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DEFUSING DISCLAIMERS

*Rachel Arnow-Richman & J.H. Verkerke**

This Article tackles the ubiquitous problem of employer-drafted "disclaimers." Disclaimers are standardized provisions, found in a variety of human resources documents, that confirm employees' at-will status. They typically preserve an employer's right to change the terms of employment at any time, sometimes without advance notice. The most careful disclaimers also renounce the legal significance of contrary statements or promises made by supervisors and other managerial agents, thus foreclosing the contractual obligations that would otherwise arise. Meanwhile, employers scrupulously preserve the legal enforceability of terms they desire, such as restrictive covenants and arbitration agreements.

Currently, there is no defensible legal framework for assessing employment disclaimers, nor has there been any meaningful theoretical engagement with their contractual status. Most courts simply treat these disclaimers as prima facie valid. As a result, employers not only avoid liability for specific commitments, but they also effectively remove one side of the employment relationship from the realm of contract. Our Article argues that courts defer too readily to disclaimers, and despite purported reliance on contract principles, their deferential approach is not doctrinally compelled.

We propose instead a holistic framework more suitable to the unique characteristics of employment contracts. This approach draws on three aspects of mainstream contract law and theory: (1) a robust

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literature that questions the validity of assent to consumer contract boilerplate; (2) interpretive canons and contextualist techniques that construe contract language against the drafter and in conformity with the reasonable expectations of the weaker party; and (3) doctrines such as unconscionability and the duty of good faith that impose modest but meaningful substantive limits on drafting. These prescriptions are particularly appropriate because of employment's "hyper-relational" character, in which the parties' obligations are never expressed in a final, formal writing. We propose a holistic treatment of disclaimers that acknowledges them as just one source of governing terms that must ultimately be reconciled with (and potentially subordinated to) conflicting expressions of commitment and nonwaivable common law obligations. In short, we aim to free employment contract law from the tyranny of exculpatory boilerplate.

INTRODUCTION 1703
I. THE HEGEMONY OF DISCLAIMERS 1710
A. The Rise and Fall of Implied Contract Rights 1710
1. The At-Will "Exceptions" Jurisprudence 1710
2. Responsive Risk Management 1713
B. Disclaimer Jurisprudence as the New Implied Contract Law 1717
1. The Deferential Approach 1718
2. The Fact-Based Approach 1723
II. ENSURING MEANINGFUL ASSENT 1726
A. What's Wrong with Employment Boilerplate? 1727
B. Parallels to Consumer Contracting 1730
C. Potential Reforms 1733
III. INTERPRETING DISCLAIMERS IN CONTEXT 1739
A. The Interpretive Continuum 1740
B. Disclaimer Law as Inept Textualism 1744
C. Implications for Employment 1747
1. True Textualism 1747
2. Disclaimers in Context 1749
3. A Reasonable Expectations Alternative 1753
IV. IMPOSING SUBSTANTIVE LIMITS ON DISCLAIMERS 1756
A. Contracting Out of Contract? 1757
B. Contract Law's Limiting Doctrines 1761
1. Structural Unconscionability and the Ironclad Disclaimer 1762

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2. Good Faith and Fair Dealing 1767
V. TOWARD A HOLISTIC APPROACH TO DISCLAIMERS 1771
A. Applying Contract Principles to Disclaimers 1772
B. Meeting Potential Objections 1774
1. Too Many Cases Will Go to Trial 1774
2. Contract Claims Are Weak Medicine 1777
3. Courts Will Continue to Defer to Disclaimers 1778
CONCLUSION 1779

INTRODUCTION

Suppose you have just landed a job. On your first day at work, your new employer requires you to undergo an onboarding process.[1] A human resources ("HR") representative directs you to a boilerplate document (or digital form) that declares you are an at-will employee who may be terminated at any time, for any reason, or for no reason at all. That same document—or others in the formidable stack (or series of screens) you will review and acknowledge—also purports to restrict your contractual rights. One clause precludes enforcement of any oral or written assurances you may have received during your recruitment and hiring process. Another clause prophylactically disclaims the legal significance of any future promise you may receive from any supervisor. Yet more boilerplate appears in other documents that describe the employer's generous benefit plans and your entitlements as an employee. For example, a prominent provision in the employee handbook expressly disclaims that the employer's written policies constitute a contractual commitment. And still another term reserves to your employer the unilateral right to change the handbook and other personnel policies at any time.

Notice first the irony of this ostensible employment contract. Although it observes key rituals of contract formation—legal language and signature lines—its evident purpose is to *avoid* creating a contract at all. Instead, your employer uses "exculpatory boilerplate" to eliminate any plausible basis you might have to bring a contract action against

[1] Our picture of onboarding synthesizes elements from both case law and commentary. See, e.g., Talya N. Bauer & Berrin Erdogan, Organizational Socialization: The Effective Onboarding of New Employees, *in* 3 APA Handbook of Industrial and Organizational Psychology 51, 54–57 (Sheldon Zedeck et al. eds., 2011).

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them.[2] Each clause aims to foreclose a potential source of express or implied contract claims. In lieu of binding contractual obligations, the employer offers you informal assurances that they value your service, will treat you fairly, and hope the employment relationship will endure. Your only hope of enforcing these promises, however, depends on nonlegal workplace and industry norms.[3] In short, your employer appears to have opted for a "norms-only" relationship that excludes, to the maximum extent permissible, any grounds you might have for legal enforcement.[4]

But, in a second ironic twist, your employer is not content with mere workplace norms when it comes to enforcing *your* obligations to the company. As part of the onboarding process, they attempt to impose various legally binding terms as a condition of your employment.[5] One of these terms surrenders your right to a jury trial and obliges you to submit any employment-related claims to binding arbitration.[6] This agreement to arbitrate also precludes class or collective actions and requires you to bring only individual claims in an arbitral forum.[7] It may even shorten the statute of limitations on any claims you pursue under federal and state employment protection legislation.[8] Your employer may also require you to accept various restrictive covenants that will limit your ability to leave your new position to pursue other work. For example, you could be subject to a noncompete clause, a nonsolicitation agreement, a nondisclosure agreement, an intellectual property

[2] See Rachel Arnow-Richman & J.H. Verkerke, Deconstructing Employment Contract Law, 75 Fla. L. Rev. 897, 948 (2023).

[3] See Edward B. Rock & Michael L. Wachter, The Enforceability of Norms and the Employment Relationship, 144 U. Pa. L. Rev. 1913, 1930–38 (1996) (asserting that an informal just-cause norm in workplace settings should be self-enforcing, not legally binding).

[4] See J.H. Verkerke, Legal Ignorance and Information-Forcing Rules, 56 Wm. & Mary L. Rev. 899, 950–55 (2015) [hereinafter Verkerke, Legal Ignorance] (describing exculpatory language as an attempt to preserve a norm-governed relationship).

[5] One of us has previously referred to this phenomenon as the "contractualiz[ation]" of the employment relationship. Rachel Arnow-Richman, Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements, 49 Ariz. L. Rev. 637, 638, 651–56 (2007) [hereinafter, Arnow-Richman, Cubewrap Contracts].

[6] See, e.g., Cynthia Estlund, The Black Hole of Mandatory Arbitration, 96 N.C. L. Rev. 679, 681 (2018).

[7] See, e.g., id. at 693.

[8] See, e.g., Logan v. MGM Grand Detroit Casino, 939 F.3d 824, 838 (6th Cir. 2019).

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assignment, and even a training repayment agreement.[9] In addition to these affirmative obligations, the documents you sign may designate a forum and applicable state law that favor your employer's interests should they ever pursue claims against you.[10]

So, what is the true nature of your employment relationship? Does a clever combination of binding agreements and exculpatory boilerplate free your employer from any contractual commitments and simultaneously impose significant legal obligations on you as an employee? Or might courts reject employers' attempts to have their contractual cake and eat it too, and instead adopt a more nuanced and holistic view of the parties' reciprocal obligations?

Perhaps surprisingly, nearly all states give employers exactly the asymmetrical obligations they crave. Courts tend to view standard-form language that imposes affirmative duties on employees as contractual.[11] Yet these same courts tend to defer uncritically to boilerplate that insulates employers from any contract claims. Thus, under current law, most judges allow employers to say: "Heads I win; tails you lose." The result is that companies may enforce an employee's legal obligations to the firm, while simultaneously escaping any obligation to their employees.[12]

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[9] See, e.g., Jonathan F. Harris, Unconscionability in Contracting for Worker Training, 72 Ala. L. Rev. 723, 725–26 (2021); Orly Lobel, Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance, 106 Minn. L. Rev. 877, 878 (2021) (describing the employer practice of "bundling . . . restrictive provisions in employment contracts" that constrain worker competition).

[10] See generally The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (holding forum selection clauses presumptively enforceable so long as they are not unreasonable or contrary to public policy); Martinez v. Bloomberg LP, 740 F.3d 211, 214 (2d Cir. 2014) (enforcing a forum selection clause in an employment contract). Other common provisions include invention assignments and holdover clauses. Orly Lobel, Exit, Voice & Innovation: How Human Capital Policy Impacts Equality (& How Inequality Hurts Growth), 57 Hou. L. Rev. 781, 791–92 (2020).

[11] For example, unless prohibited by statute, noncompetition agreements in most jurisdictions are enforceable when properly limited in time and space, supported by consideration, and justified by some legitimate employer interest. See Restatement (Second) of Conts. § 188 cmts. a, d (A.L.I. 1981). Many states impose additional restrictions by statute. See generally Norman D. Bishara & Lorenzo G. Luisetto, Goodbye, Noncompetes? Policy Diffusion and State-Level Reforms, 47 Berkeley J. Emp. & Lab. L. 231 (2026) (summarizing recent statutory changes for noncompetition agreements). Our point, however, is that these employer-imposed provisions are deemed contractually binding, albeit subject to the various requirements of external law.

[12] For a particularly poignant example of this judicial double standard, see *MIMEDX Grp. v. Fox*, No. 16-cv-11715, 2017 WL 3278913, at *3 (N.D. Ill. Aug. 2, 2017), in which the

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Even more surprising, both contract and employment law scholars have largely neglected this "judicial deference" problem, as we refer to it. To be sure, many have challenged the enforcement of rights-waiving documents, such as arbitration agreements and restrictive covenants, against employees.[13] But they have not interrogated the corresponding problem of employers' pervasive use of "disclaimers"—shorthand for the exculpatory boilerplate we describe above—to foreclose workers' potential contract claims.[14] Rather, they appear to accept that employers not only will but *may* use contract tools as both sword and shield.

This Article rejects that view, condemning judicial deference to disclaimers on both normative and doctrinal grounds. We make three contributions. First, we comprehensively review and classify contemporary judicial treatment of disclaimers. Our research reveals that courts defer far too readily to such language, shifting the balance of legal rights powerfully in favor of the already-dominant employer. Second, we expose the many errors of that approach from a mainstream contract law perspective. Judicial deference to disclaimers might be defensible if well-settled law dictated that result. However, contemporary contract theory and doctrine repudiate narrow, formalistic analysis of written text in relationships of dependence, like employment. Third, we offer an alternative "holistic approach" to disclaimers that "defuses" their destructive effects on employee contract rights.

We begin, in Part I, with a bit of history. During the first half of the twentieth century, courts developed a distinctive jurisprudence for employment contracts. A nearly irrebuttable employment-at-will "super-presumption" led judges to ignore contrary evidence of commitment and

district court held that although the employer's handbook contained a disclaimer, provisions that purported to *bind the employee* were enforceable because the formal nondisclosure agreement the employee was forced to sign incorporated those provisions by reference.

[13] See, e.g., Arnow-Richman, Cubewrap Contracts, supra note 5, at 651; Cynthia L. Estlund, Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law, 155 U. Pa. L. Rev. 379, 420–21 (2006); Orly Lobel, The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property, 93 Tex. L. Rev. 789, 853 (2015).

[14] For exceptions, see Stephen F. Befort, Employee Handbooks and Policy Statements: From Gratuities to Contracts and Back Again, 21 Emp. Rts. & Emp. Pol'y J. 307, 313–14 (2017) [hereinafter Befort, Policy Statements]; Stephen F. Befort, Employee Handbooks and the Legal Effect of Disclaimers, 13 Indus. Rels. L.J. 326, 348 (1991) [hereinafter Befort, Legal Effect of Disclaimers]; Jonathan Fineman, The Inevitable Demise of the Implied Employment Contract, 29 Berkeley J. Emp. & Lab. L. 345, 365–68 (2008).

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to distort contract law to preserve managerial discretion.[15] In the 1980s, however, some courts began to entertain implied contract claims based on protective language in employee handbooks and other assurances of job security.[16] But those same decisions repeatedly invited employers to draft express disclaimers to ward off any contractual liability.[17] In the ensuing decades, company attorneys progressively refined and expanded their clients' boilerplate, eventually developing a formidably comprehensive "ironclad" disclaimer.[18]

And they convinced courts of its effectiveness. Our research reveals that most courts now fulfill employers' desire to be free of contractual obligations by granting disclaimers legal effect subject only to a superficial analysis of clarity and prominence. Such decisions reflect what we have elsewhere called "employment contract exceptionalism"—a tendency of courts to misapply formal contract principles and invent questionable doctrinal shortcuts to regulate employment contracts.[19] The following Parts develop three overlapping critiques that show what is wrong with courts' reflexive deference to disclaimers and how to fix this problem.

Part II presents a "boilerplate critique" that questions whether workers express meaningful assent to employer-drafted disclaimers. Common contracting practices impose broad exculpatory language on newly hired employees who have little opportunity or incentive to read and understand those terms. A vast scholarly literature has criticized similar problems afflicting consumer contracts of adhesion.[20] But, surprisingly, judicial deference to employment disclaimers has attracted comparatively little critical scholarly analysis.[21] We propose that judges,

[15] See Arnow-Richman & Verkerke, supra note 2, at 907–21 (discussing the historical development of employment contract doctrine).

[16] Id. at 918–19.

[17] See J.H. Verkerke, The Story of *Woolley v. Hoffmann-La Roche*: Finding a Way to Enforce Employee Handbook Promises, *in* Employment Law Stories 23, 54, 58, 61–62 (Samuel Estreicher & Gillian Lester eds., 2007) [hereinafter Verkerke, The Story of *Woolley*] (quoting representative language from leading cases).

[18] Cf. Lobel, supra note 9, at 895–96 (using "ironclad" to describe employers' use of multiple types of restrictive covenants); see also Arnow-Richman & Verkerke, supra note 2, at 948–49 (describing the evolution of employee handbook disclaimer language).

