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## NOTES

# NONE OF YOUR BUSINESS (INTEREST): THE ARGUMENT FOR PROTECTING ALL EMPLOYEE BEHAVIOR WITH NO BUSINESS IMPACT

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### INTRODUCTION

At the beginning of the twentieth century, major American companies had entire departments staffed with hundreds of “sociological specialists” who were charged with monitoring the private behavior of company employees—often in their homes—to make sure they did not drink too much, had appropriate sex lives, kept their houses clean, and used their leisure time properly.<sup>1</sup> Worker privacy and autonomy has made tremendous advances since that time, but even today employers continue to take actions against employees whose off-the-job behavior they find objectionable.<sup>2</sup> Recent examples of employee “offenses” include cohabitating with a partner outside of marriage, smoking, drinking, motor-cycling, and even having a high cholesterol level.<sup>3</sup>

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1. Terry Morehead Dworkin, *It's My Life—Leave Me Alone: Off-the-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47, 47 (1997).

2. *Id.*

3. *Id.* at 47 nn.2-7.

The baseline presumption at common law is that employment is at the will of either party. Even with the modern dilution of this doctrine and the many exceptions that have been carved out by courts and by statute, employers still have the ability to discharge, or constructively discharge, an employee for doing anything not protected by a specific statute or not included in the nebulous protection against violations of “public policy.” This broad deference to employers’ judgment in employment matters is a result of judicial reluctance and inability to deal with issues relating to business efficiency and job performance. At-will employment encourages the flexibility and freedom needed for managers to make efficient decisions that best help their businesses compete in the marketplace. Certainly there is a consensus that managers know much better than judges what policies are needed to foster peak performance from their workforce. However, employees should not have to relinquish autonomy over every aspect of their lives just to get or keep a job. Employers have a vested interest in controlling those aspects of employees’ lives that reasonably affect the employees’ performance on the job, but that does not justify giving employers *carte blanche* to control every aspect of their employees’ lives. This Note argues that employers should only be able to take employment actions against employees for behavior that sufficiently impacts legitimate business interests.<sup>4</sup>

Part I begins by examining the traditional at-will system and its faulty dependence on the market system to protect employees. Part II then explores the various common law and statutory protections that have been used to attempt to alleviate this problem. Based on the shortcomings of these protections, Part III argues that states should adopt a law prohibiting employment actions based upon employee behavior that does not sufficiently impact a legitimate business interest of the employer.

## I. AT-WILL EMPLOYMENT AND ITS FAULTS

For many years, employment in America has been presumed to be terminable at the will of either party.<sup>5</sup> Employees are free to contract for other working arrangements, but in the absence of any express or implied agreement, the employment relationship is presumed to be at-will. Not only does this arrangement leave some sixty million American workers

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4. For a more detailed discussion of the legal definitions of “sufficiently” and “legitimate business interests,” see *infra* Part III.

5. See, e.g., *Rulon-Miller v. IBM*, 208 Cal. Rptr. 524, 529 (Ct. App. 1984); *Payne v. W. & Atl. RR. Co.*, 81 Tenn. 507, 517–18 (1884).

without much job security,<sup>6</sup> but it also keeps the courts out of many day-to-day managerial decisions, assuring flexibility and allowing employers to efficiently shape their workforce.<sup>7</sup> Under strict at-will arrangements, employers need not worry whether courts will agree with what the employer sees as inefficient individuals or inefficient behavior that merits termination or punishment. Essentially, strict at-will contracts also allow any rationale to justify terminating an employee, whether or not it has any conceivable effect on the employer's legitimate business interests.

#### A. THE MARKET'S EFFECT AND LIMITATIONS

Ideally, the market should keep employers' policies in line with the demands of efficiency and remove unnecessary restrictions on employee behavior.<sup>8</sup> Employers who put unnecessarily restrictive policies into effect will have to pay their employees more to accept these added provisions than they are worth in terms of business efficiency, and they will ultimately terminate productive employees who refuse to meet such restrictions.<sup>9</sup> In theory, these inefficient businesses will not be able to survive in the competitive marketplace.<sup>10</sup> Indeed, this pressure influences many employers in the present system, particularly those faced with a competitive labor market.<sup>11</sup> Such employers need to attract good workers, causing them to balance the legitimate interests of their businesses with the privacy needs of their employees.

The market system, however, does not always maintain this balance, as seen from the wide variety of no-impact,<sup>12</sup> off-the-job behavior for which employees are terminated.<sup>13</sup> Legal economists have identified many reasons for why the market does not protect against these restrictions.

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6. See Jack Stieber & Michael Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REFORM 319, 322 (1983).

7. Besides these "business interests" such as flexibility and efficiency, there is an argument that employers also have a property interest in controlling their workforce even beyond their business interests: Employers have built the factory, bought the machines, and are paying the wages for those who operate the machines, so they should be able to decide who operates those machines in their factories. This argument is discussed and dismissed for the purposes of this Note in Part I, *infra*.

8. See John Edward Davidson, *Reconciling the Tension Between Employer Liability and Employee Privacy*, 8 GEO. MASON U. CIV. RTS. L.J. 145, 161 (1998).

9. See *id.*

10. See *id.* at 161-62.

11. See *id.* at 165.

12. When the term "no-impact" behavior is used in this Note, it is meant to refer to employee behavior that has no (or insufficient) impact on the employer's legitimate business interests.

13. It is estimated that there are approximately 140,000 nonprobationary, nonunionized firings without "just cause" each year. See Stieber & Murray, *supra* note 6, at 324.

First, many of the restrictions concern matters that cannot be properly quantified in terms of a monetary value.<sup>14</sup> The problem with termination based on no-impact behavior, such as how employees spend their leisure time or how clean they keep their houses,<sup>15</sup> has less to do with money and more to do with the value of individual dignity. Insofar as the market fails to properly value these employee concerns, it fails to efficiently reflect their interests.<sup>16</sup>

Second, even if the value of things like individual dignity and liberty could be accurately monetized, the market only gives effect to these valuations to the extent that employees have the ability to pay for them.<sup>17</sup> Many employees are dependent on a particular job and income. They are thus unable to pay the “price” for autonomy and liberty, which is accepting lower wages or losing the job. This does not mean, however, that autonomy or liberty is any less valuable to the employee.

