & Sperduto, *supra* note 4, at 285–86 (“The party wielding the power and control is the employer, yet it is the employee who owes the so-called fiduciary duty.”).

¹⁰ *See* ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* xxii, 62–64 (2017).

¹¹ Health insurance and retirement savings are two prominent examples of this employer-based social safety net. Roughly half the population receives employer-sponsored medical insurance and retirement benefits. *See Health Insurance Coverage of the Total Population*, KAISER FAM. FOUND. (2018) <https://www.kff.org/other/state-indicator/total-population/?currentTimeframe=0&selectedDistributions=employer&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [<https://perma.cc/SN6K-AKMU>] (noting that half of the population received employer-sponsored medical insurance); THE SIGHTLINES PROJECT, *SPECIAL REPORT: SEEING OUR WAY TO FINANCIAL SECURITY IN THE AGE OF INCREASED LONGEVITY* 19, 22, 28 (2018), <http://longevity.stanford.edu/wp-content/uploads/2018/11/Sightlines-Financial-Security-Special-Report-2018.pdf> [<https://perma.cc/X8KK-MYAN>] (noting that half of the population receives employer sponsored retirement benefits). Notably, a U.S. Government website designed for public education on retirement savings identifies employer-sponsored plans as the public’s “most common option[]” for retirement savings. *See Retirement*, USA.GOV <https://www.usa.gov/retirement> [<https://perma.cc/2CKH-5ATH>] (last visited Aug. 4, 2020).

¹² *See, e.g.*, ANDERSON, *supra* note 10, at 135–38 (detailing the various abuses and indignities suffered by workers, particularly lower wage workers).

¹³ *See id.* at 49 (describing how employer “wellness programs” under the Affordable Care Act may regulate employees’ physical activities); Christopher Rowland, *With Fitness Trackers in the Workplace, Bosses Can Monitor Your Every Step—and Possibly More*, WASH. POST (Feb. 16, 2019, 7:13 PM), https://www.washingtonpost.com/business/economy/with-fitness-trackers-in-the-workplace-bosses-can-monitor-your-every-step—and-possibly-more/2019/02/15/75ee0848-2a45-11e9-b011-d8500644dc98_story.html [<https://perma.cc/SFZ9-36J4>].

¹⁴ *See* ANDERSON, *supra* note 10, at 136 (noting how “unpredictable schedules . . . wreak havoc with the private lives of workers”); Claire Cain Miller, *How Unpredictable Work Hours Turn Families Upside Down*, N.Y. TIMES (Oct. 16, 2019), <https://www.nytimes.com/2019/10/16/upshot/unpredictable-job-hours.html> [<https://perma.cc/362M-NK42>].

Especially with the ongoing decline in labor union participation,¹⁵ employees have few tools to balance the scales. Quitting the job—at-will employees’ presumed bargaining chip—comes with too many risks: the loss of an income and (for many employees) the loss of healthcare and retirement benefits.¹⁶ “Voting with one’s feet” may simply not be a viable option for most workers, particularly in difficult economic times.

Duties of loyalty are designed to regulate such one-sided relationships, particularly those in which one party entrusts the other to manage or control something of value.¹⁷ Corporate directors, for example, owe fiduciary duties to shareholders, who have entrusted them with the management of the company.¹⁸ ERISA fiduciaries owe duties of loyalty to plan participants, who depend on the fiduciaries to manage their retirement plans.¹⁹ Similarly, in the case of employees’ duty of loyalty, some courts have reasoned that the employment relationship “involves an element of confidence” that goes “beyond that merely of doing the work which [the employee] is employed to do.”²⁰

In modern times, however, employers and employees are more than master and servant or principal and agent. Given the outdated underpinnings of this doctrine in the employment context, some commentators have proposed abolishing or modifying the ordinary

¹⁵ See Drew DeSilver, *10 Facts About American Workers*, PEW RES. CTR. (Aug. 29, 2019), <https://www.pewresearch.org/fact-tank/2019/08/29/facts-about-american-workers> [<https://perma.cc/9LN4-REFA>] (noting that the labor union participation rate fell by half between 1983 and 2018).