[19] See Arnow-Richman & Verkerke, supra note 2, at 902.

[20] See, e.g., Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1173, 1242 (1983); Nancy S. Kim, Wrap Contracts: Foundations and Ramifications 176 (2013); David A. Hoffman, Defeating the Empire of Forms, 109 Va. L. Rev. 1367, 1372 (2023).

[21] See supra note 14.

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at a minimum, should demand that employers offer workers a reasonable opportunity to review all significant employment terms before accepting a job offer. We also invite creative use of tools such as the *contra proferentem* canon to constrain the exculpatory power of disclaimers. And we argue courts should impose more forceful substantive limits on the use of such clauses.

Part III presents an "interpretive critique." Courts currently apply what we call a *pro proferentem* approach to interpreting disclaimers that privileges the text of written disclaimers over all other sources of contract terms, express or implied. We call out the absurdity of allowing one document to govern this fluid, constantly evolving, hyper-relational setting. Courts should instead adopt the contemporary contextualist approach to contract interpretation that looks beyond the written word to incorporate and reconcile oral and implied sources of contract terms. More aggressive courts could adopt a "reasonable expectations" doctrine that would refuse enforcement of exculpatory terms that conflict with the reasonable understanding of the weaker party. Either approach would more faithfully capture the agreement implied by the parties' complex relationship.

Part IV presents a "regulatory critique." It confronts what we characterize as an existential question—when and whether employers (or other parties) should be able to contract out of contractual obligation entirely. A truly ironclad disclaimer not only precludes enforcement of prior, present, and future assurances but also attempts to foreclose any and all contractual obligations. We contend, however, that allowing a party to categorically disclaim all contractual obligations is anathema to contract law. Even the most "ironclad" disclaimer must sometimes give way to contrary evidence that parties had a mutual agreement concerning some aspect of their employment relationship. We would welcome statutory intervention analogous to the protective measures proposed for consumer contracts. But even if legislative solutions are not forthcoming, the common law constrains parties' ability to impose egregiously one-sided terms. We argue that both unconscionability and the duty of good faith prevent one party from enforcing terms that utterly preclude contractual obligations from arising in an ongoing relationship like employment.

Part V proposes a new "holistic" approach that understands disclaimers as one element of a more complex, ongoing, and changeable employment relationship. Currently, employers' exculpatory boilerplate

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obliterates the very notion of contractual obligation in the employment relationship. We seek to "defuse" that destructive force and draw employment contract doctrine back to the mainstream. Doing so continues our broader project of developing a contractual understanding of employment-at-will that better balances the competing goals of protecting workers' expectations and preserving managerial discretion.

Of course, an article about disclaimers would not be complete without a few of our own. First, we acknowledge that some of the contract principles on which we rely are at least partially contested. For example, a prominent neo-formalist critique of contextualist interpretation advocates for more textually oriented approaches to interpretation. These neo-formalist arguments, however, presume a transaction between sophisticated actors in which the parties execute a final writing.[22] In contrast, employment is a relationship of dependence best described as "hyper-relational"—"a long-term, fluid, and reciprocal undertaking governed by an agreement that is necessarily incomplete, usually expressed in indefinite terms, and constantly evolving."[23] In this context, we feel justified in calling for courts to apply the accepted contract principles that are most flexible and protective of employees.

Second, we will undoubtedly be accused both of destroying employment-at-will and of being unduly deferential to the prevailing at-will presumption. Our intention is to craft a doctrinal framework that many courts will find appealing. For that reason, we must take seriously their long-standing commitment to employment-at-will, even as we work to persuade judges that employment disclaimer doctrine requires substantial reform. Our Article therefore accepts the premise that parties can terminate their relationship whenever they wish, but rejects the facile conclusion that disclaimers can categorically prevent them from contracting for greater rights. In other words, we seek to downgrade the at-will super-presumption to the status of an ordinary default.

Third, we recognize that if we are successful in defusing disclaimers, additional challenging questions will arise. Courts will have to determine what aspects of the parties' hyper-relational arrangement are contractual. In this Article, we advocate for a holistic approach to employment contract enforcement, leaving for later the task of

[22] See, e.g., Robert E. Scott, The Case for Formalism in Relational Contract, 94 Nw. U. L. Rev. 847, 848 (2000) (developing an economic and instrumental defense of formalistic interpretation of contracts to protect party intent and reduce uncertainty).

[23] Arnow-Richman & Verkerke, supra note 2, at 905.

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elaborating how and when specific types of employer promises should be enforceable.[24] For now, we seek only to free employment contract law from the tyranny of exculpatory boilerplate.

I. THE HEGEMONY OF DISCLAIMERS

We begin with a brief history. Modern disclaimer language originated as a risk management strategy to combat employees' implied contract claims based on employer personnel policies. The practice expanded as employers developed increasingly robust language that ostensibly precluded any form of contract liability to their workforce. Today, the majority of courts defer to this boilerplate, giving it expansive and near-talismanic power even in the face of compelling factual evidence of employer commitment. As a consequence, the law of implied contract rights has been displaced by the hegemony of disclaimers.

A. The Rise and Fall of Implied Contract Rights

1. The At-Will "Exceptions" Jurisprudence

The story of employer-drafted exculpatory boilerplate begins during a brief period in the late twentieth century when judges eroded the stringency of employment-at-will. For at least one hundred years—from the birth of the American at-will rule in the late nineteenth century until the 1980s—courts resisted employee claims of alleged oral, implied, and even written contracts for any form of job security.[25] They subjected plaintiffs to a variety of evidentiary barriers, elevating employment-at-

[24] See Rachel Arnow-Richman & J.H. Verkerke, Reconstructing Employment Contract Law (unpublished manuscript on file with authors).

[25] See Richard A. Bales, Explaining the Spread of At-Will Employment as an Interjurisdictional Race to the Bottom of Employment Standards, 75 Tenn. L. Rev. 453, 456–60 (2008) (discussing the origin and spread of employment-at-will from Horace Gay Wood's articulation in 1877 through the turn of the century). For twentieth-century examples of judicial resistance to job security contracts in case law, see, e.g., Hanson v. Cent. Show Printing Co., 130 N.W.2d 654, 655–56 (Iowa 1964) (holding that a signed letter from the company president promising job security until retirement did not overcome the presumption of employment-at-will); Skagerberg v. Blandin Paper Co., 266 N.W. 872, 873–74, 878 (Minn. 1936) (holding that an employer's oral promise of a permanent job, memorialized in the employee's confirmation letter, did not overcome the presumption of at-will employment). We explore this history in our prior article, Arnow-Richman & Verkerke, supra note 2, at 908–14, 918–20, on which we rely throughout this Part.

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will from a mere default rule to a "super-presumption," as we have previously labeled it.[26]

Beginning in 1980, however, many courts retreated from this harsh position. They increasingly recognized the viability of implied contract claims grounded in the statements and practices of employers, including language contained in handbooks and policies.[27] Some scholars celebrated this trend—prematurely, as we now know—hailing it as the beginning of the end for employment-at-will.[28] During the same period, the Uniform Law Commission drafted the Model Employment Termination Act, which invited legislators to reject employment-at-will in favor of statutory just-cause protection.[29] To this day, the only state with a general just-cause statute is Montana.[30] And, as we will soon see, the rise of employers' exculpatory boilerplate subsequently restored to dominance a narrow conception of employment-at-will.

The cases that initially liberalized employment contract enforcement relied explicitly on a pro-employee policy rationale. The seminal New

[26] Arnow-Richman & Verkerke, supra note 2, at 903; see also Clyde W. Summers, The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will, 52 Fordham L. Rev. 1082, 1097 (1984) (asserting that courts treated the at-will presumption as "nearly irrebuttable"); Verkerke, The Story of *Woolley*, supra note 17, at 23 (reasoning that the "virtually irrebuttable presumption" of at-will employment hindered the enforcement of negotiated agreements).

[27] See, e.g., Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1264 (N.J.), *judgment modified*, 499 A.2d 515 (N.J. 1985); Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 885 (Mich. 1980). See generally Arnow-Richman & Verkerke, supra note 2, at 918–21 (discussing how courts in the 1980s pushed back on the at-will presumption); Befort, Legal Effect of Disclaimers, supra note 14, at 329–43 (discussing this history and case examples); Fineman, supra note 14, at 356–65 (same). Although we focus on contract claims, this period of judicial innovation also included recognition of novel tort law claims, specifically a cause of action for terminations in violation of public policy. See Befort, Legal Effect of Disclaimers, supra note 14, at 332; Fineman, supra note 14, at 357–59.

[28] See, e.g., Theodore J. St. Antoine, A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower, 67 Neb. L. Rev. 56, 65–66 (1988).

[29] Model Emp. Termination Act § 3(a), 7A U.L.A. 81 (1991) ("[A]n employer may not terminate the employment of an employee without good cause."). For a history of the passage of this model legislation, see generally Theodore J. St. Antoine, The Making of the Model Employment Termination Act, 69 Wash. L. Rev. 361 (1994).

[30] Mont. Code Ann. § 39-2-904 (2025); St. Antoine, supra note 29, at 381; At-Will Employment—Overview, Nat'l Conf. of State Legislatures, https://www.ncsl.org/labor-and-employment/at-will-employment-overview [https://perma.cc/6WZT-CKZG] (last updated Apr. 15, 2008). The Model Employment Termination Act has not been adopted by any states. William R. Corbett, Firing Employment At Will and Discharging Termination Claims From Employment Discrimination: A Cooperative Federalism Approach to Improve Employment Law, 42 Cardozo L. Rev. 2281, 2303 (2021).

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Jersey Supreme Court case *Woolley v. Hoffmann-La Roche, Inc.* observed that employers secure many benefits from promulgating employee-friendly policies, such as improved productivity and morale.[31] Moreover, comparatively sophisticated employers are in a far better position than their employees to avoid any potential misunderstandings about their assurances of job security.[32] Thus, it is appropriate to hold companies to their word by protecting employees' "reasonable expectations."[33]

However, employers' boilerplate disclaimers stifled the implied contract exception to employment-at-will before it could mature into a robust feature of employment contract law. The very decisions that explicitly recognized employee rights based on employee handbooks and policies laid the groundwork for employers to defeat those newly christened claims. In its final paragraph, the *Woolley* court stated that, should an employer wish to maintain the right to freely terminate workers unhindered by its policies:

> All that need be done is [include] in a very prominent position . . . an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.[34]

[31] 491 A.2d at 1268 ("The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly." (quoting *Toussaint*, 292 N.W.2d at 892)).

[32] Id. at 1271; see Verkerke, The Story of *Woolley*, supra note 17, at 54–55 ("[T]he more sophisticated party should bear the burden of any ambiguity in the policy manual. The employer—the more sophisticated party—thus bore the burden of informing the legally less sophisticated parties—its employees—that they were employed at will and that the termination provisions of the policy manual were not legally enforceable."). See generally Verkerke, Legal Ignorance, supra note 4 (theorizing about the benefits of "clause-forcing" rules that encourage the more sophisticated party to inform contractual partners of the background law governing their transaction).

[33] *Woolley*, 491 A.2d at 1264; cf. *Toussaint*, 292 N.W.2d at 884 ("[A]part from an express agreement, an employee's legitimate expectations grounded in an employer's written policy statements have been held to give rise to an enforceable contract.").

[34] *Woolley*, 491 A.2d at 1271.

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In other words, whatever contractual significance a written personnel policy might have in the abstract, there was a "simple" way for employers to avoid it.[35]

2. Responsive Risk Management

And that is precisely what they did. Employers liberally added to their policies and other personnel documents language disclaiming their contractual significance. Today, one is hard-pressed to find an HR form that does not contain some manner of exculpatory boilerplate. And those efforts have largely been successful in insulating employers from implied contract liability.[36]

This outcome was perhaps predictable, but it was not immediate. Initial employer efforts at incorporating disclaimers were primitive and achieved mixed results. Writing in 1991, Professor Stephen Befort identified a "gap between theory and practice" in the judiciary's response to employer disclaimers.[37] In his examination of the case law of the period, Befort found forty-five decisions that refused to defer to disclaimer language, denying summary judgment or even, in some instances, determining as a matter of law that the employee enjoyed contractual protection.[38]

Cases that resist disclaimers may be usefully distilled into two broad categories of pro-employee cases: those that are tied to drafting choices and those that challenge disclaimers' legal effect. In the former, much larger category are instances of poorly worded or poorly placed disclaimers—what we refer to as "faulty drafting" cases.[39] In the face of

[35] Id.

[36] See infra Section I.B; Fineman, supra note 14, at 356–57 ("[I]mplied contract litigation has reached an 'end game' in California. Through trial and error, employers eventually came up with a court-approved strategy for effectively avoiding liability in implied contract claims.").

[37] See Befort, Legal Effect of Disclaimers, supra note 14, at 328.

[38] Id. at 328, 351–68; see, e.g., id. at 355 (discussing *McLain v. Great American Insurance Cos.*, 256 Cal. Rptr. 863, 868–69 (Ct. App. 1989), in which the court upheld the jury's conclusion that the handbook created an implied contract obligation to terminate only for just cause where the at-will agreement was included in the employment application and the application did not contain an integration clause).

[39] For instance, those containing legalese or buried in the fine print of a lengthy document. See, e.g., id. at 354 (discussing *Morris v. Chem-Lawn Corp.*, 541 F. Supp. 479, 481 (E.D. Mich. 1982), in which the court found that a disclaimer that stated that employment could be terminated at any time without stating that termination could occur absent cause was ambiguous); id. at 356 (discussing *Davis v. Connecticut General Life Insurance Co.*,

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such technical problems, courts often held that the disclaimer was insufficiently "clear and conspicuous" to defeat promises otherwise amounting to an implied contract.[40] In the latter, far smaller category are cases where courts seem to question the value of a disclaimer that might otherwise meet their drafting requirements. These cases generally involve competing sources of employee expectations—prior or subsequent employer writings, oral assurances, or contrary practices—that, according to the courts, raise a factual question as to the existence of binding employer obligations.[41]

Notice the differing incentives such cases create for employers. A robust body of decisions questioning the legal value of disclaimers could conceivably lessen the appeal of disclaimers as a risk management strategy.[42] On the other hand, faulty drafting cases are more likely to inspire the opposite response, leading employers to fine-tune disclaimers to meet judicial requirements for an effective exculpation.

Unsurprisingly, employers and their counsel proved up to that challenge.[43] Writing approximately two decades after Befort, Professor Jonathan Fineman describes "a process of trial and error" through which

743 F. Supp. 1273, 1280 (M.D. Tenn. 1990), in which the court rejected a disclaimer that appeared on the last page of a fifty-two-page handbook).