Third, the market for labor is unbalanced and inefficient, which makes the “market price” for employee autonomy grossly inaccurate.<sup>18</sup> There are transaction costs involved with changing jobs, and these costs grow as employees gain job-specific skills.<sup>19</sup> Furthermore, employees often do not have the market power to hold out for a better job or better conditions.<sup>20</sup> Usually, the employer’s threat of termination is a serious one for an employee; conversely, with the relative interchangeability of low-skilled workers, the employee’s threat of quitting places few constraints on the employer.<sup>21</sup> Therefore, the theoretical mutuality involved in the presumption of at-will employment is rather illusory.<sup>22</sup>

This imperfect market situation is exacerbated by imperfect information regarding restrictive policies, particularly at the inception of

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14. See Davidson, *supra* note 8, at 163–64.

15. These examples are used because they almost certainly do not relate to any legitimate business interest, unless, for example, leisure time or a personal private residence is used for entertaining business guests. Many other behaviors or characteristics for which employees have been terminated present a much stronger argument for a “sufficient” effect on “legitimate business interests.” Courts would have to weigh these “business effect” arguments for each situation, but cases involving behavior like those in these examples would be relatively clear. See *infra* Part III for a more nuanced discussion.

16. See Davidson, *supra* note 8, at 163–64.

17. See *id.* at 163.

18. See *id.* at 164–65.

19. See *id.*

20. See *id.* This problem is particularly acute for nonunionized employees that tend to be subject to at-will employment.

21. See Stieber & Murray, *supra* note 6, at 321.

22. See Davidson, *supra* note 8, at 165.

the contract.<sup>23</sup> Even though most employers do not intentionally hide restrictive practices when they hire an employee, they usually do not emphasize them because they wish to avoid focusing on the less attractive aspects of the job.<sup>24</sup> Employees are generally reluctant to make up for this shortcoming by fleshing out this information themselves because they do not want to ask and risk being seen as a difficult employee.<sup>25</sup> Even if the employee has perfect information at the time of hiring regarding an employer's off-the-job behavior restrictions, the employer is still free to make up new rules<sup>26</sup> after the employee develops job-specific skills and becomes more dependent on keeping the job. The employer is free, under absolute at-will, to terminate the employee for no particular reason at all, even without creating a new policy. Finally, employees may know of the restriction but not realize that it may someday apply to them if their conditions change.<sup>27</sup> Once the restriction applies, it is usually too late for employees to respond. All of these factors together create unpredictability and dependence, which considerably undermine the market's ability to create an accurate valuation for employee autonomy and privacy.

However, even if the employment market's valuation of autonomy were correct, one question would still remain: Should employers be able to purchase control over their employees' non-work lives in the first place, even if it is for a price that truly reflects the values and needs of both parties? The complete answer to this question involves issues of morality, and indeed the law does put some morally-based restrictions on such contracts, such as the ban on indentured servitude<sup>28</sup> and various public policy restrictions to be discussed later.<sup>29</sup> However, one aspect of the question at issue in this discussion is relatively settled at law and free from moral ambiguity: It is permissible to bargain for people to do, or not do, almost anything. For example, it is almost certainly legal, and most would say it is moral, to allow one person to pay another to maintain a low cholesterol level. Likewise, few would object to a contract where one party agreed to pay another to stop riding a motorcycle or to stop drinking, as

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23. *See id.*

24. *See id.*

25. *See id.*

26. Even after the courts limited the at-will doctrine by implying a duty of good faith and fair dealing and finding more protections from implied contractual provisions, employers are still free to institute new restrictive policies, as long as they do not conflict with previously implied contract provisions and they are administered consistently and in good faith. *See* discussion *infra* Part II.

27. *See* Davidson, *supra* note 8, at 165.

28. *See, e.g.*, 18 U.S.C. § 1584 (2000); *United States v. Shackney*, 333 F.2d 475, 476 (2d Cir. 1964) (discussing statutory proscription against involuntary servitude).

29. *See infra* Part II.C.

long as the parties both fairly agreed to the exchange and the terms were not otherwise unconscionable.

The injustice that flows from employers' policies restricting no-impact employee behavior is not the result of the content of the restrictions themselves, but in the way that the restrictions are "purchased" by the employer. The market fails here, or at least is suspect, because the employer has the ability to use its power over the employee's livelihood to gain leverage over other, non-work areas of the employee's life.<sup>30</sup> This is much like a monopolist who abuses control over one aspect of an industry to enter and control other aspects. Employers control the mode of production, thus providing them substantial control over the business-related, economic aspect of their employees' lives.<sup>31</sup> Left unchecked, employers can and do use this influence to make demands in other parts of their employees' lives as well.<sup>32</sup> In essence, strict at-will employment allows employers to use economic influence to gain social, moral, and even political influence over their employees.

The law allows the employer to have economic influence over its employees in the first place because it is necessary for efficient job performance and efficient operation of the business.<sup>33</sup> However, this justification for employer influence does not apply to influence beyond that required by the interests of the business. The market may discourage such unnecessary control by adding some small increases in labor costs as a result of each restriction, but the price that employers must pay for social or moral control is heavily discounted by the limitations of the market that were discussed earlier. Employers drive down the price even further by linking the social or moral "transaction" with an employment bargain that many employees are, for all practical purposes, forced to accept.<sup>34</sup>

#### B. AN ILLUSTRATION OF THE FAILURE OF THE MARKET

An illustration of the discounted control employers receive through pure at-will employment is found in *New York v. Wal-Mart Stores, Inc.*<sup>35</sup> This case involved Wal-Mart's policy of prohibiting a married employee to

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30. See Lewis L. Maltby & Bernard J. Dushman, *Whose Life Is It Anyway—Employer Control of Off-Duty Behavior*, 13 ST. LOUIS U. PUB. L. REV. 645, 659 (1994).

31. See *id.*

32. See *id.* at 646.

33. See *id.*

34. See Davidson, *supra* note 8, at 165.

35. 621 N.Y.S.2d 158 (App. Div. 1995).

date another employee who is not that person's spouse.<sup>36</sup> Take, for example, the average applicant for an entry-level position at Wal-Mart. This employee probably has relatively limited employment options, and certainly does not want to ruin any chance at one of those options. The employee probably is unaware of a clause about fraternization buried somewhere in the associate handbook that was given after acceptance of the job and that may have gone unread.