¹⁶ See ANDERSON, *supra* note 10, at 139 (“Much of the time, the entire economy operates in periods of substantial unemployment or underemployment, affecting workers generally: even if they have a job, the cost of job loss is so high they have to put up with nearly any abuse just to hang on to an income.”); *id.* at 141 (describing barriers that prevent workers from leaving their jobs); *cf.* Todd Gabe, et al., *Can Low-Wage Workers Find Better Jobs?*, 846 FED. RES. BANK N.Y. 1, 9–10 (2018) (reporting relatively low levels of labor mobility at all quartiles of the job quality: most workers stay in their jobs). Anderson also notes that the proliferation of non-compete clauses has impeded employees’ ability to exit their jobs. ANDERSON, *supra* note 10, at 66.

¹⁷ See Riedy & Sperduto, *supra* note 4, at 284 (noting that fiduciary relationships involve one party ceding “both trust and power” to another party: “it is that risk the special obligations imposed on a fiduciary are intended to eliminate or reduce.”).

¹⁸ *Alpert v. 28 Williams St. Corp.*, 473 N.E.2d 19, 25 (N.Y. 1984) (citation omitted) (“Because the power to manage the affairs of a corporation is vested in the directors and majority shareholders, they are cast in the fiduciary role of ‘guardians of the corporate welfare.’”); *see also* Riedy & Sperduto, *supra* note 4, at 284 (“Thus, shareholders cede both trust and power to corporate officers and directors . . .”).

¹⁹ 29 U.S.C. § 1104(a)(1)(A) (2018) (imposing a duty of loyalty); *see also* 29 U.S.C. § 1002(21)(A) (defining a fiduciary as, *inter alia*, someone who exercises “discretionary authority or discretionary control” over plan management or assets).

²⁰ *Coffey v. Burke*, 116 N.Y.S. 514, 132 (App. Div. 1909) (“An employee, though not in a position of trust or confidence as those terms are generally employed, owes a duty of loyalty to the employer beyond that merely of doing the work which he is employed to do. The relation itself involves an element of confidence.”).

employee's duty of loyalty to his or her employer.²¹ This prescription may well be compelling. However, we venture a somewhat different approach here. We propose that the duty of loyalty owed by workers to their employers be made reciprocal: employers should also owe a general duty of loyalty and care towards their employees. In today's economy, workers indeed cede significant control over their lives to their employers.²² Thus, the social compact between employer and employee should not run in one direction in which the weaker party owes fealty to the stronger. This new principle—likely to be enacted by statute—could be accomplished as part of a broader Workers' Bill of Rights or as a stand-alone measure.

I. WHAT WOULD A RECIPROCAL DUTY OF LOYALTY MEAN IN PRACTICE?

In our view, an employer's duty of loyalty should, at minimum, start with a commitment not to harm employees arbitrarily, gratuitously, or in bad faith. This obligation can incorporate critical concepts from the implied contractual covenant of good faith and fair dealing.²³ Under the covenant, even where one party exercises contractual discretion, it must do so reasonably and in good faith, in accordance with applicable commercial norms; a party may not exercise its discretion capriciously or do so to undermine the purposes of the relationship, to defeat the reasonable expectations of the other party, or to prevent the other party from receiving the fruits of the contract.²⁴ The covenant also encompasses duties of honesty and candor.²⁵

²¹ See Riedy & Sperduto, *supra* note 4, at 271, 301–11; see also Holt, *supra* note 8, at 525 (proposing elimination of the common law duty of loyalty in favor of a requirement that any such duties be explicitly stated in employment contracts); Charles A. Sullivan, *Mastering the Faithless Servant?: Reconciling Employment Law, Contract Law, and Fiduciary Duty*, 2011 WIS. L. REV. 777, 819 (2011) (proposing a limitation of the faithless servant doctrine to high-level employees).

²² See generally ANDERSON, *supra* note 10, at 37–41, 49–50, 135–38 (describing the power employers have over workers' lives); see also *supra* notes 12–14 and accompanying text.

²³ Riedy and Sperduto maintain that employees' broad duty of loyalty and good faith toward their employers should be scrapped and replaced by a mutual and reciprocal duty of good faith and fair dealing alone. Riedy & Sperduto, *supra* note 4, at 307–10. Notably, employers may already be bound by aspects of the duty of good faith and fair dealing in a handful of jurisdictions. See *id.* at 309–10, 309 n.221.