[40] See, e.g., Jimenez v. Colo. Interstate Gas Co., 690 F. Supp. 977, 980 (D. Wyo. 1988); Loffa v. Intel Corp., 738 P.2d 1146, 1151–52 (Ariz. Ct. App. 1987); see Befort, Legal Effect of Disclaimers, supra note 14, at 352–57.

[41] See, e.g., Butzer v. Camelot Hall Convalescent Ctr., Inc., 454 N.W.2d 122, 124 (Mich. Ct. App. 1989) (per curiam); Helle v. Landmark, Inc., 472 N.E.2d 765, 773–75 (Ohio Ct. App. 1984); Swanson v. Liquid Air Corp., 826 P.2d 664, 668 (Wash. 1992); see Befort, Legal Effect of Disclaimers, supra note 14, at 361–64.

[42] If disclaimers do not reliably eliminate implied contract liability, they may not be worth the cost of drafting them. In theory, the employer incurs the "cost" of losing desirable employees who are unwilling to accept such terms. J. Hoult Verkerke, An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate, 1995 Wis. L. Rev. 837, 873–74 (explaining that although employees seldom negotiate contract terms, they "are likely to choose among potential employers in part on . . . their policies concerning discharge"). But for reasons we explore in Part II, we doubt employees can or do account for such non-salient language in "choosing" whether to accept or continue employment. Cf. Arnow-Richman, Cubewrap Contracts, supra note 5, at 654 (asserting that "many employees are in no position to scrutinize" arbitration clauses and promises not to compete regardless of when they are presented because of the difficulty of finding new work); Estlund, supra note 13, at 384 ("Most contract terms are offered by employers on a take-it-or-leave-it basis, and are set under the shadow of employment at will—the employer's presumptive power to fire employees for any reason at all, including refusal to accept the employer's [proffered] or modified terms of employment.").

[43] See Arnow-Richman & Verkerke, supra note 2, at 948–49 (describing the evolution of employee handbook disclaimer language).

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employers perfected the disclaimer as a way to "immunize themselves against implied contract claims."[44] Human resources professionals and management-side counsel encouraged these efforts by proclaiming the dangers of implied contract liability.[45] As a consequence, broadly worded disclaimer language became a standard practice.

The Society for Human Resource Management ("SHRM"), the primary professional association for corporate HR managers, provides a useful illustration. SHRM offers its membership a suite of standardized documents including the following handbook acknowledgment form:

> I have entered into my employment relationship with [Company Name] voluntarily and acknowledge that there is no specified length of employment. *Accordingly, either I or [Company Name] can terminate the relationship at will, with or without cause, at any time* . . . .
>
> I understand and agree that no manager, supervisor, or representative of [Company Name] has any authority to enter into any agreement for employment other than at-will. Only the President of the company has the authority to make any such agreement and then only in writing . . . .
>
> This manual and the policies and procedures contained herein supersede any and all prior practices, oral or written representations, or statements regarding the terms and conditions of your employment with [Company Name]. By distributing this handbook, [Company Name] expressly revokes any and all previous policies and procedures which are inconsistent with those contained herein.
>
> I understand that, except for employment at-will status, any and all policies and practices may be changed at any time by [Company

[44] Fineman, supra note 14, at 349; see supra note 34 and accompanying text. This response by employers mirrors what contracts scholars have observed in other relationships where a sophisticated drafter imposes adhesive terms on a less powerful party, such as a consumer. See, e.g., David Horton, The Shadow Terms: Contract Procedure and Unilateral Amendments, 57 UCLA L. Rev. 605, 645 (2010); Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts, 43 J. Legal Stud. 1, 2–3 (2014).

[45] See Lauren B. Edelman, Steven E. Abraham & Howard S. Erlanger, Professional Construction of Law: The Inflated Threat of Wrongful Discharge, 26 Law & Soc'y Rev. 47, 80 (1992) (asserting that HR professionals and management-side attorneys vastly overstated the risks of wrongful discharge litigation).

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> Name], and the company reserves the right to change my hours, wages and working conditions at any time. . . .
>
> *I understand and agree that nothing in the employee handbook creates, or is intended to create, a promise or representation of continued employment and that employment at [Company Name] is employment at-will, which may be terminated at the will of either [Company Name] or myself. Furthermore, I acknowledge that this handbook is neither a contract of employment nor a legal document*.[46]

This gold-standard disclaimer is available to paid members only. But in the era of generative AI, sample language is widely available to employers of all sizes and levels of sophistication.[47] A ChatGPT prompt requesting liability-reducing language for a personnel manual yields a respectable, though more understated, result. In fact, the use of

[46] Employee Handbook Receipt Acknowledgment, Soc'y for Hum. Res. Mgmt. (Nov. 16, 2023) [hereinafter SHRM Disclaimer], https://shrm.org/topics-tools/tools/forms/employee-handbook-receipt-acknowledgment.

[47] The prompt "[P]lease draft disclaimer language for me to include in my personnel manual to protect against contract liability to my employees," entered into a free version of ChatGPT, yields the following:

> This Employee Handbook is intended solely as a general guide to the Company's current policies, practices, benefits, and expectations. It is not a contract, express or implied, and it does not create any contractual rights or obligations between the Company and any employee.
>
> Nothing in this Handbook, or in any other Company policy, procedure, practice, statement, or communication, shall be construed as creating a promise of continued employment, a guarantee of any particular terms or conditions of employment, or a limitation on the Company's right to manage its operations and workforce.
>
> Unless otherwise provided in a written agreement signed by the Company's authorized representative, employment with the Company is and remains at will. This means that either the employee or the Company may terminate the employment relationship at any time, with or without notice, and with or without cause, subject only to applicable law.
>
> The Company reserves the right to interpret, modify, suspend, revoke, terminate, or depart from any policy, procedure, benefit, or practice described in this Handbook at any time, with or without notice, except where prohibited by law. No supervisor, manager, or other representative of the Company has authority to enter into any agreement contrary to the foregoing or to make any binding commitments concerning terms or conditions of employment, except in a written agreement signed by the Company's authorized representative.
>
> Employees are required to sign an acknowledgment confirming receipt of this Handbook and understanding that it does not constitute a contract of employment.

Rachel Arnow-Richman, ChatGPT-5.5 Instant, "please draft disclaimer language for me to include in my personnel manual to protect against contract liability to my employees" (June 10, 2026) (on file with the *Virginia Law Review*).

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disclaimers has become so widespread that a ChatGPT prompt requesting a draft personnel manual, without mentioning the need for exculpation of liability, produces a manual that contains, at a minimum, a recital of at-will status.[48]

Notably, SHRM's model language does far more than assert employees' at-will status and disclaim the legal significance of the document in which it appears. It contains several additional clauses that seek to make that result ironclad. We examine the specific features of disclaimers in greater detail later.[49] At this point, we need only observe that exculpatory boilerplate appears to be as expansive as it is ubiquitous. The judicial invitation to draft disclaimers arose in the context of liability for breaches of employee handbooks. But employers' practice of using disclaimers has gone well beyond that. The most aggressive and well-crafted employer disclaimers seek to repudiate all sources of contractual liability, whether arising from documents, from statements, or by implication. Accepting contemporary disclaimers at face value would, in effect, prevent nearly all employment contract formation. Astonishingly, courts have largely acquiesced in this effort, as the next Section describes.

B. Disclaimer Jurisprudence as the New Implied Contract Law

The prior Section described the rise of exculpatory boilerplate. Here, we turn to the judicial response. Consistent with prior writing, we find that most courts readily defer to employment disclaimer language.[50] We explore this highly deferential approach and courts' asserted justifications for privileging exculpatory boilerplate. We also identify a small, largely overlooked body of employee-friendly decisions that have survived despite improvements in drafting. As we will see, both judicial approaches are under-theorized and only loosely connected to contract doctrine.

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[48] Rachel Arnow-Richman, ChatGPT-5.5 Instant, "Can you draft a personnel manual for me to distribute to my employees" (June 10, 2026) (on file with the *Virginia Law Review*).

[49] Several of them echo provisions commonly found in mainstream commercial contracts, such as merger clauses and no-oral-modification clauses. See infra Part III.

[50] See Fineman, supra note 14, at 369–70; Rachel S. Arnow-Richman, Employment as Transaction, 39 Seton Hall L. Rev. 447, 469 (2009); Befort, Policy Statements, supra note 14, at 313.

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1. The Deferential Approach

The majority of jurisdictions dismiss employee contract claims as a matter of law whenever the employer includes a reasonably prominent, well-crafted disclaimer in its written documentation.[51] Courts that follow this deferential approach reflexively subordinate any evidence of employer commitment to the disclaimer. They generally offer one (or both) of two rationales. The first is that employees presented with a clear disclaimer cannot reasonably develop expectations of continued employment or the enforceability of other employer commitments.[52] This approach is largely acontractual and draws on the peculiar law of handbook enforcement. The second rationale purports to apply formal principles of contract law. In such cases, courts treat disclaimer language as an "express" and unambiguous contract for at-will employment that supersedes any "extrinsic" evidence or "implied" terms.[53]

The U.S. Court of Appeals for the Fourth Circuit's decision in *Scott v. Merck & Co.* reflects the first rationale.[54] The plaintiff was a

[51] We performed an original review of disclaimer case law across jurisdictions (chart on file with authors). See also A.B.A., Employment at Will: A State-by-State Survey (Cynthia N. Sass ed., 2025) (ebook) (cataloging variations in treatment of implied contract claims and disclaimers across the states).

[52] See, e.g., Scott v. Merck & Co., 497 F. App'x 331, 336 (4th Cir. 2012) (holding that disclaimer language precluded Scott from being able to show reliance on the employer's Code of Conduct or other policies as creating contractual rights); Fournier v. U.S. Fid. & Guar. Co., 569 A.2d 1299, 1304 (Md. Ct. Spec. App. 1990) (holding that language stating that employment was at-will precluded an employee from "justifiably rely[ing] on any indication in the employee manual that his employment would only be terminated after certain procedures were followed by [the employer]"); Castiglione v. Johns Hopkins Hosp., 517 A.2d 786, 793–94 (Md. Ct. Spec. App. 1986) ("Justifiable reliance is precluded where . . . contractual intent has been expressly disclaimed."); Leikvold v. Valley View Cmty. Hosp., 688 P.2d 170, 174 (Ariz. 1984) (holding that personnel manuals with clear, prominent disclaimers stating that they are not contractual and that employment is at-will do not create reasonable expectations of continued employment or justify employee reliance on their contents).

[53] See, e.g., Dore v. Arnold Worldwide, Inc., 139 P.3d 56, 58 (Cal. 2006) (concluding that an unambiguous at-will provision in a written employment contract cannot be overcome by extrinsic evidence); Kuhl v. Wells Fargo Bank, N.A., 2012 WY 85, ¶ 33, 281 P.3d 716, 727 (Wyo. 2012) (explaining that a valid at-will employment disclaimer defeats an employee's implied contract and promissory estoppel claims based on alleged promises of continued employment); Aberle v. City of Aberdeen, 2006 SD 60, ¶ 25, 718 N.W.2d 615, 622–23 (concluding that "because an express contract existed as to at-will status" in the form of a disclaimer, "an implied contract could not exist").

[54] 497 F. App'x at 335.

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pharmaceutical sales representative who was terminated allegedly in retaliation for reporting her supervisor's misconduct.[55] She did so in conformity with the employer's Code of Conduct, which included an explicit nonretaliation clause. It promised that a concern about a business practice issue, raised in good faith by an employee, "cannot be a basis for denial of benefits, termination, demotion, suspension, threats, harassment or discrimination."[56]

On the employer's appeal, following an adverse jury verdict, the Fourth Circuit held that summary judgment should have been granted based on the employer's disclaimer language.[57] This language consisted of an at-will recital in Scott's job application and a statement in the company's "Manager's Policies," asserting that none of the company's "policies, procedures, or practices should be viewed as creating promises or any contractual rights to employment for a specific duration of time or to any specific benefits of employment."[58] The Fourth Circuit did not grapple with the relationship between these seemingly conflicting sources of employment terms. Applying Maryland law, it stated that to prevail on an implied contract claim, an employee must show not only that a policy statement constrained the employer's discretion to terminate at will, but also that the employee justifiably relied on that statement.[59] Since the disclaimers in the employer's other documents "clearly and conspicuously" informed Scott she was at-will, she could not have believed the anti-retaliation clause in the Code of Conduct created any contractual right or obligation.[60]

Despite its allusion to contract law, the court did not apply ordinary contract doctrine. Reliance is not a prerequisite to a claim of breach,[61]

[55] Id. at 332–33.

[56] Id. at 332 n.2. Plaintiff also cited documents from Merck's Office of Ethics, which provided: "Retaliation and threats of retaliation against employees who raise concerns, or against individuals who appropriately bring important workplace and business issues to the attention of management, are serious violations of Merck's values and standards and will not be tolerated." Id.

[57] Id. at 336–37.

[58] Id. at 335–36.

[59] Id. at 335.

[60] Id. at 336; see also McPherson v. Cingular Wireless, LLC, 2007-0462, pp. 7–8 (La. App. 3 Cir. 10/3/07), 967 So. 2d 573, 578 (finding that though an employer's Code of Conduct "strongly implies protection" for employee whistleblowing, "the only thing set in stone is . . . that all employees are governed by the unmodified at-will doctrine").

[61] See 1 Williston on Contracts § 1:18 (4th ed.), Westlaw (database updated May 2026) (explaining that a fully executory bilateral contract is enforceable where there is mutual assent and consideration, even if neither party has yet performed).

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and the court ignored the obvious questions of contract modification and interpretation presented by the facts.[62] Perhaps the court used reliance as a proxy to determine whether a reasonable employee would expect the employer's anti-retaliation provision to be binding, applying the "reasonable expectations" rule for handbook enforcement under the implied contract exception.[63] However justified, the inquiry would appear to require a factual determination in Scott's case. The Code of Conduct purported to be obligatory, and its nonretaliation provision was crystal clear.[64] Yet the court disregarded Scott's understanding of the disclaimer language and made no effort to reconcile it with the guarantees in the separate Code of Conduct.