This employee may value autonomy, but must secure a job even if it means being unable to date certain people, because being able to date a person will not be very useful if one cannot even afford to go on a date. Even if the employee does not need the job to meet basic needs, little or no value may be assigned to dating autonomy because there is no way to know how valuable it might be in the future or how it may feel when it is restricted. For example, an employee may know about the policy but not think that they will ever be separated from their current spouse. By the time their conditions change and they are dating while separated from their spouse and hence affected by the policy, they have probably received several raises, developed Wal-Mart-specific skills, and would be economically devastated if they lost their job and were forced to start out from the bottom at another store.

If any one of these situations applies to a potential applicant to Wal-Mart, that applicant will likely be willing to accept the antifraternization policy without extra monetary consideration. The newly hired worker will see the antifraternization policy, if even aware of it, as simply part of the job—even though it may have absolutely no impact on job performance. If Wal-Mart is able to satisfy its workforce needs with individuals such as these, it will pay absolutely nothing in return for the control that it will gain

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36. It could be argued that Wal-Mart's fraternization policy has a sufficient connection to a "legitimate business interest" to make it acceptable even under the guidelines proposed by this Note. For example, an employer could argue that there are fairness or morale issues involved when one employee, who supervises or has the ability to favor another employee, dates that employee. An employer might also make the argument that dating relationships might cause unnecessary tension in the workplace. While the first argument probably has merit, there was no supervisory issue in this case. The tension in the workplace argument might have some merit as well, but it would be much tougher to prove a sufficient threat to a business interest. In *Wal-Mart Stores* specifically, it would be a tough sell because Wal-Mart's policy did not prohibit all dating relationships between employees—only those between married employees and nonspousal employees, ostensibly because of moral objections to that specific type of adulterous relationship, and not because of an objection to all interemployee dating. Regardless of whether this particular policy sufficiently relates to a legitimate business interest, the point is that this distinction should be the focus of the discussion. If this fraternization policy, or any fraternization policy, is motivated purely or mainly by morality or the "taste" of the employer and has no arguable relation to a legitimate business interest, then it should not be allowed.

over its employees' dating autonomy. In essence, Wal-Mart gets free social and moral control that may not be justified by its legitimate business interests.

Of course, there are some people who do not fall into one of the above situations. These are people who do read through employee handbooks, know the true value of their dating autonomy, have skills that are generic and never become job-specific, know in advance that they will be single and want to date one of their coworkers, do not necessarily need a job at Wal-Mart to survive, and have plenty of employment options. These people, however, are a small minority. Nevertheless, Wal-Mart does miss these applicants and loses these employees when it upholds its policy.<sup>37</sup> Theoretically, this result has to have some effect on the size of the overall labor pool from which Wal-Mart gets its workers, which might have some marginal effect on the price it must pay for labor. But as long as there are enough workers available that will follow Wal-Mart's "no fraternization" policy for absolutely no extra consideration, Wal-Mart gets this extra social control for virtually nothing, courtesy of the law's at-will presumption.<sup>38</sup> While potential applicants' dating autonomy is difficult to monetize or value precisely, one can be fairly certain that the value is much greater than what Wal-Mart is paying.<sup>39</sup>

### C. THE EMPLOYER PROPERTY INTEREST ARGUMENT

The argument can be made that employers also have a property interest in controlling their workforce beyond their business interests. The

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37. Wal-Mart's efficiency will also be reduced insofar as it terminates good, productive employees and is unable to replace them with new employees of equal knowledge and productivity. However, particularly for rather unskilled positions, this loss would be relatively small.

38. If *some* other major employers competing for the same pool of labor also had a similar fraternization policy, then the potential applicant would have even fewer alternatives for employment with the freedom to fraternize, and hence less market power and more of a likelihood of having to accept the policy. If *all* employers competing in a specified market adopt the same policy, then *every* worker must live with the restriction because they have no choice, and employers would have unilaterally decided to usurp this employee autonomy. Ironically, when an employer decides to break ranks, eliminate the restriction, and cater to the small minority who value dating autonomy, it might be able to pay smaller wages in exchange for easing the restriction—in effect, it would be selling back the autonomy that had just been unilaterally taken without business justification.

39. If Wal-Mart had to enter into a separate contract with its employees in exchange for their right to fraternize, the cost to Wal-Mart would certainly be substantial and the company would likely abandon its policy. However, this measurement might be misleading because Wal-Mart would probably have to pay a substantial amount of money to get separate contracts guaranteeing compliance with even job-related policies. Nevertheless, insofar as non-job-related policies and social/moral restrictions are truly separate from the employment bargain, one might argue they should be treated and executed separately.

reasoning is that employers have built the factory, bought the machines, and are paying the wages of those who operate the machines. Therefore, the argument goes, they should be able to decide who operates those machines in their factories. If this argument is unconditionally accepted, there is little point in discussing any restrictions on the right to hire and terminate because any restriction would violate this broad definition of employer property rights, including all current laws banning discrimination.

This strong deference to the property rights of employers is exactly what delayed implementation of many laws aiming to prevent the exploitation of workers, such as the federal minimum wage.<sup>40</sup> “At one time, however, laws regulating labor relations were regarded, without more, as a per se deprivation of property rights.”<sup>41</sup> These laws “were considered totally outside the scope of the state’s police power.”<sup>42</sup> However, because of the crucial nature of the employment relationship, and because of imbalances in bargaining power in the labor market, lawmakers have chosen to steadily increase protections for employees, adding minimum wages, maximum hours, antidiscrimination laws, occupational safety laws, and even some current protection for employee autonomy that will be discussed later. As long ago as 1876, the Supreme Court held that the use of property in a manner that affects the public interest creates in the public the right of regulation.<sup>43</sup> Preventing economically coercive control of employees’ lives is almost certainly in the public interest, so it is clear that employers’ property interests do not bar lawmakers from regulating the employment relationship.<sup>44</sup>

Nevertheless, employers can and do make the argument that even though the employment relationship can be regulated, it should *not* be regulated because of the employers’ property interests. Again, the argument is that employers have paid for the factories and machines, and they pay the wages for the employees’ labor, so they should be able to choose which labor they “buy,” just as they chose the characteristics of the machines that they have purchased.<sup>45</sup> They are buying the labor, so they should be able to choose the laborer.

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40. See Michael Kaplan, Comment, *Is Labor a Widget: A Comparative Study*, 59 TUL. L. REV. 1517, 1531 (1985).

41. *Id.* at 1529.

42. *Id.* (citing *Lochner v. New York*, 198 U.S. 45, 56-57 (1905)).