²⁴ See, e.g., *Dalton v. Educ. Testing Serv.*, 663 N.E.2d 289, 291–92 (N.Y. 1995); *Legend Autorama, Ltd. v. Audi of Am., Inc.*, 954 N.Y.S.2d 141, 143–44 (App. Div. 2012) (citation omitted) (“[E]ven an explicitly discretionary contract right may not be exercised in bad faith so as to frustrate the other party's right to the benefit under the agreement.”).

²⁵ See, e.g., U.C.C. § 1-201(b)(20) (AM. INST. & UNIF. LAW COMM'N 2017) (“‘Good faith,’ except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.”).

In addition, employers should consider and look out for the interests of their employees in all transactions and, where reasonably possible, refrain from acting against employees' interests. In parallel with aspects of employees' duty of loyalty, employers must not engage in self-dealing to enrich themselves at their employees' expense.²⁶

At its heart, our proposed employer duty of loyalty would mirror the duties employees now owe their employers. While the borders of an employee's duty of loyalty may be somewhat blurred, at its center, an employee is generally prohibited from acting in an adversarial manner towards his or her employer—such as by competing with the employer, diverting potential business opportunities, and divulging or exploiting confidences. Employers should therefore also be precluded from engaging in adversarial, self-aggrandizing conduct toward their employees. The most straightforward and clear-cut applications of a reciprocal duty of loyalty would prevent employers from self-dealing on the backs of employees. Less straightforward uses would address other practices that harm workers and may seem incompatible with concepts of loyalty, care, good faith, and fair dealing; such applications are worth positing for discussion and consideration.

The specific manifestations of an employer duty of loyalty and good faith—to be fleshed out in legislation, interpretative regulations and guidance, and judicial interpretation—could be manifold. We set forth a few possible examples here, both of the straightforward and perhaps less straightforward variety.

II. AT THE HEART OF THE DUTY

A. *Reformation of the “At-Will” Employment Doctrine*

While an employer might not need good cause to fire employees, a bad faith reason should not suffice.²⁷ Nor may the employer engage in

²⁶ The business community has begun to adopt similar standards. See *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy that Serves All Americans’*, BUS. ROUNDTABLE (Aug. 19, 2019) <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/XD9T-96GG>]. In August 2019, the Business Roundtable issued a new Statement on the Purpose of the Corporation, which modified its prior focus on “shareholder primacy” and affirmed a commitment to various stakeholders, including employees. *Id.* The Roundtable now promotes “[i]nvesting in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.” *Id.*

²⁷ Legal developments and proposals for barring or limiting bad faith discharges are hardly new. See, e.g., Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to*

dishonest or deceitful conduct. One common example of an underhanded motive would be terminating an employee to avoid paying compensation owed to the employee or about to become vested or due.²⁸ Just as an employee may not act to undercut the employer's interests while in its employ, an employer should not be able to inflict harm on an employee out of a nakedly self-interested purpose.

In like fashion, an employer should not be able to surreptitiously plan and engage in mass layoffs or outsourcing of jobs just to marginally boost the company's stock price. The desire to satisfy shareholders should be mitigated by an obligation to look after the security and well-being of employees. Of course, downsizing is permitted when reasonably warranted to safeguard the future of the organization. But the employer should be forthright with its workers at every stage of the process (WARN Act notice, which does not cover all employees or all situations,²⁹ is a useful but inadequate step). The employer should also document its rationale and processes for arriving at its decision. And, it should not subordinate employees' interests to outsized executive bonuses and equivalent perks. The duty of loyalty should preclude businesses and their executives from unduly enriching themselves on the backs of their workers.³⁰

Such protections are all the more imperative due to ongoing trends such as the mass outsourcing of certain jobs abroad,³¹ as well as the growing gap in pay between workers and executives.³² With exorbitant

Terminate Only in Good Faith, 93 HARV. L. REV. 1816 (1980) [hereinafter Note, *Protecting At Will Employees*]. Now, as in 1980, the United States is unique among industrialized countries in lacking comprehensive, nationwide protections against wrongful discharge. *Id.* at 1844. This is particularly striking when considered against employees' common law duty of loyalty.

²⁸ See, e.g., Riedy & Sperduto, *supra* note 4, at 310; *York v. Zurich Scudder Invs., Inc.*, 849 N.E.2d 892, 899 (Mass. App. Ct. 2006) (“[W]here an at-will employee has been terminated in bad faith, such as where an employer has acted to deprive an employee of a commission due, or about to be due, and to benefit financially at the employee's expense, the employee may recover compensation for work performed.”). Notably, statutes such as ERISA and the FMLA already prohibit employers from interfering with certain benefits. See 29 U.S.C. § 1140 (2018) (prohibiting interference with protected rights under ERISA); 29 U.S.C. § 2615 (2018) (prohibiting interference with exercise of rights under the FMLA).