Courts that adopt the second rationale appeal explicitly to traditional principles of contract law to justify their deference to employers' disclaimer language, though as we will see, their analysis is often superficial or erroneous. The Supreme Court of Wyoming's decision in *Kuhl v. Wells Fargo Bank, N.A.* illustrates this "contract-lite" approach and the aggressive use of disclaimers to prevent all forms of contractual liability.[65] Plaintiff Kuhl was a branch president of a bank being purchased by defendant Wells Fargo in the wake of the Great

[62] For instance, the employment application necessarily preceded the plaintiff's receipt of the company's Code of Conduct, allowing for the conclusion that the Code of Conduct superseded the at-will clause in the prior document. The opinion is opaque as to the order in which the other documents were received. Similarly, the court did not interrogate whether all of the policy documents, which presumably did not cross-reference one another, constituted part of Scott's employment contract. Rather it summarily concluded that the appearance of the disclaimer and promissory language in separate documents was "not material." *Scott*, 497 F. App'x at 336.

[63] See supra Subsection I.A.1; see, e.g., Ivory v. Specialized Assistance Servs., Inc., 850 N.E.2d 230, 231, 233 (Ill. App. Ct. 2006) (explaining that the "express disclaimer in defendant's employee manual precluded the existence of an employment contract," making reliance less reasonable); Roberson v. Wal-Mart Stores, Inc., 44 P.3d 164, 169 (Ariz. Ct. App. 2002) ("Disclaimers . . . that clearly and conspicuously tell employees that the manual is not part of the employment contract and that their jobs are terminable at will 'instill no reasonable expectations of job security and do not give employees any reason to rely on representations in the manual.'" (quoting Leikvold v. Valley View Cmty. Hosp., 688 P.2d 170, 174 (Ariz. 1984))).

[64] *Scott*, 497 F. App'x at 332 n.2 (quoting the Code of Conduct which stated that "[a]ny employee or third party who raises a business practice issue *will* be protected from retaliation" and "[t]he fact that an employee has raised concerns in good faith, or has provided information in an investigation, cannot be a basis for denial of benefits, termination, demotion, suspension, threats, harassment or discrimination" (second alteration in original) (emphasis added)).

[65] 2012 WY 85, ¶¶ 18–21, 281 P.3d 716, 723–24 (Wyo. 2012).

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Recession.[66] In the interest of retaining key staff during the transition, Wells Fargo made various representations to Kuhl about his continued employment.[67] However, during negotiation and onboarding, Kuhl received at least five different documents containing strong boilerplate disclaimer language.[68]

Kuhl was terminated within six months of the acquisition, just shy of the first installment of his promised retention bonus and well short of the full year necessary to secure the entire amount.[69] In the ensuing litigation, the court affirmed summary judgment for Wells Fargo on all of Kuhl's breach of contract theories.[70] It held that the handbook Kuhl received could not confer implied contract rights, as it contained at least four disclaimers limiting the contractual effect of its provisions and asserting that employment was at-will.[71] The court also rejected an "express" contract claim based on Kuhl's individual "offer" letter from Wells Fargo. The letter reflected an expectation and desire that Kuhl would remain with the company long-term.[72] In addition, Kuhl asserted that Wells Fargo's human resources manager, who hand-delivered the letter, assured him he could only be fired if he did something illegal.[73]

None of this evidence, according to the court, could be considered in assessing the letter because of five small-print paragraphs that appeared in a bordered text box located after the closing and signature lines. That language imposed a number of "[c]onditions" on the plaintiff's employment, including an at-will disclaimer with all the hallmarks of strategic management-side lawyering.[74] The court held that the letter

[66] Id. ¶¶ 3–5.

[67] Id. ¶ 5.

[68] Id. ¶¶ 6–11.

[69] Id. ¶¶ 5–12.

[70] Id. ¶¶ 38–39.

[71] Id. ¶¶ 9–34. The court rejected the plaintiff's contention that the disclaimer was insufficiently conspicuous insofar as it was neither bolded nor "in larger print." Id. ¶ 31 (finding that whatever the disclaimer language may have lacked in emphasis was made up for by "repetition, prominence, and placement").

[72] The letter twice expressed the company's "commit[ment] to retaining key employees such as [the plaintiff]" post-acquisition. It outlined plaintiff's compensation package, which included an annual salary, a guaranteed incentive compensation "for the calendar year," payable nine months after plaintiff's start date, and a "retention bonus," payable in two installments over the next year. Id. ¶¶ 15–17.

[73] Id. ¶¶ 5–6.

[74] Id. ¶¶ 15–19. In addition to stating that both parties had "the right to terminate a team member's employment at any time, with or without advance notice and with or without cause," the disclaimer provided that "no employee of Wells Fargo has the authority to alter

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unambiguously offered only at-will employment. It disregarded language about the company's commitment to retention and its long-term compensation package, and cited (somewhat disingenuously) the continued employment requirement for Kuhl's receipt of a retention bonus as affirming his at-will status.[75] It concluded: "[T]here is simply no language in the letter that can reasonably be interpreted as providing that Mr. Kuhl's employment would be for any specified period of time, or that he could be terminated only for cause."[76] Consequently, the court refused to allow any "extrinsic evidence" on the meaning of the "contract."[77] That is, it refused to consider the alleged oral statements, or presumably any evidence about the context in which the parties reached their agreement.

This analysis has superficial appeal, yet is inapt in several respects. To begin, the court treats the letter as a final contract—the definitive statement of the terms of the relationship. But it was plainly at most an offer (in the colloquial sense of the term) and just one of several documents and conversations discussing terms of employment. Although the court applies supposedly objective principles of interpretation, it cites no canons of construction, nor any legal standard for ambiguity.[78] Its conclusion that the "contract" is unambiguous relies

[the at-will] arrangement without the express authorization of a Wells Fargo officer at the level of executive vice president or higher." Id. ¶ 17. Notably, the conditions also included a confidentiality provision that would likely violate the National Labor Relations Act and several states' equal pay and wage transparency laws. Id.; see, e.g., Flex Frac Logistics, L.L.C. v. NLRB, 746 F.3d 205, 208–09 (5th Cir. 2014); Cal. Lab. Code § 1197.5(k)(1) (West 2026); Colo. Rev. Stat. § 8-5-102(2)(d) (2026).

[75] *Kuhl*, 2012 WY 85, ¶¶ 18–21. The point of a deferred retention bonus is to encourage the employee to remain with the company. If the employee continues for the designated period, the company pays the bonus; if the employee leaves, the employee forfeits that amount. It presumes that the *employee* may choose to terminate employment, but it has no bearing on the *employer's* termination rights.

[76] Id. ¶ 21.

[77] Id.; see also Kenyon v. Applied Techs. Assocs., No. B249735, 2015 WL 1286355, at *4 (Cal. Ct. App. Mar. 19, 2015) (characterizing an employee's handbook acknowledgment as an "express agreement for at-will employment" that precluded extrinsic evidence of prior or contemporaneous agreement); Dore v. Arnold Worldwide, Inc., 139 P.3d 56, 58, 60 (Cal. 2006) (asserting that the court need not consider extrinsic evidence when there is an express written contract that establishes at-will employment); Malmstrom v. Kaiser Aluminum & Chem. Corp., 231 Cal. Rptr. 820, 827–28 (Ct. App. 1986) (holding that the parties' written agreement was clear and precluded consideration of any prior oral agreement).

[78] Many canonical principles of contract interpretation—most notably *contra proferentem*—would support a contrary conclusion. We discuss how proper application of these concepts would alter the result in many disclaimer cases infra Part III.

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on the court's tacit, simplistic understanding of employment-at-will that forecloses a more nuanced interpretation of the term in this context. For example, it is possible that the plaintiff's employment would be at-will only after being employed long enough to earn his retention bonus. Finally, and perhaps most problematically, the court refuses to consider the statements of the HR manager—the very person the employer chose to present and discuss the terms of Kuhl's employment—based on the mere recital that no one could deviate from the company's boilerplate terms other than a vice president. Not only did the HR manager plainly present himself as having authority, but he was also slated for elevation to vice president once the acquisition was completed.[79] The court's deference to the employer's ironclad boilerplate thus enshrined a strict reading of employment-at-will that prospectively negated almost any alteration of that arrangement.

Cases like *Scott* and *Kuhl* typify the majority approach to disclaimers. Both plaintiffs presented contrary evidence and a plausible basis for believing their employers had compromised the employers' discretion to terminate at will. But in both cases, courts held as a matter of law that such evidence was powerless in the face of a written disclaimer. Such language was dispositive of any and all claims.

2. The Fact-Based Approach

In contrast to the majority approach, there is a small body of case law permitting employees to pursue breach of contract claims despite disclaimers. These cases are fact-specific, but generally fall into the two categories previously described: those involving faulty drafting and those that appear to resist disclaimers regardless of how well they are drafted. Cases in both categories often feature competing evidence or contextual factors that are especially compelling.

Cases in the first category are much like those identified by Befort in his survey of early disclaimer jurisprudence. They generally involve weakly drafted or poorly placed disclaimers. While many (perhaps most) contemporary employers adopt ironclad disclaimers, some are less careful.[80] In such cases, a reasonable employee is even less likely to understand the meaning or appreciate the impact of the employer's

[79] *Kuhl*, 2012 WY 85, ¶ 22 n.2.

[80] Some employers may have limited resources to review and revise HR documents. Others may be resistant to the harsh tone of ironclad disclaimers and opt for softer language.

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exculpatory language.[81] This is particularly true where the employee also encounters strong, conflicting promissory language.[82] A variation on this theme is the inconspicuous disclaimer. A disclaimer may be buried in fine print, obscured in a voluminous document, or appear in a document other than the one giving rise to the employee's claim.[83] Such disclaimers do little to alert employees that the employer's policies and statements are nonbinding, no matter how clearly they are drafted.

These cases are an evaporating minority, and at least one jurisdiction has sought to supersede such results by statute.[84] In 2004, South Carolina enacted a law broadly asserting that no personnel manual "or other document" provided by an employer will "create an express or implied contract of employment if it is conspicuously disclaimed."[85] The statute provides that a disclaimer appearing in "underlined capital letters on the first page of the document and signed by the employee" satisfies this requirement and specifically removes the question of conspicuousness from the jury.[86] This law presumably was intended to reverse pro-employee case law that subjected the content and placement

[81] See, e.g., Ferguson v. Host Int'l, Inc., 757 N.E.2d 267, 272 (Mass. App. Ct. 2001); Jones v. Cent. Peninsula Gen. Hosp., 779 P.2d 783, 787–88 (Alaska 1989).

[82] See, e.g., Leyden v. Am. Accreditation Healthcare Comm'n, 83 F. Supp. 3d 241, 247 (D.D.C. 2015); *Jones*, 779 P.2d at 788.

[83] See, e.g., *Leyden*, 83 F. Supp. 3d at 247 (disclaimer and implied promise appeared in different documents); Swanson v. Liquid Air Corp., 826 P.2d 664, 673 (Wash. 1992) (disclaimer located in roughly two-hundred-page benefits manual); *Jones*, 779 P.2d at 788 (disclaimer located in eighty-plus-page manual).

[84] Befort saw such decisions as reflecting a judicial desire to protect employees from harsh results. Befort, Legal Effect of Disclaimers, supra note 14, at 328 ("The common denominator in these cases is a reluctance to allow a boilerplate disclaimer to shield handbook promises from enforcement without a prior examination of the overall circumstances and equities of the situation."). That explanation was consistent with the at-will exceptions jurisprudence of the times. Our research suggests, however, that the pendulum has swung back. Courts are now more likely to favor a robust employment-at-will rule and defer to employer disclaimers.

[85] S.C. Code Ann. § 41-1-110 (2025) (effective Mar. 15, 2004); cf. Ariz. Rev. Stat. Ann. § 23-1501(A)(2) (2026) (effective Sep. 29, 2012) (recognizing a "written contract" overcoming employment-at-will based on a "handbook or manual or any similar document distributed to the employee, if that document *expresses the intent that it is a contract* of employment" (emphasis added)).

[86] S.C. Code Ann. § 41-1-110 (2025) ("Whether or not a disclaimer is conspicuous is a question of law."). But see Yonathan A. Arbel & Andrew Toler, ALL-CAPS, 17 J. Empirical Legal Stud. 862, 865 (2020) (showing that all-caps text is less readable).

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of disclaimers to close review.[87] Notably, it is written in such broad terms, much like the boilerplate it protects, that it ostensibly precludes any contract for job security or other terms of employment.

The few cases in the second category take a fact-centered rather than technical view of disclaimers. Such courts hold that a disclaimer is only partial evidence of the parties' employment agreement and weigh the disclaimer relative to circumstances. Kansas is one of a few jurisdictions that appear to take this approach. In *Wilkinson v. Shoney's, Inc.*, the defendant's regional director persuaded Wilkinson, a former employee, to return to the company as a store manager.[88] Wilkinson had previously quit, allegedly due to a conflict with his supervisor. He had to appear before Shoney's "Rehire Board" to qualify for reemployment, after which he negotiated terms and began working. At that point, the employer presented Wilkinson with company policy documents and a poster notification containing a variety of disclaimers. Within a short time after his return, Wilkinson was cited in a misconduct investigation, leading the employer to contact his prior supervisor. The employer subsequently terminated Wilkinson based on the supervisor's negative comments.[89]

In Wilkinson's subsequent claim for breach of contract, the court affirmed a jury verdict in his favor. It rejected the employer's argument that the court should have awarded summary judgment based on the disclaimer language, which it found "*not* determinative [but] . . . only a factor to be considered by a properly instructed jury."[90] Other evidence included the promissory language of the employer's policies, evidence that managers followed policies of progressive discipline, and the context of the rehire, including the encouragement of the regional director who recruited the plaintiff and the fact that plaintiff cleared the hurdle of appearing before the Rehire Board.[91]

[87] See, e.g., Conner v. City of Forest Acres, 560 S.E.2d 606, 611 (S.C. 2002) (finding that a handbook that included both a disclaimer and "mandatory" progressive discipline procedures raised a jury question as to the latter's enforceability).

[88] 4 P.3d 1149, 1153–54 (Kan. 2000).

[89] Id.

[90] Id. at 1164.

[91] Id. at 1163–64. Regarding the comments of the plaintiff's prior supervisor, the court observed that the Rehire Board's approval could be understood as an assurance that the plaintiff's prior conflict with his supervisor would not derail his reemployment because the company's written rehire policy provided that once an employee cleared this hurdle, "the employee could be rehired 'with no hard feelings from anyone.'" Id. at 1164.

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Wilkinson takes an expansive view of the evidence supporting the plaintiff's breach of contract claim rather than privileging the employer's exculpatory boilerplate. It does not, however, draw on any contract doctrine in reaching this conclusion.[92] Some cases that take this fact-based approach adopt the rationale of early handbook cases in finding employer policies legally enforceable: it is unfair to allow employers to reap the benefits of making employee-protective statements while assiduously avoiding any binding obligation.[93] Some allude to the idea (often implicitly) that the employer's affirmative policy statements and their disclaimer language must be interpreted consistently with employees' reasonable expectations.[94] This presumably extends not only to conflicting language but also to specific assurances, practices, and the context as a whole. Courts generally do not provide a clear doctrinal rationale for these holdings, though we will soon supply several.