43. See *Munn v. Illinois*, 94 U.S. 113, 126 (1876).

44. The most obvious evidence of this is the existence of at least some rather extensive lifestyle protection laws.

45. See Kaplan, *supra* note 40, at 1530.

As one author succinctly put it, however, labor is not a “widget.”<sup>46</sup> People have feelings and a sense a dignity; they develop job-specific skills, and employers should not be able to simply discard them on a whim. They have lives outside of their roles as mere tools of the employer. As other authors put it, “Employees are not property. An employer purchases an employee’s labor with a paycheck, not the employees themselves.”<sup>47</sup>

Furthermore, even if employees were considered “property” in which employers have a legitimate “interest,” regulation would be justified by the substantial dysfunction of the market for this “property.”<sup>48</sup> The law is continually stepping in to regulate poorly functioning markets, from regulation of monopolies and unconscionable contracts to regulations on specific industries like insurance or car sales. Whenever the market is not functioning properly, there is a justification for some type of regulation because the public interest can benefit from the elimination of either the source of the market failure or its symptoms. The difficulty is finding ways of fixing the market that address its core problems without unnecessarily stifling it at the same time. The remainder of this Note endeavors to search for this solution.

## II. CURRENT PROTECTIONS

Unchecked, at-will employment can be used to force employees to remain silent when the public is in danger, to surrender their political rights, and even to commit felonies. Fortunately, courts and legislatures have enacted policies to curtail the most serious abuses of employers’ at-will power. Some recent statutes even aim to eliminate employer influence over a wide variety of off-the-job activities, though these statutes are small in number and generally limited in scope.<sup>49</sup> Nevertheless, these policies have provided at least some options for employees seeking redress for at-will employment actions based on no-impact behavior. This Section will explore each of these options.

### A. EXPRESS AND IMPLIED CONTRACT PROTECTION

One of the basic assumptions about at-will employment has always been that employers and employees are free to cancel the at-will presumption and contract for different working arrangements, including a

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46. See generally *id.* (using “widget” analogy).

47. Maltby & Dushman, *supra* note 30, at 659.

48. See *supra* Part I.A.

49. See *infra* Part II.D.

specific duration for the employment and/or protection against discharge without just cause. Just cause protection is expressly included in almost all collectively bargained contracts,<sup>50</sup> but is relatively rare in private, nonunionized employment relationships. In some cases, however, employers take actions or make statements that cause an employee to justifiably believe that he or she will only be terminated for just cause, and sometimes the employer goes as far as to say or hint that off-the-job employee behavior that does not affect business interests will not be just cause for termination.

In these cases, courts have become increasingly willing to imply contractual protection, as seen in *Rulon-Miller v. IBM*.<sup>51</sup> The plaintiff, Virginia Rulon-Miller, was terminated for an off-the-job relationship that she maintained with a former employee of IBM after he had transferred to work for a competitor.<sup>52</sup> A chairman of IBM had issued a memorandum earlier to all IBM managers stating that “[IBM has] concern with an employee’s off-the-job behavior only when it reduces his ability to perform regular job assignments, interferes with the job performance of other employees, or if his outside behavior affects the reputation of the company in a major way.”<sup>53</sup> From this statement, the court implied an employment contract term for Rulon-Miller that gave her protection from termination for off-the-job activities that had none of these listed effects.<sup>54</sup> Despite claims that Rulon-Miller’s relationship created a conflict of interest as codified in IBM’s employment policies manual, the court found no conflict and awarded Rulon-Miller substantial damages.<sup>55</sup>

Courts have used similar reasoning to provide relief to discharged employees in a number of cases,<sup>56</sup> but such implied contract protection does nothing to alleviate the shortcomings of the market in protecting employees’ off-the-job interests. Enforcing implied contract provisions simply gives weight to quasi-agreements or statements voluntarily made by the employer. The employer still has the discretion to withhold protection

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50. Around ninety-seven percent of all collective bargaining agreements require an employer to have “just cause” before disciplining or discharging an employee. Tamara F. Stenzel, *Title VII or Collective Bargaining: Must an Employee Choose One Over the Other?*, 2 NE. U. F. 119, 121 n.12 (1997).

51. 208 Cal. Rptr. 524, 529 (Ct. App. 1984).

52. *See id.* at 528.

53. *Id.* at 530.

54. *See id.* at 529.

55. *See id.* at 534–35.

56. *See, e.g., Pugh v. See’s Candies, Inc.*, 171 Cal. Rptr. 917, 927 (Ct. App. 1981) (finding implied promise on part of employer to refrain from engaging in arbitrary conduct in discharging at-will employee).

for off-the-job behavior. The only protection offered by such implied contract terms is against deceptive statements or promises that an employer uses to curry favor with employees, but which the employer subsequently ignores. The chairman who wrote the memorandum in *Rulon-Miller* probably regretted writing it because he did not have to provide the protection and was probably never going to receive any real consideration for it, since his employees had no practical means to oppose any off-the-job restriction in the first place.

Thus, this implied contract theory does very little to protect employee autonomy because it appears to require a voluntary company statement implying protection. Accordingly, parties attempting to use implied contracts to obtain redress for off-the-job behavior discharges have generally been unsuccessful, despite the plaintiff's success in *Rulon-Miller*, because the type of unconditional voluntary statements present in that case are relatively rare.<sup>57</sup> In addition, a breach of contract claim is "less attractive to plaintiffs because only contract damages are available."<sup>58</sup>

#### B. DISCRIMINATION STATUTES

One basic, established way employees may seek protection from employer restrictions is through antidiscrimination statutes. Most notably, Title VII provides protection against discrimination based on race, color, religion, sex, and national origin.<sup>59</sup> A majority of states have added to this list a ban on discrimination based on marital status.<sup>60</sup> These protections are far from complete, but they do touch on many common reasons for non-business-related employment actions.

Because the literature on Title VII is so extensive, this Note will only discuss it briefly. Title VII provides protection for no-impact employee behavior when that behavior relates in some way to the religious beliefs, national origin, sex, race, or color of the employee or sometimes the employer.<sup>61</sup> For example, a common suit based on religious beliefs involves employees who suffered adverse job consequences because their

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57. See, e.g., *Coatney v. Enterprise Rent-A-Car Co.*, 897 F. Supp. 1205, 1209–11 (W.D. Ark. 1995) (holding that pro-employee fraternization policy in personnel handbook did not protect employee's dating another employee due to disclaimer in manual). Such disclaimers are now common.