²⁹ See 29 U.S.C. §§ 2101–2109 (2018).

³⁰ Likewise, while “[d]ismissals that are part of large-scale coordinated layoffs necessitated by an economic downturn, for example, generally would be valid. . . . [A]n employer should not be free to use an economic downturn as a pretense to expel preselected employees.” Note, *Protecting At Will Employees*, *supra* note 27, at 1841. In other words, ulterior motives should not enter the equation.

³¹ See, e.g., ANDERSON *supra* note 10, at 139 (“Workers of all races who live in towns devastated from plant closures due to competition from abroad also suffer from high unemployment, because their mobility is low.”).

³² Lawrence Mishel & Julia Wolfe, *CEO Compensation Has Grown 940% Since 1978*, ECON. POL'Y INST. (Aug. 14, 2019) <https://www.epi.org/publication/ceo-compensation-2018> [<https://perma.cc/R5TE-F9XN>].

executive compensation packages, and stagnant, or even declining wages for workers, the pay gap has reached virtually unprecedented levels: Over the last 40 years, CEO compensation has increased by nearly 1,000%, while the pay of ordinary workers has risen by only 11.9%.³³ As a result, CEOs now make 278 times what the average worker does, with some garnering compensation in the tens or even hundreds of millions of dollars.³⁴ These skewed practices run counter to a duty of loyalty. It is especially disingenuous for companies to claim financial hardship and to impose fiscal austerity measures to the detriment of workers after lavishing their executives in this manner.

B. *Safeguarding Employee Benefits*

Absent unusual and unforeseen circumstances, employers should abide by their promises and representations to workers. It is disloyal for a company to place itself above its workers and to renege on commitments on which they have relied. Employers should not be allowed to slash or eliminate employee benefits—such as retirement and health benefits—when they are no longer seen as convenient to the bottom line. As with mass layoffs, a duty of loyalty would force employers to undergo a transparent and well-documented process to justify reductions of employee benefits as necessary to safeguard the future of their businesses. Similarly, employers should not be able to designate workers as independent contractors for the purposes of evading employment benefits. We have seen circumstances in which employers manipulate the system by firing workers en masse just to hire them back as “contractors.” This is inconsistent with a duty of loyalty, and workers should not have to prove that they qualify as “employees” under one legal test or another in order to be protected and to recover damages. Employers should not be in the business of grabbing from their workers.

As highlighted by recent debates over the coronavirus economic stimulus package, corporations should not be able to accept large cash bailouts or tax cuts from the government—designed to stabilize those businesses, protect current workers, and incentivize new hiring—only to turn around and expend the funds on executive perks or stock buybacks.³⁵ Appropriating public money, intended to safeguard employees’ jobs and

³³ *Id.*

³⁴ *Id.*

³⁵ See Matt Phillips, *The Stock Buyback Binge May Be Over. For Now.*, N.Y. TIMES (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/business/coronavirus-stock-buybacks.html> [<https://perma.cc/CS2L-B7BV>] (discussing changing political attitudes towards stock buybacks and noting the bi-partisan support for a prohibition on stock buybacks in the coronavirus stimulus package).

benefits, for private corporate gain would be incompatible with the mandate of good faith and fair dealing.

In our view, these are fairly clear-cut implications of the duty we propose. It would remain to be seen how they are reconciled with a corporation's duty to its shareholders. But, in our understanding, the duty to shareholders does not carry an obligation to mistreat employees or to squeeze every last cent from them. The duty to shareholders does not preclude good business practices and corporate stewardship.³⁶ This is particularly the case when the benefits gleaned from harming employees will accrue primarily to the company's principals and executives.