* * *

As we have seen, employers currently use disclaimers to foreclose nearly all employment contract claims. In the next three Parts of this Article, we challenge this deferential stance and argue for a fundamentally new approach to employment disclaimers. Our proposals would radically alter existing practice, but they are far more firmly grounded in mainstream contract doctrine.

II. ENSURING MEANINGFUL ASSENT

As we saw in Part I, well-counseled managers insist, during the onboarding process, that new employees accept exculpatory language

[92] The only legal principle it cites in analyzing the disclaimer is the standard for summary judgment. Id. at 1164.

[93] As one court put it:

> It is one thing to permit an employer to reap the benefits of a handbook by making explicit representations of job protections or job security, but quite another thing to allow the employer to avoid complying with these representations . . . merely by including a disclaimer. As observed in a number of recent opinions, the situation becomes the quintessence of having "one's cake and eating it too."

Ortega v. Wakefield Thermal Sols., Inc., 20 Mass. L. Rptr. 337, 339 (Mass. Super. Ct. 2006).

[94] See, e.g., Leyden v. Am. Accreditation Healthcare Comm'n, 83 F. Supp. 3d 241, 247 (D.D.C. 2015) (finding an at-will disclaimer "rationally at odds" with anti-retaliation language in employer's whistleblower policy (quoting Strass v. Kaiser Found. Health Plan of Mid-Atl., 744 A.2d 1000, 1013 (D.C. 2000))).

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that reduces or eliminates employers' exposure to contractual liability. But this situation is not unique to employment. Sellers of consumer goods and services have long used similarly exculpatory language. These clauses disclaim warranties, exclude consequential damages, narrowly limit remedies for breach, require individual arbitration, and preclude any class proceedings. We all routinely accept countless agreements containing terms like these every day.

These widespread consumer contracting practices have attracted vigorous and voluminous criticism.[95] Contracts scholars have challenged both consumers' attenuated assent to these exculpatory terms and the substance of the terms themselves. Critics have sensibly questioned whether consumers meaningfully agree to surrender their preexisting legal rights. These critiques have led some courts to question the enforceability of consumer boilerplate and even occasionally to refuse to enforce particularly obscure or inaccessible terms. Largely in response to such critical commentary, the American Law Institute ("ALI") has adopted a new Restatement of Consumer Contracts that somewhat tightens doctrinal standards for finding consumer assent to these contracts of adhesion.[96]

In this Part, we reexamine the process of contract formation that allows disclaimers to dominate nearly every employment contract. We identify features of the onboarding process that prevent employees from fully understanding and expressing meaningful assent to common disclaimer language. And we draw lessons from the consumer contract literature for how courts (and legislatures) might better ensure meaningful assent in the employment context.

A. What's Wrong with Employment Boilerplate?

Recall the stylized description of the employment onboarding process with which we began our Introduction. Once again, put yourself in the position of a worker navigating that process. Consider for a moment whether, or to what extent, you have meaningfully agreed to the many terms presented. Unless you are a high-level executive, there is a vanishingly small chance that you consulted an attorney before

[95] See infra notes 108–10 and accompanying text.
[96] See Restatement of Consumer Conts. § 2 cmt. 14 (A.L.I. 2024).

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electronically signing these myriad documents.[97] The circumstances surrounding their presentation similarly militate against thoughtful deliberation. You are at the very start of your employment relationship. You naturally want to make a good impression on your new employer. Even if the HR professional supervising your onboarding expresses no overt impatience, it will be clear to you that careful—and necessarily time-consuming—reading is unwelcome. Nothing about the process even hints that these "agreements" are being presented as the opening proposal in a negotiation. Indeed, you have already been hired. And the onboarding process is a mere formality required by your employer. But if you refuse to sign any document as presented, your new employment relationship will unravel before it has even begun.[98]

To a legally unsophisticated worker, the substance and significance of these agreements are also likely to be rather obscure. In some cases, the words themselves may be easy to comprehend, but their implications will not be apparent to a layperson. For example, the conventional confirmation of at-will status that appears in nearly every employee handbook describes the mutual right of the employer and employee to terminate the employment relationship without cause and without prior notice.[99] This language is relatively straightforward.[100] And yet, few employees are likely to be aware of or anticipate precisely how an at-will clause may negate statements the employer has made during the hiring process about the position or the company. Moreover, this simple clause often appears in tandem with provisions disclaiming the enforceability of prior or future oral assurances concerning job security or other personnel policies.[101] The effects of these clauses are considerably more opaque. Legally unsophisticated parties are unlikely to comprehend—or recall years later—the extent to which these terms

[97] We imagine here an online process completed in the presence of a company HR staff member, but our criticisms apply equally to more traditional paper-based onboarding documents or fully remote online systems.

[98] See Lisa J. Bernt, Tailoring a Consent Inquiry to Fit Individual Employment Contracts, 63 Syracuse L. Rev. 31, 50 (2012) (describing the nature of most individual employment contracts as a take-it-(all)-or-leave-it proposition).

[99] See supra notes 43–49 and accompanying text.

[100] Richard A. Epstein, In Defense of the Contract at Will, 51 U. Chi. L. Rev. 947, 955 (1984) ("[T]he phrase 'at will' is two words long and has the convenient virtue of meaning just what it says, no more and no less.").

[101] See supra notes 43–49 and accompanying text.

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combine to foreclose legal enforcement of any promise connected to their employment.

These circumstances undermine any claim that employees have meaningfully agreed to the terms presented to them at onboarding. A new employee exercises at most a very attenuated sort of choice during this process. These terms arrive long after the basic employment "bargain" has been concluded.[102] Having already accepted an offer of employment, no one can reasonably be expected to scuttle that deal by objecting to these mere formalities on the first day of work. Moreover, the sheer volume of information is likely to be overwhelming. Recall that the (virtual) stack of paperwork usually includes an employee handbook chock-full of detailed policies, a form confirming at-will status, and separate technology and confidentiality agreements. Employers often add an agreement to arbitrate and various post-employment restrictive covenants.[103] Any reasonable person understands that the employer firmly intends to impose these terms on the employment relationship, and no amount of deliberation or discussion will alter that reality.

The act of digitally "signing" these myriad documents thus signals a limited form of acquiescence at best. The newly hired employee most likely thinks:

> I understand you want me to agree to these terms. There's no time to figure out what they really mean, and even if I could, I'm not prepared to lose this job at the last minute by fighting for more favorable provisions. Thus, I will perform the act you have requested (signing),

[102] On the specific concerns attendant to documents signed post-hire, see Arnow-Richman, Cubewrap Contracts, supra note 5, at 647–51 (analogizing noncompetes and arbitration agreements signed during onboarding to consumer "shrinkwrap" contracts).

[103] See, e.g., Evan P. Starr, J.J. Prescott & Norman D. Bishara, Noncompete Agreements in the US Labor Force, 64 J.L. & Econ. 53, 60–61 (2021) (finding that nearly 40% of employees have signed a noncompete at some point in their career); Natarajan Balasubramanian, Evan Starr & Shotaro Yamaguchi, Employment Restrictions on Resource Transferability and Value Appropriation from Employees, 45 Strategic Mgmt. J. 2519, 2527, 2528 fig. 1 (2024) (finding that 88.2% of surveyed firms use NDAs and 66.5% use noncompetes for at least some employees); Alexander J.S. Colvin, The Metastasization of Mandatory Arbitration, 94 Chi.-Kent L. Rev. 3, 11 tbl. 1 (2019) (finding that 49.8% of employers with fewer than 100 employees and 67.7% of employers with 5,000 or more employees adopt mandatory arbitration). Although 99.9% of businesses have fewer than 500 employees, larger businesses employ a majority of all workers. See U.S. Small Bus. Admin., 2025 Small Business Profile 1, 4 (2025), https://advocacy.sba.gov/wp-content/uploads/2025/06/United_States_2025-State-Profile.pdf [https://perma.cc/Q4S9-6JCB].

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> though it represents to me only an acknowledgment that these are terms on which you insist.

Although recognizable as a form of assent, this process falls far short of the contractual ideal of free and informed consent. Few, if any, workers truly understand the legal consequences of these many terms. And the surrounding circumstances conspire to induce them to manifest agreement despite having little idea what they are agreeing to.

New employees are surely aware that employers intend these documents to have some legal significance when they sign them. The venerable "duty-to-read" doctrine thus provides a ready argument that workers should be legally bound.[104] Moreover, the objective theory of contractual assent reinforces that conclusion.[105] Employees have taken an action—physical or electronic signature—conventionally understood to signify agreement. And yet, any fair-minded observer must acknowledge that workers' assent is remarkably shallow. It arguably lacks the deeper moral and economic significance we usually associate with genuine contractual agreement.

Despite these obvious problems, employment law scholars have mostly neglected the limited nature of workers' assent to disclaimers.[106] Most focus on enhancing employees' statutory rights and, perhaps understandably, appear to have given up on contract law as a source of worker protection.[107] In contrast, countless scholars have developed forceful critiques of the assent-based problems that afflict consumer contracts. We next consider how the vast literature on consumer boilerplate can inform our analysis of employment contracts.

B. Parallels to Consumer Contracting

Contracts scholars have identified key features of consumer contracts that make them problematic. They are ordinarily standardized contracts

[104] See 27 Williston, supra note 61, § 70:114 ("One who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them.").

[105] See 2 id. § 6:3; Joseph M. Perillo, The Origins of the Objective Theory of Contract Formation and Interpretation, 69 Fordham L. Rev. 427, 463–64 (2000).

[106] For exceptions, see Arnow-Richman, Cubewrap Contracts, supra note 5, at 647–51; Hoffman, supra note 20, at 1399–1400.

[107] See Arnow-Richman & Verkerke, supra note 2, at 900–01.

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of adhesion offered at the point of sale on a take-it-or-leave-it basis.[108] Nobody reads their terms.[109] Comparatively sophisticated sellers consult legal counsel and progressively refine their terms of sale (or service) to maximize their protection and minimize their potential liability.[110] They spread the considerable cost of developing exculpatory boilerplate across a large number of identical transactions. In contrast, consumers necessarily engage in countless dissimilar transactions with many distinct sellers and service providers. They can ill afford to invest the time required to read these lengthy documents.[111] Nor can they justify the cost of retaining counsel to fully understand the implications of the agreements they must sign in order to function in our modern exchange economy. Moreover, no seller really expects any customer to read these terms or consult counsel.

Employment disclaimers broadly resemble the exculpatory boilerplate found in consumer contracts. In both situations, the more legally sophisticated party (a producer, service provider, or employer) imposes unfavorable terms on comparatively unsophisticated parties (consumers or workers). The terms themselves are frequently lengthy, legalistic, and presented in a way that discourages anyone from reading them. Moreover, the exculpatory language of the disclaimer may conflict with informal promises or assurances made to either consumers or employees.

[108] See Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law 8–9 (2013).

[109] See Omri Ben-Shahar & Carl E. Schneider, The Failure of Mandated Disclosure, 159 U. Pa. L. Rev. 647, 704–11 (2011) (presenting rationales for why consumers fail to read terms of service and other common contractual boilerplate). For less direct evidence of lack of reading in the employment context, see Verkerke, supra note 42, at 885–86; Pauline T. Kim, Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World, 83 Corn. L. Rev. 105, 139–40 & tbl. 4 (1997).

[110] See, e.g., David Horton, Arbitration About Arbitration, 70 Stan. L. Rev. 363, 393–94 (2018) (describing companies' efforts to refine arbitration clause language in response to unconscionability decisions).

[111] See Omri Ben-Shahar, Regulation Through Boilerplate: An Apologia, 112 Mich. L. Rev. 883, 890, 897 (2014) (reviewing Radin, supra note 108); Audie Cornish, Why Do We Blindly Sign Terms of Service Agreements?, NPR: All Things Considered, at 02:11 (Sep. 1, 2014, at 16:07 ET), https://www.npr.org/2014/09/01/345044359/why-do-we-blindly-sign-terms-of-service-agreements [https://perma.cc/GP64-TKV3] (featuring Ben-Shahar discussing printing a fifty-five-page Apple iTunes contract and displaying the contract from the roof of the University of Chicago Library "to exhibit the length and the pointlessness of trying to read the disclosure that we receive from all sorts of services").

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Of course, employment relationships also differ from consumer transactions, and those differences might diminish our concerns about the lack of meaningful assent. First, consumers commonly accept multiple contracts every day. In contrast, employees on average enter into only about a dozen employment contracts in their lifetime, and almost half of those jobs are held before age twenty-five.[112] Faced with comparatively infrequent transactions, employees might be able to justify investing more time and effort into understanding their terms of employment. Second, the employment onboarding process typically extends over several hours, while consumer transactions rarely take longer than a few minutes to complete. Thus, the employment context arguably allows more time for workers to ask questions and independently investigate important contract terms.[113] Finally, with the exception of purchasing a home or a car, individual consumer transactions tend to involve hundreds or, at most, thousands of dollars as compared to employment where the median annual compensation is $65,052.[114] In theory, the higher stakes of an employment contract might motivate employees to review its terms more carefully.

However, these distinctions—less frequent transactions, more time, and higher stakes—ultimately leave employees no better off than consumers. First, the available empirical research strongly implies that most employees ignore disclaimer language in these employment documents.[115] And even those workers who read carefully are unlikely to understand the full implications of common disclaimer language.[116]

[112] See Bureau of Lab. Stat., U.S. Dep't of Lab., Number of Jobs, Labor Market Experience, Marital Status, and Health for Those Born 1957–1964, at 1 (Aug. 22, 2023, at 10:00 ET), https://www.bls.gov/news.release/archives/nlsoy_08222023.pdf [https://perma.cc/P5Z8-KNR5] (describing a study on "[i]ndividuals born in the latter years of the baby boom (1957–64)").

[113] See Arnow-Richman, Cubewrap Contracts, supra note 5, at 655–56 (making similar points in the context of arbitration agreements and noncompetition agreements).

[114] See Bureau of Lab. Stat., U.S. Dep't of Lab., Usual Weekly Earnings of Wage and Salary Workers: Second Quarter 2026 (July 21, 2026, at 10:00 ET), https://www.bls.gov/news.release/wkyeng.nr0.htm [https://perma.cc/Q7NM-J57W] (finding that median weekly earnings were $1,251 in the second quarter of 2026).