58. Dworkin, *supra* note 1, at 78.

59. See 42 U.S.C. §§ 2000e to 2000e-17 (2000); Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 379 (1995).

60. See Dworkin, *supra* note 1, at 56.

61. See Turner, *supra* note 59, at 379.

behavior did not follow the employer's idea of proper religious conduct.<sup>62</sup> In cases where the religious beliefs of the employer and employee have come into conflict, "most courts have erred on the side of protecting the employee because of the employee's relatively powerless position."<sup>63</sup> However, this type of protection is by definition only applicable to employee behavior relating to a religious belief, and the rest of Title VII only protects employee behavior related to national origin, sex, race, or color. Though these categories and their associated behaviors do reach many of the most common reasons for employer action based on no-impact behavior, all other behavior is left unprotected by Title VII.

States have added other categories of protection against employer discrimination. A widespread example is the protection available in most states against employment actions based on marital status.<sup>64</sup> Statutory formulations and court interpretations of these laws range from protecting against discrimination based solely and directly on whether an employee is married or unmarried<sup>65</sup> to protection based on the traits of the employee's significant other, "such as occupation, race, stance on an issue, illegal or questionable actions, or marital status."<sup>66</sup>

However, even in the most expansive versions of these marital status statutes, like any discrimination statute, they still only protect a small fraction of the almost infinite varieties of employee behavior—specifically, the behavior that is in some way connected to a protected trait. True safeguards of employee autonomy would require a much broader, more flexible source of protection. One broader source of protection is the public policy exception to the at-will doctrine, which is the topic of the next section.

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62. See, e.g., *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 846–47 (Minn. 1985). In that case, Christian employers refused to hire and terminated individuals living with, but not married to, a person of the opposite sex, people strongly committed to a non-Christian religion, and young, single women working without their fathers' consent. *Id.*

63. Dworkin, *supra* note 1, at 69 (citing *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 621 (9th Cir. 1988) ("Where the practices of employer and employee conflict . . . it is not inappropriate to require the employer, who structures the workplace to a substantial degree, to travel the extra mile in adjusting its free exercise rights, if any, to accommodate the employee's Title VII rights.")).

64. An example of such a statute is that of California, which reads, "It shall be an unlawful employment practice . . . [f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, *marital status*, sex, or sexual orientation of any person, to refuse to hire or employ the person . . ." CAL. GOV'T CODE § 12940 (West 2001) (emphasis added). Some twenty-five other states and Washington, D.C. now provide protection for marital status. See Dworkin, *supra* note 1, at 56 n.60.

65. See Dworkin, *supra* note 1, at 58.

66. *Id.* at 58–59.

## C. WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

At first, courts were reluctant to get involved in wrongful discharge cases because they viewed the employment relationship as private and thought that the rights of management were not amenable to outside interference.<sup>67</sup> The facts of some cases cried out for a legal remedy, however, and courts first reacted by creating the common law tort of wrongful discharge in violation of public policy.<sup>68</sup> One of the first wrongful discharge cases was *Petermann v. Local 396, International Brotherhood of Teamsters*, where the plaintiff was a business agent for the Teamsters union who refused to perjure himself in front of a state legislative committee as instructed by the union, and was discharged the following day.<sup>69</sup> The *Petermann* court found that the public policy against soliciting perjury barred the union from terminating the plaintiff for refusing to lie under oath.<sup>70</sup> Slowly, this common law doctrine has spread; today, it is recognized by at least three-fifths of the states to some degree.<sup>71</sup>

The public policy exception has been successful in protecting five main categories of employee behavior: (1) refusing to commit an act that is unlawful under a state's constitution, statutes, or common law; (2) fulfilling an important public obligation, such as political participation<sup>72</sup> or jury duty; (3) exercising a statutory or constitutional right or privilege, such as filing for worker's compensation; (4) whistleblowing; and (5) challenging employer behavior that is prohibited by a professional code of ethics governing employer behavior.<sup>73</sup>

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67. See Cathryn C. Dakin, Note, *Protecting Attorneys Against Wrongful Discharge: Extension of the Public Policy Exception*, 44 CASE W. RES. L. REV. 1043, 1047 (1995).

68. See *id.* at 1053-54.

69. 344 P.2d 25, 26 (Cal. Dist. Ct. App. 1959).

70. See *id.* at 27-28.

71. See Jane P. Mallor, *Discriminatory Discharge and the Emerging Common Law of Wrongful Discharge*, 28 ARIZ. L. REV. 651, 652 (1986).

72. See, e.g., *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 899-900 (3d Cir. 1983) (holding wrongful discharge in violation of public policy when employee dismissed for refusing to politically lobby on behalf of employer).

73. See Angela Gilmore, *Employment Protection for Lesbians and Gay Men*, 6 LAW & SEXUALITY 83, 93 & nn.80-84 (1996) (citing *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985) (holding wrongful discharge in violation of public policy when employee dismissed for refusing to violate law with criminal penalty); *Shaffer v. Frontrunner, Inc.*, 566 N.E.2d 193, 196-97 (Ohio Ct. App. 1990) (holding wrongful discharge in violation of public policy when employee dismissed for fulfilling public duty of jury service); *Murry v. St. Michael's Coll.*, 667 A.2d 294, 298 (Vt. 1995) (holding that it is wrongful discharge in violation of public policy when an employee is dismissed for filing a worker's compensation claim); *Palmer v. Brown*, 752 P.2d 685, 689-90 (Kan. 1988) (holding that it is wrongful discharge in violation of public policy when an employee is dismissed for reporting employer's Medicaid fraud); *Rocky Mountain Hosp. & Med. Serv. v. Mariani*, 916 P.2d

The problem with using the public policy exception to protect off-the-job employee behavior is that, as shown by this list of covered areas, it is generally limited to employee actions that are specifically protected by some outside constitutional provision, statute, common law, or sometimes a regulation or professional code.<sup>74</sup> Because protecting the vague concept of “public policy” without specific legal provisions would expose employers to substantial liability, courts have maintained strict limits on what is covered by the exception.<sup>75</sup> Accordingly, this exception has never been used to protect general employee autonomy where the autonomy in question is not backed by a specific legal provision strong enough to create a “public policy.”<sup>76</sup>