III. IN THE POSSIBLE PENUMBRAS

A less straightforward and more expansive potential application would involve a broader transformation of the employment "at will" rubric in a manner that supplements existing employment laws. It may be argued that liability for discharging a worker based upon personal characteristics having nothing to do with one's abilities, performance, or conduct in the workplace should not revolve solely on whether one comes within a specific protected category. Legislatures have codified protections based on race, gender, and other enumerated categories out of societal recognition that these forms of discrimination are most glaring and pernicious;³⁷ their prevalence and devastating impact are not to be underestimated. Still, terminations predicated on other job-immaterial traits can also be arbitrary, unjustified, and highly damaging.³⁸

Indeed, a duty of loyalty and fair dealing could potentially offer a means for courts to adapt employment discrimination law to society's evolving norms.³⁹ Federal law, as well as the laws of many states and

³⁶ See Note, *Protecting At Will Employees*, *supra* note 27, at 1833–36 (observing that "[a]rbitrary or economically unjustified dismissals can have detrimental repercussions" for both employees and employers and that expanded liability on the part of employers would have beneficial effects, notably including increased worker productivity resulting from greater employee job security and satisfaction). The business community appears to agree. See *supra* note 26.

³⁷ See, e.g., N.Y.C. ADMIN. CODE § 8-101 (2020) (effective Aug. 27, 2020) ("In the city of New York, with its great cosmopolitan population, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences . . ."); N.Y. EXEC. LAW § 290(3) (McKinney 2020) ("The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life . . .").

³⁸ Development of the law in this direction would traverse the relatively narrow conception of the duty of good faith and fair dealing (without an obligation of loyalty) advanced by Riedy and Sperduto. See Riedy & Sperduto, *supra* note 4, at 309–10.

³⁹ Our firm has also argued that non-discrimination precepts—incorporated in professional ethics rules and standards, see, e.g., N.Y. RULES OF PROF'L CONDUCT r. 8.4(g) (N.Y. STATE

municipalities, do not explicitly protect caregiver or familial status, political affiliation, personal appearance, and a variety of other personal characteristics.⁴⁰ A duty of loyalty and good faith could offer an avenue for workers to achieve such protections without having to persuade courts that they already fall within enumerated protected classifications.⁴¹

Similarly, one may argue, an employer should be prohibited from gratuitously subjecting employees to other forms of hostile or abusive conduct. Sheer meanness and pettiness—if rising to a sufficient threshold of materiality and harm—may not comport with a duty of loyalty and good faith. There *should* be a place for civility at work. Even if not driven by a protected trait, extreme forms of workplace incivility needlessly harm workers, damage productivity, and benefit no one.

If this conception of the duty of loyalty and care were adopted, an employer would still remain liable for discriminating against or differentiating between workers based on recognized categories or characteristics. But employers could also be liable for gratuitously abusing or injuring employees for any illegitimate reason.⁴²

UNIFIED COURT SYS. 2018); MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018)—are an inherent part of the contractual bargain of good faith and fair dealing in the legal field, and should apply even if certain technical requirements of statutes such as Title VII are not met. Note that the covenant, with its emphasis on commercial norms, may often be industry specific.

⁴⁰ Certain states and municipalities already prohibit employment discrimination based on these characteristics. *See, e.g.*, N.Y.C. ADMIN. CODE § 8-107(1) (2020) (effective Aug. 28, 2020) (including “marital status, partnership status, caregiver status, [and] sexual and reproductive health decisions” among protected characteristics); N.Y. EXEC. LAW § 296(1)(a) (McKinney 2020) (including “familial status, marital status, [and] status as a victim of domestic violence” among protected characteristics); D.C. CODE ANN. § 2-1402.11(a) (West 2020) (including “marital status, personal appearance, . . . family responsibilities, . . . matriculation, political affiliation, status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking, or credit information” among protected characteristics); CAL. GOV'T CODE § 12940(a) (West 2020) (including medical condition and marital status among protected characteristics); S.F., CAL. POLICE CODE § 3303(a) (2020) (including height and weight among protected characteristics). However, such protections have not yet been universally adopted or fully incorporated into existing law.

⁴¹ *Cf. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (interpreting Title VII's prohibition on discrimination “because of sex” to cover discrimination on the basis of an employee's sexual orientation or gender identity); *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (May 23, 2007), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities#background> [<https://perma.cc/D7ZJ-ZBBM>] (“Although the federal EEO laws do not prohibit discrimination against caregivers per se, there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment.”).