[115] See Kim, supra note 109, at 139–40, 154; Jesse Rudy, What They Don't Know Won't Hurt Them: Defending Employment-At-Will in Light of Findings that Employees Believe They Possess Just Cause Protection, 23 Berkeley J. Emp. & Lab. L. 307, 335–37 (2002); Verkerke, supra note 42, at 886.

[116] See supra notes 99–101 and accompanying text (discussing the potentially complex interaction of general at-will terms with other assurances about more specific employment rights).

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Second, new employees face considerable pressure to raise no objections during the onboarding process to avoid being branded a troublemaker. As a result, the formal opportunity to review contract terms means little in practice.

Finally, rather than inspiring more deliberation, the higher stakes of employment contracting may make newly hired workers more, rather than less, likely to assent unthinkingly. New employees justifiably fear that questioning any contract terms will jeopardize their job. In sum, even if employees, as compared to consumers, have more time to read and greater reason to inquire about terms, they often feel more pressure to assent.[117] After all, consumers purchase most goods and services after a comparatively short search in markets with many sellers. In contrast, workers' job searches may extend over weeks or months and typically yield one, or at most a few, offers of employment. Thus, employment boilerplate warrants at least as much skepticism as its consumer analogue.[118]

Continued judicial deference to disclaimers is particularly troubling given the significant power imbalance inherent in employment relationships. Unlike consumers who can often choose among competing sellers, new employees often face a single take-it-or-leave-it proposition. Moreover, once prospective employees have accepted a job offer, they have little leverage to negotiate more favorable terms. Rejecting the proffered disclaimers at the onboarding stage is tantamount to refusing the job itself. Thus, courts should be far more skeptical of purported assent in these circumstances.

C. Potential Reforms

The troubling characteristics of consumer boilerplate have inspired various reform proposals. Many scholars have argued that the absence of meaningful assent should make consumer boilerplate presumptively

[117] But see Arnow-Richman, Cubewrap Contracts, supra note 5, at 655–56 (suggesting that employees may be more likely than consumers to read the documents given to them and thus providing terms earlier may be valuable).

[118] Consumer terms also tend to be more complex than most employment offer letters. And since many consumer contracts are electronic and involve no interaction between the seller and buyer, informal assurances are far more frequent in the employment context. Nevertheless, employment and consumer disclaimers are sufficiently similar to make the academic critique of consumer boilerplate relevant to our analysis of employment contracts.

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unenforceable.[119] Some critics have expressed support for enhanced disclosure requirements.[120] Still other scholars have advocated for stricter judicial and statutory constraints on consumer contracting.[121] In response, a few judicial decisions have raised notice standards for consumer contracts, and some courts now insist on more meaningful evidence of knowing assent to important terms.[122] Judges occasionally hold that oppressive exculpatory terms are procedurally and substantively unconscionable.[123] And legislative enactments impose limited constraints on the enforceability of some specific exculpatory language.[124] Scholars also have advocated for more robust application of the *contra proferentem* canon and unconscionability doctrine. Others have proposed requiring retailers and service providers to meet a "duty to draft reasonably" or to obtain specific assent to key terms.[125]

[119] See Radin, supra note 108, at 213; Rakoff, supra note 20, at 1176.

[120] See, e.g., Robert A. Hillman, Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?, 104 Mich. L. Rev. 837, 839, 845–47 (2006) (analyzing the potential value of additional disclosures). Recall, however, that scholars have found evidence that mandated disclosures fail to improve consumers' understanding of their contracts. See Ben-Shahar & Schneider, supra note 109, at 711–18; Lauren E. Willis, The Consumer Financial Protection Bureau and the Quest for Consumer Comprehension, 3 RSF: The Russell Sage Found. J. Soc. Scis., Jan. 2017, at 74, 76–80.

[121] See Hoffman, supra note 20, at 1409–10 (advocating for a "Statute Against Forms" that would make comparatively low-value adhesive written contracts unenforceable); Andrea J. Boyack, The Shape of Consumer Contracts, 101 Denv. L. Rev. 1, 2, 43–44 (2023) (proposing a distinction between enforceable "constructive" terms necessary for a transaction's infrastructure and unenforceable "destructive" terms that solely reduce consumers' default legal rights); Jonathan F. Harris, Consumer Law as Work Law, 112 Calif. L. Rev. 1, 9–10 (2024) (observing that employers sometimes treat workers as consumers of their services and credit products and proposing an integrated use of consumer law and employment law to protect workers more fully).

[122] See Restatement of Consumer Conts. § 2 cmt. 6 (A.L.I. 2024); Byars v. Goodyear Tire & Rubber Co., 654 F. Supp. 3d 1020, 1025 (C.D. Cal. 2023) ("Absent actual notice, a website owner can show constructive notice by showing that: '(1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms.'" (quoting Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 856 (9th Cir. 2022))).

[123] See Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203, 1256–57, 1273–77 (2003).

[124] See Rachel Arnow-Richman, Modifying At-Will Employment Contracts, 57 B.C. L. Rev. 427, 498–502 (2016) [hereinafter, Arnow-Richman, Modifying At-Will Contracts] (reviewing statutory and common law constraints on "change-of-terms" clauses in consumer contracts).

[125] Kim, supra note 20, at 185–92, 195–97 (proposing a "duty to draft reasonably" and a "specific assent approach"). Similar proposals for reform feature prominently in much

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Mounting scholarly criticism led the ALI, in May 2022, to adopt a new Restatement of Consumer Contracts.[126] The Restatement endorses some existing protective doctrines. For example, it embraces the *contra proferentem* canon, which directs courts to construe ambiguous terms in standard-form consumer contracts against the drafter.[127] It also modestly expands the protections available under current law. For instance, the Restatement provides that consumers are bound by terms only if they had a reasonable opportunity to understand them (considering the terms' clarity, prominence, and accessibility) before manifesting assent.[128] Provisions that permit unilateral modification must ensure consumers receive adequate notice of the new terms, and those consumers must manifest assent either expressly or through continued use of the product or service with knowledge of the modified terms.[129] The Restatement even endorses a narrow version of the "reasonable expectations" doctrine, an insurance law concept that, as we discuss later, allows courts to reject policy terms that conflict with a reasonable policyholder's coverage expectations.[130] Finally, the Restatement endorses a "sliding-scale" approach to unconscionability, under which a greater showing of procedural unconscionability may compensate for a lesser showing of substantive unconscionability, and vice versa.[131]

Despite the obvious parallels to widely criticized consumer contract practices, employer-drafted boilerplate has attracted remarkably little critical scholarly analysis.[132] The only recent scholarship examining adhesive employment terms focuses primarily on arbitration agreements

earlier literature arguing that blanket assent by consumers implies consent only to salient terms and those that conform to consumers' reasonable expectations. See, e.g., Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 370 (1960).

[126] Restatement of Consumer Conts. (A.L.I. 2024); see also Ian Ayres & Gregory Klass, How to Use the Restatement of Consumer Contracts: A Guide for Judges, 15 Harv. Bus. L. Rev. 363, 367–77 (2025) (encouraging courts to embrace six features of the Restatement of Consumer Contracts).

[127] See Restatement of Consumer Conts. § 4 (A.L.I. 2024); see also Ayres & Klass, supra note 126, at 370–72 (describing the Restatement's rules of construction).

[128] Restatement of Consumer Conts. § 2 cmt. 2 (A.L.I. 2024).

[129] Id. § 3.

[130] See infra text accompanying notes 214–22.

[131] Restatement of Consumer Conts. § 6(b) cmt. 2 (A.L.I. 2024); see also Ayres & Klass, supra note 126, at 372–73 (criticizing Section 6's sliding-scale rule for potentially permitting a certain degree of substantive unconscionability).

[132] For exceptions, see Befort, Policy Statements, supra note 14, at 315–16; Fineman, supra note 14, at 367.

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and restrictive covenants.[133] Both contract and employment law scholars have largely ignored employee handbook disclaimers and the difficult legal question of when written policies and oral assurances may become implied contracts.[134]

The parallels between employment disclaimers and consumer boilerplate suggest potential avenues for reform. As we have seen, scholarly analysis of consumer contracts focuses on the lack of meaningful assent to contractual obligations. Our boilerplate critique thus invites courts to reconsider whether employees have meaningfully assented to employers' broad exculpatory language. Simply burying such language within lengthy handbooks or online portals is insufficient to ensure meaningful assent.[135] Nearly all jurisdictions thus require disclaimers to be both clear and prominent. Making these terms conspicuous and avoiding obscure, legalistic language potentially makes their meaning more accessible to a lay reader. But the onboarding process we described above reveals why these requirements are insufficient to ensure genuine assent.

How then might we change the formation process to improve this situation? What practices would make it more likely that employees have truly assented to the employer's terms? First, we suggest that courts should draw inspiration from contemporary decisions that impose a more robust "inquiry notice" standard for adhesive consumer contracts.[136] Although most of these cases arise in the context of online contracting, their approach extends naturally to employee onboarding, which also involves the imposition of take-it-or-leave-it form contracts on legally unsophisticated parties. Courts should consider the totality of the circumstances in determining whether an employee had sufficient notice of and access to the employer's exculpatory boilerplate. Any

[133] See Estlund, supra note 13, at 421–37 (arbitration agreements and noncompetes); Arnow-Richman, Cubewrap Contracts, supra note 5, at 658–60 (same); Lobel, supra note 9, at 893–94 (restrictive covenants). But see Hoffman, supra note 20, at 1409–11 (proposing nonenforcement of boilerplate terms in indefinite-term employment contracts with a wage of less than $15/hour).

[134] But see Befort, Policy Statements, supra note 14, at 310–11.

[135] See Arnow-Richman, Cubewrap Contracts, supra note 5, at 660–61.

[136] See, e.g., Long v. Provide Com., Inc., 200 Cal. Rptr. 3d 117, 123, 126–27 (Ct. App. 2016); Schnabel v. Trilegiant Corp., 697 F.3d 110, 126–27 (2d Cir. 2012); Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 393–94 (E.D.N.Y. 2015); cf. Restatement of Consumer Conts. § 2 (A.L.I. 2024) ("A standard contract term is adopted as part of a consumer contract if the . . . consumer manifested assent to the transaction after receiving . . . reasonable notice of the term . . . and . . . reasonable opportunity to review [it].").

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expression of assent elicited from an employee who was pressured to complete the onboarding process or given inadequate time to read these complex documents carefully should be viewed with extreme skepticism.

To frame this inquiry somewhat differently, judges should demand that employers offer workers a reasonable opportunity to review all significant employment terms before accepting a job offer.[137] Such a requirement would substantially change current practices of employment contract formation. Many employers now confirm employment based on a simple offer letter or even an oral agreement. Instead, they would have a strong incentive to provide a more complete picture of the terms they plan to impose. Waiting to present any important terms until an employee shows up for the first day of work would risk a court later refusing to enforce those terms.

But this requirement does not go far enough. A growing body of scholarship has cast doubt on the efficacy of disclosure as a remedy for legal ignorance or misunderstanding.[138] Unsophisticated parties (and perhaps many sophisticated ones as well) often ignore disclosures and proceed with important transactions based on hopes and intuitions rather than a careful reading of relevant contractual documents. Moreover, employers have shown they are more than willing to progressively refine their disclaimer language and comply with any procedural requirements to ensure enforcement. Thus, we recognize that merely enhancing disclosure of contract terms cannot fully address the problem of employment disclaimers. The inadequacy of disclosure as a remedy for overreaching disclaimers thus motivates two further reform proposals.

Drawing inspiration from the Restatement of Consumer Contracts, courts should use the *contra proferentem* canon to interpret ambiguous disclaimer language against the drafting employer. Some judges already

[137] Cf. Arnow-Richman, Cubewrap Contracts, supra note 5, at 657 (proposing that noncompetes and other documents signed during onboarding be deemed unenforceable if the employer could have provided them in advance). A number of state statutes now explicitly require this type of advance notice for noncompetes and other mobility restraints. See, e.g., Colo. Rev. Stat. § 8-2-113(4) (2026) (fourteen days); Mass. Gen. Laws Ann. ch. 149, § 24L (2026) (ten business days); Or. Rev. Stat. § 653.295(1)(a)(A) (2025) (fourteen days).

[138] See sources cited supra note 109.

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deploy *contra proferentem* aggressively in the consumer context.[139] Although normally understood as a mere interpretive tiebreaker, the canon also allows judges to push back against boilerplate terms they see as potentially abusive. Thus, a court could approach employer-drafted disclaimers skeptically and construe their exculpatory language narrowly. Doing so would diminish the power of disclaimers and create more space for courts to entertain workers' implied contract claims. Employers would no longer be able to make informal assurances with impunity, secure in the knowledge that their disclaimer will ward off all contractual liability. Instead, judges would be free to construe boilerplate disclaimers more narrowly whenever the language allows them to do so.

Finally, the problem of consumer boilerplate has led many scholars and some judges and legislators to consider imposing substantive constraints on exculpatory language. State legislatures could enact statutes restricting the use or scope of disclaimers, as they have done in the consumer context with warranties and limitations of liability.[140] Such targeted legislation could limit the enforceability of overly broad exculpatory clauses by prohibiting disclaimers that purport to negate prior representations made during the hiring process. Or judges could use unconscionability doctrine and the duty of good faith to restrict disclaimers that categorically preclude future implied contractual obligations or those that undermine fundamental statutory rights.[141] Whether imposed under the common law or arising from newly enacted statutes, these substantive limits could ensure that employer-drafted disclaimers are no longer an insurmountable barrier to enforcing legitimate worker claims.

[139] See Farshad Ghodoosi & Tal Kastner, Against the Drafter: An Empirical and Theoretical Analysis of the Doctrine of *Contra Proferentem*, 94 Fordham L. Rev. 1455, 1461–62, 1470–72 (2026).

[140] Prominent legislative responses include Uniform Commercial Code ("UCC") provisions restricting both warranty disclaimers and damage limitation clauses, and the Magnuson-Moss Warranty Act. See U.C.C. §§ 2-316, 2-719 (A.L.I. & Unif. L. Comm'n 2023); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–2312).

[141] See infra Section IV.B. Some jurisdictions, such as California, have long deployed these doctrinal tools to limit the enforceability of arbitration agreements, but the Federal Arbitration Act broadly preempts state law rules that operate as a barrier to the enforcement of arbitration agreements. 9 U.S.C. § 2; AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011).