An argument can be made that the public policy exception should protect all employee autonomy not relating to an employer’s business interests. The argument follows that since employers generally hold a tremendous bargaining power advantage over employees and applicants,<sup>77</sup> it is a matter of public concern to ensure that employers do not abuse this power to coerce their employees into contract terms to which they would never freely have agreed if given a fair choice. Such a public policy would be akin to our present regulation of monopolies or unconscionable contracts where the market has failed due to an imbalance of bargaining power and the courts need to step in to prevent abuse of the situation. However, unlike the specific laws regulating monopolies and the common law restricting unconscionable contracts, courts have yet to recognize a strong public policy in favor of maximizing employee autonomy.<sup>78</sup>

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519, 526–28 (Colo. 1996) (holding wrongful discharge in violation of public policy when accountant dismissed for refusing to follow employer’s orders to falsify accounting statements in Colorado)). The Colorado Supreme Court in *Rocky Mountain* noted that whether a particular professional code could serve as public policy for purposes of the exception must “depend on a balancing between the public interest served by the professional code and the need of an employer to make legitimate business decisions.” *Rocky Mountain*, 916 P.2d at 525.

74. See Gilmore, *supra* note 73, at 93.

75. See *id.* See also *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840–41 (Wis. 1983) (limiting public policy exception to statutory and constitutional provisions).

76. For example, a decision to terminate an employee based on things like the cleanliness of their home or the way they spend their leisure time would never be protected by the public policy exception, even though these attributes, in most cases, bear little relation to the employer’s business interests.

77. See *supra* Part I. Furthermore, the mere existence of the public policy exception is an implicit acknowledgement of the tremendous power that employers have over their employees. The exception is thought necessary because without it, employers have enough power to coerce their employees to commit perjury, see, e.g., *Petermann v. Local 396, Int’l Bhd. of Teamsters*, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959), or other crimes punishable by jail time, see, e.g., *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985).

78. This maximum autonomy must, of course, be within the limits of employers’ legitimate business interests. See *infra* Part III.

Furthermore, if lawmakers wanted to craft such a policy regarding employee autonomy, they would not need to rely on application of the public policy at-will exception; they could simply protect employee autonomy independently with specific lifestyle protection laws. That is exactly what some lawmakers have done, and it is the topic of the next section.

#### D. LIFESTYLE PROTECTION STATUTES

Approximately twenty-eight states have recognized the failure of the market to protect employees' off-the-job interests and adopted specific protections against at-will abuses.<sup>79</sup> Loosely, these lifestyle protection laws protect three categories of employees: (1) those who smoke or use tobacco products while off-duty; (2) those who use lawful products while off-duty; or (3) those who engage in lawful behavior unrelated to their employment.<sup>80</sup> This Section will examine the details and shortcomings of each of these categories.

The first category is by far the most widespread of the various lifestyle protection laws. In fact, the entire national movement to protect off-the-job activities was actually started by the lobbying influence of major tobacco companies.<sup>81</sup> In the 1980's, employer discrimination against smokers grew drastically as companies realized that employing smokers dramatically increased their health care costs, as well as their exposure to liability for second-hand smoke injuries.<sup>82</sup> Starting with the "tobacco state" of Virginia,<sup>83</sup> legislatures began responding to the concerns of smokers and the tobacco industry by prohibiting employment discrimination based on tobacco use. However, the limited scope of these tobacco-related protections can be illustrated by Connecticut's statute:

No employer or agent of any employer shall require, as a condition of employment, that any employee or prospective employee refrain from smoking or using tobacco products outside the course of his employment, or otherwise discriminate against any individual with respect to compensation, terms, conditions or privileges of employment for smoking or using tobacco products outside the course of his employment . . . .<sup>84</sup>

79. See Gilmore, *supra* note 73, at 100.

80. *Id.*

81. See Dworkin, *supra* note 1, at 50-51.

82. *Id.* at 50.

83. Milo Geyelin, *The Job is Yours—Unless You Smoke*, WALL ST. J., Apr. 21, 1989, at B1.

84. CONN. GEN. STAT. ANN. § 31-40s (West 2001).

Clearly, statutes like this one only prevent discrimination based on a single type of employee behavior, but this off-the-job tobacco use legislation advocated by tobacco companies gained a life of its own in many other states, and several statutes went far beyond protecting smokers' rights.

The first extra step of protection is found in states that protect employees' use of any lawful product, not just tobacco.<sup>85</sup> Minnesota Statute section 181.938 offers an example of this category of protection:

An employer may not refuse to hire a job applicant or discipline or discharge an employee because the applicant or employee engages in or has engaged in the use or enjoyment of lawful consumable products, if the use or enjoyment takes place off the premises of the employer during nonworking hours.<sup>86</sup>

Again, these statutes are narrowly drafted to provide protection only for a narrow range of employee behaviors, namely the use of legal products. This, of course, leaves many no-impact employee actions unprotected, which is why a handful of states have added a third level of lifestyle protection for any legal activity not related to employment.<sup>87</sup>

The most limited of these third-level laws is that in New York, which protects both "legal recreational activities" and "legal use of consumable products," but falls short of the protection for "any lawful activity" found in the other third-level statutes, such as those in North Dakota, Colorado, and California.<sup>88</sup> The early effect of the New York law's more limited language has included denying employees protection for off-duty dating behavior with arguably<sup>89</sup> no impact on the employer's business interests. In *New York v. Wal-Mart Stores, Inc.*, the court refused to include a dating relationship within the definition of "recreational activities" when a

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85. Examples of states with this type of protection include Minnesota, *see* MINN. STAT. ANN. § 181.938 (West 2001), Illinois, *see* 820 ILL. COMP. STAT. ANN. 55/5 (West 2002), Louisiana, *see* LA. REV. STAT. ANN. § 23:966 (West 2002), Nevada, *see* NEV. REV. STAT. ANN. 613.333 (Michie 2002), North Carolina, *see* N.C. GEN. STAT. § 95-130 (2002), and Wisconsin, *see* WIS. STAT. ANN. § 111.31 (West 2002).

86. MINN. STAT. ANN. § 181.938. New York's lifestyle protection statute, discussed here as a "third level" law because it protects all "recreational activities," also specifically protects "legal use of consumable products." N.Y. LAB. LAW § 201-d (McKinney 2002).