⁴² We note that the Restatement of Employment Law proposes an implied default contractual term preventing employers from firing workers from engaging in off-duty activities that implicate their personal autonomy, unless the employer can prove that the employee's activity interfered with its legitimate business interests. RESTATEMENT OF EMPLOYMENT LAW § 7.08 (AM. LAW INST. 2015). The Reporters' Notes indicate that this proposal may be an offshoot or species of the implied covenant of good faith and fair dealing, but recognize that it is a “departure from existing law.” *Id.*

Another potentially more creative usage would entail revision of the law on arbitration agreements, likely through a federal statute to undo recent judicial interpretations and applications of the Federal Arbitration Act (FAA).⁴³ In the employment context, arbitration clauses inure to the benefit of employers at the expense of employees.⁴⁴ Such clauses are used to curtail employees' ability to achieve redress for substantive legal violations.⁴⁵ By imposing such compulsory provisions, employers are able to secure waivers of important rights belonging to their employees while offering them little if anything meaningful in return.⁴⁶ This may be seen as inflicting harm on workers out of pure self-interest. Indeed, the present jurisprudential regime on arbitration is the culmination of decades of industry strategy designed to erode the rights and remedies of employees and consumers.⁴⁷

In our professional experience, the vast majority of employees who are subject to arbitration clauses are entirely unaware of such obligations until they are injured and seek to sue for redress. Employers frequently bury such agreements in a sheath of mandatory paperwork. In some instances, workers do not need to sign at all: They are deemed bound simply by remaining employed after some modicum of notice is provided. Employers can even change the terms of employment midstream, imposing new arbitration requirements through a bulletin

reporters' notes, cmt. f; *see also* William R. Corbett, *Finding a Better Way Around Employment At Will: Protecting Employees' Autonomy Interests Through Tort Law*, 66 *BUFF. L. REV.* 1071, 1077–78, 1078 n.32 (2018); *see generally* Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 *U. ILL. L. REV.* 223 (2017).

⁴³ 9 U.S.C. §§ 1–16 (2018). Such legislation has been introduced in Congress, titled the Arbitration Fairness Act and the Forced Arbitration Injustice Repeal (FAIR) Act. *See generally* Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017); Arbitration Fairness for Consumers Act, S. 630, 116th Cong. (2019); Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019); Forced Arbitration Injustice Repeal Act, S. 610, 116th Cong. (2019). Legislative efforts have also been made at the state and local level. *See, e.g.*, N.Y. C.P.L.R. § 7515 (McKinney 2020). Duties of loyalty, good faith, and fair dealing could help to provide conceptual grounding and framework for these types of bills.

⁴⁴ *See generally* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 *BROOK. L. REV.* 1309, 1333–52 (2015) (describing the various ways in which arbitration impedes access to justice for workers).

⁴⁵ *See id.* at 1309–12.

⁴⁶ *See* Ann C. Hodges, *Employee Voice in Arbitration*, 22 *EMP. RTS. & EMP. POL'Y J.* 235, 238–40 (2018) (describing various ways in which employers may impose arbitration agreements on employees and the generally negative impact arbitration has on employee access to justice).

⁴⁷ *See, e.g.*, *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266, 1287–88 (D. Ariz. 2006), *report and recommendation adopted*, 503 F. Supp. 2d 1266 (D. Ariz. 2007); *see generally* Joshua T. Mandelbaum, Note, *Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?*, 94 *IOWA L. REV.* 1075 (2009).

devised—to the greatest extent possible—to fly under the radar.⁴⁸ In any case, employees rarely elect to arbitrate their claims voluntarily and with full knowledge and understanding of the consequences; instead, they are compelled to do so as a condition of employment.

Yet, the consequences of submitting to an employer's arbitration demands are quite acute. Employees relinquish basic legal and constitutional rights to pursue claims in open court before a jury of their peers. In arbitration, the deck is often stacked in favor of the employer. Further, under recent Supreme Court law, by imposing mandatory arbitration, employers are able to secure otherwise impermissible waivers of class and collective action rights.⁴⁹ Without efficient collective remedies, employees' substantive rights may be rendered a dead letter.⁵⁰

An employer duty of loyalty and care to workers could help to ameliorate this harsh scenario. Employers should not be able to trick or coerce employees into forfeiting their rights through arbitration clauses imposed as a condition of employment. Invocation of the duty seems particularly compelling when an employer foists new arbitration requirements on current workers as opposed to new hires. However, it is arguable that the duty should not be so restricted in its reach. Under a system animated by bonds of good faith and fair dealing, employers should not be entitled to force ordinary workers into arbitration or to use such arbitration clauses to secure waivers of rights, which would not be permitted outside of the arbitration context. Rather, employers should potentially be limited to entering negotiated arm's-length arbitration agreements with those possessing at least roughly commensurate bargaining power: executive-level employees and perhaps labor unions acting with the benefit of legal advice.