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Our "boilerplate critique" thus inspires three broad groups of reform proposals, each more ambitious than the last. First, working within the existing framework for contractual assent, we have proposed doctrinal reforms that would enhance workers' access to the terms governing their employment. Second, we invited creative use of tools such as the *contra proferentem* canon to constrain the exculpatory power of disclaimers. In Part III, we expand on this notion to develop a holistic approach to the problem of *interpreting* exculpatory employment boilerplate. Finally, we proposed more forceful substantive limits on exculpatory clauses such as unconscionability, good faith, and corrective legislation. We say more about those limits in Part IV.

III. INTERPRETING DISCLAIMERS IN CONTEXT

Drawing from the consumer boilerplate debate, the previous Part proposed reforms that would enhance employee assent and affirmatively limit the power of disclaimers to foreclose claims. This Part examines disclaimers through an alternative lens: the law and theory of contract interpretation.[142] We show how most courts erroneously construe them in the light most favorable to the employer, elevating this text above all other potential sources of contract terms, express or implied. They should abandon this inept textualism, which we dub *pro proferentem*, and instead apply well-established interpretive canons and embrace the contextualist turn of contemporary contract law.

We propose three nonexclusive doctrinal approaches: First, courts should construe disclaimers against the drafting employer and permit consideration of extrinsic evidence in the face of ambiguity. Second, courts should reconcile and incorporate oral and implied terms that more

[142] We acknowledge the distinction between contract "interpretation"—referring in the narrower sense of the term to the meaning of words expressed in a text—and "construction," a constitutive process that is either supplemental to or coextensive with interpretation, depending on how those terms are defined. See generally Gregory Klass, Two Forms of Formalism in Contract Law, 46 Cardozo L. Rev. 369 (2024) (coining the umbrella term "contract exposition" to embrace both concepts). Much of what we take up in this Part is arguably better characterized as construction than interpretation, were we to abide by those categories. See id. at 376–77 (distinguishing between interpretation as the act of identifying the meaning of words and construction as determining their legal effect). However, for simplicity's sake, we use the more common term "interpretation" to embrace both constructs, as do many courts and commentators. See, e.g., Jeffrey W. Stempel & Erik S. Knutsen, Rejecting Word Worship: An Integrative Approach to Judicial Construction of Insurance Policies, 90 U. Cin. L. Rev. 561, 563 n.5 (2021).

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fully reflect the parties' agreement in the hyper-relational employment setting. Third, courts should adopt the reasonable expectations doctrine, applied in some insurance cases, that permits interpretation consistent with the understanding of the weaker party despite contrary terms. All these approaches recognize the unique character of indefinite-term employment, in which the parties' expectations and obligations are never wholly defined by a single contract document.

A. The Interpretive Continuum

The proper rules of contract interpretation, and indeed the meaning of contract interpretation itself, are a matter of long-standing debate. The predominant tension in the case law and academic literature is the degree to which courts should consider extrinsic evidence—sources other than the parties' written words—to determine the content and meaning of their agreement.[143]

On one end of the continuum is the textualist approach. Textualist decisions look solely within the "four corners" of a contract document to determine its meaning and consider extrinsic evidence only if the written language is ambiguous on its face.[144] Textualist decisions also take a strict view of parol evidence. They generally treat a boilerplate merger clause as dispositive of the finality and completeness of a written document, precluding jury consideration of all prior or contemporaneous statements.[145]

On the other end is the contextualist approach. Contextualist decisions expand the interpretive lens wider and earlier in the interpretive process. These decisions embrace the possibility that evidence outside the four corners of a contract document may reveal a latent ambiguity in the written terms.[146] Similarly, they admit parol

[143] See Joshua M. Silverstein, The Contract Interpretation Policy Debate: A Primer, 26 Stan. J.L. Bus. & Fin. 222, 224–25 (2021); 5 Corbin on Contracts § 24.4, Lexis (database updated June 2026).

[144] See Silverstein, supra note 143, at 228–30 (describing this approach). To be considered ambiguous, text must be "reasonably susceptible" to disputing parties' competing interpretations. Id. at 228.

[145] See, e.g., Air Safety, Inc. v. Tchrs. Realty Corp., 706 N.E.2d 882, 885 (Ill. 1999) (treating an integration clause as triggering a strict four-corners rule and refusing to consider any "prior negotiations").

[146] This approach was most famously articulated in *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968). See generally Stempel & Knutsen, supra note 142, at 569–72 (discussing this decision).

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evidence whenever the parties might plausibly have agreed to a term not included in the writing irrespective of how "complete" it might appear.[147]

This description admittedly oversimplifies. Substantial contract interpretation literature parses the textualist/contextualist distinction with greater nuance.[148] For present purposes, however, it is only important to observe that the law has progressed away from a position of strict textualism toward one embracing at least some forms of contextualism. This move was part of a broader liberalization of classical contract law that grew out of the Realist movement of the mid-twentieth century.[149] The Restatement (Second) of Contracts and the Uniform Commercial Code reflect this contextualist trend. They both adopt a "modern" and more flexible approach to interpretation and parol evidence.[150]

[147] See Silverstein, supra note 143, at 227–28 (describing this approach).

[148] See, e.g., id. at 224–26; Corbin, supra note 143, § 24.4 ("To say that there are only two approaches to interpretation—textualism and contextualism—is simplistic to the point of error."). A number of commentators have complicated or questioned the relevance of the distinction. See, e.g., Lawrence A. Cunningham, Contract Interpretation 2.0: Not Winner-Take-All but Best-Tool-for-the-Job, 85 Geo. Wash. L. Rev. 1625, 1640–44 (2017) (reviewing literature favoring "hybridization" over a binary approach to interpretation); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, Text *and* Context: Contract Interpretation as Contract Design, 100 Corn. L. Rev. 23, 43–46 (2014) (asserting that "characteristics of the particular contracting environment—the thickness of the market and the uncertainty associated with it—determine how contracting parties (or other interpretive bodies) deal with interpretation issues").

[149] See Curtis Bridgeman, Why Contracts Scholars Should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law, 29 Cardozo L. Rev. 1443, 1444 (2008) (describing the Realist movement as an "assault on formalism" across the law generally and in contract law particularly); Meredith R. Miller, Contract Law, Party Sophistication and the New Formalism, 75 Mo. L. Rev. 493, 499 (2010) (equating Realism with the rejection of rigidity, a "concern for the particular circumstances," and the adoption of "reasonableness and fairness as guiding principles").

[150] See, e.g., Hunt Foods & Indus., Inc. v. Doliner, 270 N.Y.S.2d 937, 939–40 (App. Div. 1966) (finding extrinsic evidence that the parties' unconditional written option would be exercised only if seller bid-shopped an admissible consistent additional term); Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 780 (9th Cir. 1981) (permitting industry and parties' practice of "price protection" to qualify an express "posted price of delivery" term); Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3, 7–12 (4th Cir. 1971) (permitting trade usage and prior dealing to show that fixed minimum quantity and price terms were flexible despite a merger clause); see also Chapin F. Cimino, The Relational Economics of Commercial Contract, 3 Tex. A&M L. Rev. 91, 123 (2015) ("As to both expressed terms and gaps or silences, Article 2 [of the UCC] directs courts to determine meaning from a transaction's context."); Cunningham, supra note 148, at 1628–29 (noting that the anti-

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This is not to say that contextualism has fully overtaken textualism. Courts do not uniformly apply contextualist principles.[151] And a vocal group of "neo-formalist" scholars rejects contextualism on the grounds that it contravenes party intent and increases costs.[152] These contemporary objections, however, focus on arm's-length transactions between sophisticated actors. At the time that courts began applying implied contract theory to employment, there was ample precedent to support a contextualist approach to the relationship.

Several features of at-will employment make it uniquely suited to contextualist treatment. First, as discussed in Part II, employment disclaimers appear in take-it-or-leave-it boilerplate presented to legally unsophisticated parties during onboarding. There has long been precedent for (and relative consensus about) the use of contextualism in interpreting contracts of adhesion. Widely accepted canons of interpretation, to which courts and scholars of all stripes subscribe, reflect the contextual realities of unequal bargaining relationships. Thus, under the familiar principle of *contra proferentem*, courts resolve textual ambiguity in the manner most favorable to the non-drafting party.[153] In a similar vein is the judicial practice of "close reading" when confronting unfavorable terms, including, for example, waivers of negligence that would otherwise violate public policy.[154] In these ways, courts have

formalist approach to interpretation was "adopted expressly in the Restatement (Second) of Contracts").

[151] Empirical studies that attempt to identify the dominant judicial approach have been inconclusive. See Eric A. Posner, Essay, The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation, 146 U. Pa. L. Rev. 533, 538 (1998) (concluding that the doctrine is internally inconsistent in many jurisdictions); Joshua M. Silverstein, Contract Interpretation Enforcement Costs: An Empirical Study of Textualism Versus Contextualism Conducted via the West Key Number System, 47 Hofstra L. Rev. 1011, 1016 (2019) (concluding that contract interpretation case law is "too convoluted to classify the requisite number of states as either textualist or contextualist").

[152] See, e.g., Alan Schwartz & Robert E. Scott, Contract Interpretation Redux, 119 Yale L.J. 926, 930–39 (2010); Scott, supra note 22, at 852–56. To the extent employment-at-will contracts are fundamentally different from the sophisticated written contracts considered by the neo-formalist critique, we comfortably lay aside these concerns for our present purposes. See Alan Schwartz & Robert E. Scott, Contract Theory and the Limits of Contract Law, 113 Yale L.J. 541, 544 (2003) (limiting theory to contracts between firms); Cunningham, supra note 148, at 1644 ("[W]hat is good for the merger agreement may not be good for the employment contract.").

[153] See Corbin, supra note 143, § 24.19.

[154] Courts adopting this technique may painstakingly construe the text of an exculpatory clause to conclude that it does not embrace the particular risk or injury giving rise to the

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deployed ostensibly textualist tools to achieve results consistent with contextual fairness.

Second, the judicial impulse to protect unsophisticated parties has sometimes inspired rules that go beyond contextualism to favor the weaker party. In insurance disputes, some courts apply a "reasonable expectations" principle that protects a reasonable policyholder's understanding of their coverage despite contrary language in the governing policy.[155] Few decisions apply this doctrine to non-insurance cases, but the new Restatement of Consumer Contracts expands the concept to standardized consumer terms more generally.[156] Employment contracts deserve similarly protective treatment. These disputes arise in situations of profound vulnerability for the individual, who often makes substantial investments throughout the contractual relationship.[157]

Indeed, employment relations, even more than insurance or consumer contracting, cry out for contextualist interpretation. Both consumer and insurance contracts involve performance by the weaker party that is discrete, usually consisting merely of payment. In contrast, we have described employment as hyper-relational: a long-term, indefinite arrangement whose terms are constantly evolving.[158] Performance is ongoing, collaborative, and personal.[159] The daily interactions between employer and employee inevitably spawn additional commitments and contextual understandings. These communications and expectations often alter or deviate from language appearing in the company's standard documentation.

Finally, at-will employment relationships generally lack anything resembling a comprehensive contract document.[160] Offer and acceptance

plaintiff's negligence claim. See, e.g., Cooke v. Allstate Mgmt. Corp., 741 F. Supp. 1205, 1208 (D.S.C. 1990); Gross v. Sweet, 400 N.E.2d 306, 309 (N.Y. 1979).

[155] The doctrine owes its name to a pair of 1970 articles by Professor Robert Keeton. Robert E. Keeton, Insurance Law Rights at Variance with Policy Provisions (pt. 1), 83 Harv. L. Rev. 961, 967 (1970) [hereinafter Keeton, Part 1]; Robert E. Keeton, Insurance Law Rights at Variance with Policy Provisions (pt. 2), 83 Harv. L. Rev. 1281, 1282, 1285 (1970). See generally Roger C. Henderson, The Doctrine of Reasonable Expectations in Insurance Law After Two Decades, 51 Ohio St. L.J. 823 (1990) (tracing the doctrine's origins).

[156] Under Section 4(d), standardized terms are to be "interpreted in a manner that effectuates the reasonable expectations of the consumer." Restatement of Consumer Conts. § 4(d) (A.L.I. 2024).

[157] See Stewart J. Schwab, Life-Cycle Justice: Accommodating Just Cause and Employment at Will, 92 Mich. L. Rev. 8, 24–25 (1993).

[158] See Arnow-Richman & Verkerke, supra note 2, at 922.

[159] Id. at 931–32.

[160] Id. at 932.

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are frequently oral.[161] If the company issues a written offer of employment, it will often take the form of a confirmatory letter, one that is highly, and intentionally, incomplete. It secures the employee's agreement to a few initial terms that the company will immediately begin supplementing during onboarding and that both parties expect will change over time.[162] Thus, the question of what terms constitute the at-will employment "contract" is necessarily contextual. In this dynamic setting, it makes little sense to evaluate any particular portion of any single writing in isolation or through an exclusively textualist lens.

B. Disclaimer Law as Inept Textualism

For all these reasons, one would expect courts to apply a contextualist approach to interpreting employers' exculpatory boilerplate. Yet, in a counterintuitive turn, judicial treatment of disclaimers shifted toward an especially strict form of textualism. Courts adopting the judicial deference approach have declined to apply even conventional interpretation techniques—like *contra proferentem*—to protect workers from ambiguously worded disclaimers.

Dore v. Arnold Worldwide, Inc. is the poster child for these regressive developments.[163] Dore was terminated two years after relocating for a job in California. During an on-site recruitment visit, Dore was given the impression that the employer's practice was to terminate only for cause and that his job would be long-term.[164] After Dore orally accepted employment, he received a three-page "confirm[ation]" letter containing the following language:

> [A]s with all of our company employees, your employment with Arnold Communications, Inc. is at will. This simply means that Arnold Communications has the right to terminate your employment at any time just as you have the right to terminate your employment with Arnold Communications, Inc. at any time.[165]

[161] Id. at 931.
[162] Id. at 932.
[163] 139 P.3d 56, 61 (Cal. 2006).
[164] Id. at 57–58. The employer told Dore that he would "play a critical role in growing the agency" and that the company treated employees like "family." Id. at 57. In addition, the employees who had previously held the open position had both been terminated for cause. Id.
[165] Id. at 57–58.

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Notably, the letter said nothing about cause to terminate.

Despite these facts, the Supreme Court of California held that the letter definitively and unambiguously foreclosed any claim that the company had breached an implied contract to terminate Dore only for cause. First, the court held that the phrase "at will" on its face meant that the relationship could be terminated without cause.[166] Second, it held that none of the other terms of the letter cast doubt on that meaning.[167] Finally, it held that none of the representations made to Dore about the job gave rise to any latent ambiguity as to whether Dore could be fired without cause.[168] In other words, the court held that Dore lacked any viable contract rights under *both* a textualist and contextualist reading of the defendant's letter.