87. Examples of states with this highest level of lifestyle protection include New York, *see* N.Y. LAB. LAW § 201-d, Colorado, *see* COLO. REV. STAT. ANN. § 24-34-402.5 (West 2001), California, *see* CAL. LAB. CODE § 96(k) (West 2002), and North Dakota, *see* N.D. CENT. CODE § 14-02.4-03 (2002).

88. N.Y. LAB. LAW § 201-d.

89. *See* discussion *supra* note 36.

married (but separated) Wal-Mart associate was terminated for dating another employee in violation of the company's fraternization policy.<sup>90</sup>

Dating, on the other hand, is certainly a "lawful activity," so it would likely be included in the protection of the more expansive third-level statutes, assuming none of these laws' exceptions apply.<sup>91</sup> An example of such a statute can be found in Colorado, where the law reads:

It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction:

- (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or
- (b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.<sup>92</sup>

North Dakota's version is a bit simpler, barring employment actions because of "participation in lawful activity off the employer's premises during non-working hours which is not in direct conflict with the essential business-related interests of the employer."<sup>93</sup> California's law simplifies this even further, neglecting to mention any business-related exception and

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90. 621 N.Y.S.2d 158, 159 (App. Div. 1995).

91. Because of the wide range of activities that are protected on the face of the laws, most higher-level lifestyle protection laws, including Colorado's, Minnesota's, and North Dakota's, also include exceptions allowing for employer control over otherwise protected behavior when that behavior interferes with the employer's business interests. North Dakota provides this protection with a requirement that the lawful activity protected not be in "direct conflict with the essential business-related interests of the employer." N.D. CENT. CODE § 14-02.4-03. Minnesota and Colorado both provide an exception for employment actions taken because of employee behavior which relates to any "bona fide occupational requirement" or which might create a "conflict of interest" or the "appearance of a conflict of interest." COLO. REV. STAT. ANN. § 24-34-402.5; MINN. STAT. ANN. § 181.938 (West 2001). There seems to be little practical difference between the two.

Those states with laws that do not include such exceptions may be under-protecting employers:

[T]here are numerous situations in which an employee's off-duty conduct would be of legitimate concern to his or her employer. For example, the American Cancer Society should not be forced to hire a smoker, at least not in a high level position involving exposure to the public. But the laws of these states make no exception for off-duty conduct which is inconsistent with the fundamental mission of the employer.

Maltby & Dushman, *supra* note 30, at 654.

92. COLO. REV. STAT. ANN. § 24-34-402.5.

93. N.D. CENT. CODE § 14-02.4-03 (2002).

prohibiting discharge actions based on “lawful conduct occurring during nonworking hours away from the employer’s premises.”<sup>94</sup>

Even with the most expansive protection for any lawful activity or conduct, there is still some employee, no-impact behavior left unprotected. First, the term “legal” can be an unnecessary limitation. In most cases, illegal activity does have an effect on an employer’s business interests because, at the very least, there can be some implication for an employee’s lack of integrity, in which an employer almost certainly has a legitimate business interest. However, an employee who receives a traffic or parking ticket, for example, has committed an illegal act. Without protection, an employer may use that illegal act as a reason to terminate that employee, even though a traffic or parking ticket almost certainly does not have a sufficient relationship to a legitimate business interest.<sup>95</sup>

Second, the requirement that the behavior be during nonworking hours and off the employer’s premises, which exists in all of the third-level lifestyle protection laws mentioned above, could be an unnecessary limitation to the lifestyle protection.<sup>96</sup> An employer should have no more of a right to use its unfair bargaining advantage to control its employee’s no-impact behavior when that employee is on-duty or on-premises than it does when they are off-duty and off-premises. It is true that when employees are on-duty and on-premises, it is much more likely that any given aspect of their behavior has at least some impact on a legitimate business interest, but that is not necessarily the case.

The hypotheticals here need to be a little more far-fetched in order to avoid any possible implication of a business interest, but imagine, for example, an employee who likes to eat sushi for lunch and an employer who hates sushi. Under any of the third-level statutes, the employer would

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94. CAL. LAB. CODE § 96(k) (West 2002).

95. This argument would not apply, of course, if the employee happened to be a courier or driver where traffic tickets do bear a reasonable relation to the employer’s legitimate interest.

96. These off-duty, off-premises provisions seem to exist as an acknowledgment of the employer’s property rights. As discussed above, employers can make the argument that they are paying for employees’ time and for the premises on which they work, so employers should be able to control those employees’ behavior during that time and on those premises. Just as in the discussion of employer’s property interests, *supra* Part I.C, this argument may have some merit, and indeed it does have more merit when applied to the employer’s premises and the employee’s working time because this can be called more aptly employer “property.” However, the same market justifications that are used for regulating the employment relationship in the first place can also be extended to behavior that is “on-duty” and “on-premises.” The market is still out of balance whether on-premises and on-duty or not, so there is the same justification for regulation. Therefore, it seems that the off-premises/off-duty provisions of the current lifestyle laws are more of a compromise with employers than they are a rationally-tailored solution for the autonomy-stealing problems of the employment relationship.

not be able to terminate that employee for eating sushi at a restaurant across the street during lunch because eating sushi is a lawful activity. However, if that same employee ate their sushi at their desk, in their private office, with the door closed, during that same lunchtime, it might be an acceptable cause for termination. It is also possible that this same logic could be extended to allow termination for an otherwise protected dating relationship when the person the employee is dating comes to the office for a visit during lunchtime. It is unclear whether courts would take it that far, but ultimately the off-premises, off-duty limitations of many lifestyle protection statutes are an imperfect surrogate for the employer's true business interests and are an unnecessary restriction on the needed protection that should be the goal of the statutes.

Admittedly, the actual constraints imposed by the "legal" and "off-duty, off-premises" limitations of the third-level lifestyle laws are relatively minor. Nevertheless, because they do pose some unnecessary limits, there is room for improvement in even the third-level states, and particularly in New York with its protection for only "recreational activities." Furthermore, it is important to note that these third-level laws are the exception, not the rule. Third-level laws can only be found in few states, and the rest of the country has either no lifestyle protection, or has protection that is limited to a relatively narrow range of behaviors.

### III. PROTECTING EMPLOYEE AUTONOMY

Liberal contract interpretation, antidiscrimination provisions, the public policy exception, and lifestyle protection laws each provide some level of protection for off-the-job employee autonomy, but even taken together, these protections are often far from complete. Liberal contract interpretation only applies when employers voluntarily offer protection; antidiscrimination laws only protect behavior that relates to a protected trait; the public policy exception only covers behavior that is fundamental enough to be protected by deeply established public policy; and current lifestyle protection laws, where they exist, generally only protect a limited set of behaviors. More universal protection is needed, and this Section of the Note will attempt to bring together the basic argument and structure for such a system.

