

RESTATEMENT OF EMPLOYMENT LAW
MOTION TO DEFER CONSIDERATION OF ALL, OR PART, OF CHAPTER 8

IT IS HEREBY MOVED that Chapter 8 (Employee Duty of Loyalty and Restrictive Covenants) of Tentative Draft No. 3, RESTATEMENT OF THE LAW THIRD EMPLOYMENT LAW, be deferred from interim or final consideration until the Reporters have submitted the appropriate Tentative Draft of the chapter covering damages, to the American Law Institute. Alternatively, IT IS HEREBY MOVED that Sections 8.01 through and including 8.04, relating to "Duty of Loyalty," be so deferred.

Proposed by Joseph D. Garrison of New Haven, CT

STATEMENT IN SUPPORT OF THE PROPOSED MOTION

The proposed Chapter contains significant expansions of the common law duty of loyalty. It has no mutuality, as non-contract employees are generally at-will. Because an "implied duty of good faith and fair dealing must be read consistently with the at-will nature of the [employment] relationship," see Section 2.06 (b), normally the employer has no binding duty to any at-will employee. In those circumstances where an implied duty of good faith and fair dealing does exist, the duty is contractual.

Chapter 8, however, expands the common-law duty of loyalty in two major respects: (1) it extends the duty to all employees, including rank-and-file and lower level employees, and (2) it appears to allow an action in tort, even though the underlying foundation for the duty is contractual. Thus, a claim of breach of the non-competition agreement or a non-solicitation agreement seems to allow expansion of the remedies available beyond contract damages, to include undefined tort damages.

This expansion is particularly troubling with regard to confidential information, which broadly defines confidential information to include "all types of information," "all forms of information," and "all manner of information." Without knowing what the chapter on damages will provide, a perhaps unintended consequence of allowing a claim in tort to be brought by employers against employees will result, assuredly, in a substantial increase in counterclaims in employment cases. Those claims do not exist presently, because most employees are not bound by written confidentiality agreements.

Many of the reported breach of duty of loyalty cases do involve quite egregious factual situations. Therefore, proposed remedies such as disgorgement of all profits or forfeiture of wages during the period of "disloyalty" have been considered and, often due to the bad facts, are adopted. Other cases, however, seemingly correctly note that even a disloyal employee provides some benefit to the company and may be entitled to retain some of the wages earned, or else require an actual showing of economic harm rather than disgorgement. Neither the cases, nor this Chapter, have given much thought to the "garden variety" case, which may become in fact the common case if counterclaims are routinely pled.

For these reasons, it is respectfully submitted that the motion should be granted, to allow further study to be given to the proper parameters of the duty of loyalty.