IV. SUGGESTED LIMITING PRINCIPLES

Like any doctrine, the duty of loyalty should not be limitless but circumscribed by reasonable boundaries. As in many areas of law, these

⁴⁸ See Hodges, *supra* note 46, at 239–40 (“Employers use a variety of methods to get agreement from their employees, some employed to obscure their intent.”).

⁴⁹ See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

⁵⁰ See Sternlight, *supra* note 44, at 1343–52 (describing the harm class action waivers impose on worker rights and access to justice). We note, however, that in certain cases, employees have been able to file hundreds, or even thousands, of individual arbitrations, causing their employers' tactics to backfire. Even there, employers have sought court intervention to save them from their own arbitration contracts. See Braden Campbell, *New Postmates Suit Pans Workers' 'Abusive Tactics'*, LAW360 (Mar. 26, 2020, 9:58 PM), <https://www.law360.com/articles/1257424> [<https://perma.cc/YH23-QGEC>]; Dorothy Atkins, *Postmates Still Can't Pause 10K Wage Arbitration Proceedings*, LAW360 (Apr. 16, 2020, 7:04 PM), <https://www.law360.com/articles/1264176> [<https://perma.cc/G7ZD-L6BE>].

can generally be determined through the interpretative and iterative process. The universal contractual covenant of good faith and fair dealing—on which our proposal is largely predicated—has proven relatively workable to administer.⁵¹ Moreover, our proposed duty of loyalty would comport with the familiar business judgment rule, which does not shelter illegal activity, self-dealing, or other illicit breaches of loyalty, care, or good faith.⁵² Under our proposal, proprietors would maintain their general prerogative to act in the perceived best interests of the business—as long as they are not arbitrarily and gratuitously inflicting harm on workers.

Under the approach set forth above in Sections II–III, the duty would not result in the outright abolishment of employment “at will,” but would merely mitigate that prevailing construct with common-sense constraints. In most instances, employers could still freely discharge workers, so long as they took such action in good faith. In other words, our proposal would “limit the employer’s discretionary power in order to prevent bad faith discharges, not [] give employees permanent job security.”⁵³

While imposing a reciprocal duty on employers and employees does not necessarily demand a one-to-one correspondence in the specific obligations owed by each side, at least a reasonable correlation is advisable. Exposition of the details of an employer’s duty should be guided by existing authority regarding employees’ duty of loyalty as well as the covenant of good faith and fair dealing.

CONCLUSION

The backbone of employment law derives from centuries-old concepts of master and servant, developed in pre-modern England.⁵⁴ Over time, we have developed republican forms of government, but the employment relationship remains fundamentally undemocratic. As a result, significant aspects of employees’ lives are subject to the unilateral control of their employers.⁵⁵ Despite this, employers are ordinarily unrestrained in their dealings with employees, while, paradoxically,

⁵¹ See, e.g., Riedy & Sperduto, *supra* note 4, at 308–11; Note, *Protecting At Will Employees*, *supra* note 27, at 1840.

⁵² See, e.g., *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006) (holding that the business judgment deference can be rebutted “if the plaintiff shows that the directors breached their fiduciary duty of care or of loyalty or acted in bad faith.” If shown, “the burden then shifts to the director[s] . . . to demonstrate that the challenged act or transaction was entirely fair to the corporation and its shareholders.”).

⁵³ Note, *Protecting At Will Employees*, *supra* note 27, at 1840.

⁵⁴ See *supra* note 4 and accompanying text.

⁵⁵ See generally ANDERSON, *supra* note 10.

employees owe their employers “uberrima fides.”⁵⁶ Our current assemblage of labor and employment statutes and regulations tempers this regime and provides important protections to workers, but it is incomplete. A more comprehensive approach is called for. Here, we propose replacing the one-sided duty of loyalty—a prominent vestige of the master-servant origins of employment law—with reciprocal obligations, under which employers owe a duty of loyalty and good faith to their employees. Implementing such a concept would help bring the American workplace into the twenty-first century and ensure that workers’ interests are appropriately considered in all circumstances.

⁵⁶ *Supra* note 5 and accompanying text.