#### A. PRELIMINARY ARGUMENT

When employers restrict any employee behavior, they are using their economic influence to control the autonomy of their employees. Much of

the control that employers typically exercise is necessary to satisfy the employer's and the public's interest in efficient business operation. Furthermore, it would be extremely difficult for courts to intervene and weigh the efficiency of each employer restriction on liberty against the autonomy that is lost by the particular employee. Besides, the market for qualified labor theoretically balances this equation automatically as potential employees demand more and more money for increasing restrictions, and employers in a competitive labor market hesitate to terminate good, productive employees. Because of this, courts traditionally stay out of disputes over employee restrictions in all but the most egregious of cases.

On the other hand, when an employer's restriction of employee autonomy has absolutely no impact on the interests of the business, there is no longer any efficiency interest in allowing the restriction; society is simply allowing employee autonomy to be purchased by the employer. Viewed independently, this purchase of autonomy is perfectly acceptable under traditional contract principles, provided the exchange does not violate some fundamental public policy, as exemplified by the purchase of perjury in *Petermann*.<sup>97</sup> However, this purchase of autonomy is acceptable only because it assumes a transaction in a free, well-functioning market where one person voluntarily agrees to surrender their liberty in return for fair consideration from another.

These circumstances cannot be assumed when the "contract" for no-impact employee autonomy is linked to employment. As shown above, the market does little to protect most employees, as employers end up paying little or nothing in exchange for substantial control over intimate aspects of their employees' off-the-job lives.<sup>98</sup> As long as employers maintain their substantial market power over most employees, and as long as the market continues to fail for all of the other reasons this Note has discussed, employers will continue to receive a heavy discount when "purchasing" off-the-job employee liberty. In the present paradigm, only employers in the most competitive situations or with the worst restrictions will ever be truly deterred by the cost.

Current lifestyle protection laws are on the right track in protecting some—and in a few states, almost all—employee autonomy not related to an employer's business-related interest. As one commentator noted:

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97. See *supra* notes 69–70 and accompanying text.

98. See market discussion and Wal-Mart example *supra* Part I.A–B.

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It would be unfair . . . to criticize these first legislative efforts [to enact lifestyle protections]. When the first statutes were enacted, little was known about the issue, other than the fact that the abuse existed and was growing. Published material on the issue was almost nonexistent. These early legislatures were sailing into uncharted waters. The most one can expect of such pioneers is that they go in the right general direction, and this they clearly did.<sup>99</sup>

The same arguments that justify current, limited lifestyle protections also justify more complete protection. The real, underlying problem is that employers can use their unfair bargaining advantage to force employees to surrender more autonomy than those employees would if given an independent choice, and more autonomy than the legitimate business interests of the employer can justify. The problem is not limited, as are most current protective laws, to just some particular sets of behaviors that employers should normally not be able to control, so the solution should not be limited to particular sets of behaviors either. On the contrary, the market problem can potentially affect any type of employee autonomy and employee behavior, so the solution should be applied to all autonomy and all behavior that might be unfairly restricted by the bargaining power of employers. And this broad protection should be limited only by the legitimate business interests of the employer since any other property interests of the employer should not be considered when the market is out of balance and those property rights can be easily abused.

Therefore, the legislatures of all fifty states should adopt expanded lifestyle protection legislation that fully protects all employee activities that do not have a sufficient impact on the employer's legitimate business interests.

#### IV. CONCLUSION

There are a number of aspects of this proposal that will need further clarification and input by individual state legislatures and courts. First, states will have to decide how they wish to define the word "sufficient" in the suggestion above. The proposal's use of this word is intentionally vague. States may want to adopt different standards for the requisite impact on a legitimate business interest that would justify an intrusion on employee autonomy. This is not to say, however, that judges should be free to decide the standard used. A baseline standard should be a "more than de minimis" effect, and states may require a "significant" or even

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99. Maltby & Dushman, *supra* note 30, at 657-58.

“substantial” effect, depending on the amount of autonomy they wish to protect. States that do not mind more litigation on this issue might even want to adopt a standard in which employer restrictions on employee liberty must be “in proportion” to some legitimate business interest. Either way, these details are left open for individual states to decide.

The term “business interests” used in the proposal will also need some input from state legislatures and courts. “Job performance” or “bona-fide occupational requirement” is often used in discussions of, and laws controlling, off-the-job conduct restrictions, but “business interests” is generally a broader term, which could potentially include just about any legitimate interest that employers may have in controlling the behavior of their employees. However, the “business interest” language admittedly has the potential to under-protect employees because many things, including perjury or forced political participation as seen in the public policy cases, may have at least some effect on “business interests.” Even employer actions based on things like cholesterol level, weight, or dangerous activities like motorcycling as seen earlier are arguably related to an employer’s business interest in the safety and health of their workforce, as well as to their interest in reducing health-related costs.<sup>100</sup> The requirement of “sufficient” effect on business interests and the modifier of “legitimate” business interests, both used in the proposal, may limit employer abuse of this broad language, but the final statutes written by state legislatures would need to clarify these terms, preferably including an extensive, nonexclusive list of examples, to help courts decide which particular business interests are sufficient and legitimate enough to merit employer restriction of autonomy.

Under this system, there will certainly be increased litigation over whether an employee’s behavior “sufficiently affects legitimate business interests,” and many employers will decry their loss of contractual freedom. But the new discussion over business impact will only serve to replace the misguided debate currently taking place in the courts over which no-impact liberties can be unduly restricted by employers who never had any legitimate business justification to contract for the restrictions in the first place. If employers want to contract with their employees

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100. There will also be evidentiary issues regarding employers who falsely claim that they have terminated an employee for cost-saving or performance-related reasons, but like any other wrongful termination or discrimination case, the factfinder has ways of distilling the truth. At the very least, in the many cases where the motive is purely personal and there is simply no way an employer can justify an employment action based on any business interest, these employees will get the protection they deserve.

independently to purchase these same restrictions, they would be as free as before to do so, but these transactions must be kept isolated from the often-coercive inequities of the employment relationship. Only then can we be sure that employees are getting a fair deal.