This is an astonishing result from a court known historically both for its permissive pro-employee jurisprudence[169] and its contextual approach to contract interpretation generally.[170] One might have expected the court to find that Dore's extrinsic evidence exposed an ambiguity in the meaning of the employer's disclaimer.[171] Or it might

[166] Id. at 60–61.

[167] Id. at 61.

[168] Id.

[169] The California courts pioneered the so-called "implied-in-fact" contract for job security, which infers the parties' understanding from the totality of the circumstances. See, e.g., Foley v. Interactive Data Corp., 765 P.2d 373, 387–88 (Cal. 1988) (approving *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 925–26 (Ct. App. 1981)); see also Rachel Arnow-Richman, Response to Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Putting the Restatement in Its Place, 13 Emp. Rts. & Emp. Pol'y J. 143, 148 (2009) [hereinafter Arnow-Richman, Putting the Restatement in Its Place] (describing the result in *Dore* as a "stunning conclusion"); Fineman, supra note 14, at 376–77 (recounting the management bar's embrace of the *Dore* decision).

[170] The Supreme Court of California is also famous—or infamous in some corners—for its willingness to entertain possible latent ambiguities in otherwise clear text based on compelling extrinsic evidence. See Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644–46 (Cal. 1968) (asserting that "[w]ords . . . do not have absolute and constant referents" in permitting extrinsic evidence of intent as to the meaning of a seemingly clear indemnity clause). But see Trident Ctr. v. Conn. Gen. Life Ins. Co., 847 F.2d 564, 569 (9th Cir. 1988) (deriding *Pacific Gas* for "cast[ing] a long shadow of uncertainty over all transactions negotiated and executed under the law of California"); *Dore*, 139 P.3d at 62 (Baxter, J., concurring) (asserting that *Pacific Gas* "stretched the unremarkable principle that extrinsic evidence is admissible to resolve a contractual ambiguity into a rule that parol evidence is *always* admissible to *demonstrate* ambiguity *despite* facial clarity").

[171] See Arnow-Richman, Putting the Restatement in Its Place, supra note 169, at 148 (concluding that the *Dore* facts "strongly support a jury question on the existence of an implied contract. Dore cited not only oral representations and assurances, but also evidence

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have treated the discussions during Dore's interview as admissible parol evidence.[172] Alternatively, the court could have taken a broad view of the contextual evidence, treating it together with the letter as constitutive of the parties' agreement, which could not possibly be embodied in a single document.

Ironically, none of these contextual moves were even necessary to resolve the case in Dore's favor. The court could have reached that result through purely *textualist* interpretation techniques. It could have found that the contract unambiguously supported Dore's interpretation through close reading of the disclaimer[173] or by reference to other provisions in the writing.[174] The court could also have found the language ambiguous on its face, triggering canons of interpretation such as *contra proferentem*. Certainly Dore's employer, as the drafter, could have easily specified that termination was permitted "without cause" as well as "at any time."

Dore represents a high-water mark for the enforceability of disclaimers and reveals how far courts will go to preserve employment-at-will. The deferential majority approach treats exculpatory boilerplate as the exclusive statement of contract terms. It ignores context and contextualist tools that are especially appropriate for understanding employment contracts. Instead, these cases place more emphasis on the disclaimer than even a textualist reading of such language would require. This perverse *pro proferentem* approach to interpretation diverges from mainstream doctrine and disregards the hyper-relational features of employment.

of employer practices"); cf. *Pacific Gas*, 442 P.2d at 644–45 (holding that extrinsic evidence is admissible to the extent that it is "relevant to prove a meaning to which the language of the instrument is reasonably susceptible").

[172] The letter containing the disclaimer could not be deemed a completely integrated writing: it was but a few words; it contained nothing akin to a merger clause; and presumably, like most employees, Dore signed other documents during onboarding. *Dore*, 139 P.3d at 57–58; cf. SHRM Disclaimer, supra note 46 ("This manual . . . supersede[s] any and all prior practices, oral or written representations, or statements regarding the terms and conditions of your employment . . . .").

[173] The court rejected several appellate court cases, including one involving a commercial distributorship, that found comparable language to be reasonably susceptible to an interpretation that required cause for contract termination. *Dore*, 139 P.3d at 59–60.

[174] The letter detailed an expected performance-based review to take place ninety days post-hire and annually thereafter. Id. at 58; see infra Subsection III.C.1.

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C. Implications for Employment

The preceding analysis identified possible alternative approaches to interpreting the *Dore* disclaimer. This Section draws out those possibilities. It offers three successively more ambitious reforms to existing law: a "true textualism" approach, an openly contextual approach, and an approach that privileges employee expectations. All three provide doctrinal and theoretical support for minority court decisions that reject judicial deference to disclaimers.

1. True Textualism

A modest alternative to the judicial deference approach to disclaimers is to apply established textualist rules of ambiguity, including the widely accepted interpretive canons that *Dore* disregards. Doing so would alter the result in cases where courts defer to disclaimers despite faulty drafting or inconsistencies in the written documents.

In *Dore* itself, the disclaimer was facially susceptible to different meanings, one that allowed only termination "at any time" and one that also permitted termination without cause. A close reading would interpret the words "[employer] has the right to terminate . . . at any time" as merely negating a commitment to a fixed period of employment.[175] The letter is silent or ambiguous as to whether termination can occur without cause.[176] Textualist principles of ambiguity thus would permit the worker to introduce extrinsic evidence to resolve this uncertainty.[177] Dore could testify about conversations during the recruitment process and about how he understood the offer letter in light of those interactions.

Textualist ambiguity rules also would allow a court to construe the letter against the employer as a matter of law. Widely accepted canons of interpretation direct courts to evaluate ambiguous language in the

[175] *Dore*, 139 P.3d at 58; see Rachel Arnow-Richman, Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination, 66 Fla. L. Rev. 1513, 1520–27, 1530 (2014) [hereinafter Arnow-Richman, Mainstreaming Employment Contract Law] (providing historical justification for this interpretation).

[176] To be sure, the at-will default implies that termination without cause is permissible. But the written disclaimer here defines at-will as termination "at any time" and omits termination without cause. This formulation departs from typical definitions, and although other readings are possible, *contra proferentem* directs courts to adopt the version favoring the employee.

[177] See 11 Williston, supra note 61, § 30:7.

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context of the writing as a whole.[178] In *Dore*, statements in the letter promising performance-based evaluations and advancement opportunities would allow a court to conclude that, absent language expressly permitting termination without cause, termination must be based on similar considerations.

Properly applying textualist interpretive canons would also expand employee protections when employers issue inconsistent policy documents. In *Scott v. Merck & Co.*, for example, we saw an employee terminated for reporting an ethics violation.[179] Although the employer's written whistleblower policy unequivocally promised nonretaliation, the court held that general disclaimer language in other documents foreclosed any claim.[180] It neither identified the issue as one of contract interpretation nor applied any applicable interpretive canons. Instead, its conclusion was a *pro proferentem* resolution of facial ambiguity in favor of the employer.

True textualism would see ambiguity between two written terms and permit the employee to offer evidence that the whistleblower policy should be enforced. Such evidence might include written or oral assurances about nonretaliation and policy statements about high ethical standards.[181] True textualism would also reconcile competing terms in favor of the non-drafting employee.[182] That could be achieved by treating the policy's nonretaliation commitment as an exception to the general at-will term.

A contemporary decision in a dispute over an employer's paid time off ("PTO") policy illustrates this flavor of pro-employee textualism. In *Hall v. City of Plainview*, the City-employer's handbook provided that workers would be paid for accrued PTO upon separation from

[178] See Corbin, supra note 143, § 24.13; Restatement (Second) of Conts. § 202(2) (A.L.I. 1981).

[179] 497 F. App'x 331, 332 (4th Cir. 2012); see supra Subsection I.B.1.

[180] *Scott*, 497 F. App'x at 332 n.2, 336.

[181] See Roberson v. Wal-Mart Stores, Inc., 44 P.3d 164, 173 (Ariz. Ct. App. 2002) (Weisberg, J., dissenting) ("Where a disclaimer, no matter how clear or conspicuous, is contradicted by another document or policy of the employer, it is for the trier-of-fact to determine whether that document or policy negates the disclaimer.").

[182] See Leyden v. Am. Accreditation Healthcare Comm'n, 83 F. Supp. 3d 241, 246–47 (D.D.C. 2015) (finding an at-will disclaimer "rationally at odds" with employer's nonretaliation policy (quoting Strass v. Kaiser Found. Health Plan of Mid-Atl., 744 A.2d 1000, 1013 (D.C. 2000))).

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employment.[183] The handbook also contained disclaimers.[184] When the City terminated the plaintiff, it refused to pay out his time, arguing that the manual containing the policy was nonbinding.[185]

The Supreme Court of Minnesota permitted Hall's subsequent breach of contract claim, reversing dismissal by two lower courts. It concluded that language denying the contractual significance of the handbook was "ambiguous as to its applicability to the PTO policy."[186] This language was "general, lack[ing in] precision," and "conflict[ed] with the detailed and concrete explanation of . . . [the employer's PTO] policy."[187] Accordingly, the court concluded that the impact of the disclaimer on the plaintiff's claim was for the fact finder.[188]

Hall involved an employer's promise of benefits rather than protection against termination. The court pointedly declined to opine on the impact of a similar disclaimer on "non-compensation conditions of employment."[189] But there is no reason why the same approach should not apply whenever a general disclaimer conflicts with a specific limitation on the right to terminate, such as a policy of whistleblower protection or another sufficiently detailed written promise.

2. Disclaimers in Context

True textualism is an effective, but inherently limited, corrective for excessive judicial deference to disclaimers. Textualism demands a showing of facial ambiguity before admitting extrinsic evidence or applying *contra proferentem*. A disclaimer must be superficially susceptible to an employee's contrary understanding or subject to

[183] 954 N.W.2d 254, 258 (Minn. 2021). The policy stated: "When an employee ends their employment with the City, for any reason, 100% of the accrued unused personal leave time will be paid up to 500 hours, unless the employee did not give sufficient notice as required by the policy." Id.

[184] The first disclaimer, contained in the handbook introduction, stated that the handbook's contents were intended "to establish a uniform and equitable system of personnel administration [and] . . . should not be construed as contract terms." Id. A second similarly disclaimed the contractual significance of the handbook and asserted that all city employment was "'at-will,' terminable by either [party] at any time for any reason." Id.

[185] Id. at 258–59. This was not a low-stakes dispute. As a thirty-year employee, the plaintiff had accrued nearly 1,800 documented hours of PTO. Id. at 258.

[186] Id. at 259, 266.

[187] Id. at 266.

[188] Id. at 267.

[189] Id. at 268.

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possible exceptions.[190] Employers can easily prevent employees from making this demonstration by adopting more carefully worded disclaimers. For instance, a more specific disclaimer in *Hall v. City of Plainview*—one that expressly mentioned the PTO policy—or a less detailed description of the policy would have altered the result under a textualist analysis.[191]

By contrast, contextualism potentially enables employee claims despite better drafting. Under this approach, courts examine context to determine whether facially clear language might contain a latent ambiguity.[192] Strong background evidence or individual assurances evincing an employer's commitment to job security or other benefits could undermine the reach of a disclaimer, however well-written. This evidence, in turn, might justify reading a situation-specific exception into a generic recital of at-will status.

Scott v. Merck & Co. once again serves as an example.[193] Had there been no written anti-retaliation policy contradicting the employer's disclaimer, a contextualist court might still have considered evidence that the employer's managers encouraged employees to report workplace misconduct and promised non-reprisal. Such evidence could be understood as exposing a latent ambiguity in the disclaimer regarding its applicability to whistleblowers, which in turn would necessitate consideration of all evidence bearing on its reach.

A contextualist approach would also favor admitting oral statements and assurances that textualist courts bar as parol evidence. However, the fluidity of employment terms suggests that no single writing should ever be treated as a final written contract.[194] This is particularly true of handbooks, which the employer intends to continually modify.[195] Moreover, even integrated agreements may be supplemented if they are

[190] See 11 Williston, supra note 61, § 30:5.

[191] Indeed, the Minnesota Supreme Court, in a move reminiscent of *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1271 (N.J. 1985), concluded its discussion of the plaintiff's contract claim by inviting employers to do precisely that and draft a more specific disclaimer. *Hall*, 954 N.W.2d at 268–69; see supra text accompanying note 31 for a discussion of *Woolley*.

[192] See 6 Corbin, supra note 143, § 25.16 (discussing the "California Rule," including *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 643–44 (Cal. 1968)).

[193] 497 F. App'x 331, 332 & n.2 (4th Cir. 2012).

[194] See supra Section III.A.

[195] The boilerplate formula for disclaimers generally says as much. See SHRM Disclaimer, supra note 46.

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only "partially" complete.[196] In employment, the recruitment and hiring process often involves interpersonal interactions in which parties reach understandings outside the boilerplate documents the employee signs at onboarding. These individual commitments would "naturally be omitted" from broadly applicable documents not intended to cover the specifics of one hire.[197]

These contextual principles supply a firm doctrinal basis for the more permissive approach to employee claims espoused by some minority jurisdictions. Consider the previously discussed Kansas Supreme Court decision, *Wilkinson v. Shoney's, Inc.*, involving the rehiring of a store manager later fired due to the negative report of his original supervisor.[198] The court held that the company's disclaimers did not preclude a claim of job security based on evidence of the employer's policies and practices and the specific circumstances surrounding the plaintiff's hire.[199] The court offered no doctrinal explanation for its decision, relying instead on fairness to an employee who had been encouraged to return and had received a formal stamp of approval from the company's rehiring board.

We can frame this result in the language of contextualism. The background circumstances in *Wilkinson* revealed a latent ambiguity concerning the interaction of at-will recitals in Shoney's personnel materials and its rehiring process. Shoney's rehiring policy stated that, once approved, a returning employee could "go back to work with no hard feelings from anyone."[200] Such language arguably forecloses consideration of the worker's past employment record going forward. Alternatively, the assurances Wilkinson received about returning to Shoney's could be admissible parol evidence that would naturally not appear in the company's more generic personnel materials. Either way, in the words of the court, whatever Shoney's hoped to achieve with its disclaimers, its right to terminate Wilkinson was "[not] unqualified."[201]

[196] Restatement (Second) of Conts. §§ 210, 213 (A.L.I. 1981).

[197] Id. § 216(2)(b); cf. Providence & Worcester R.R. Co. v. Sargent & Greenleaf, Inc., 802 F. Supp. 680, 689 (D.R.I. 1992) (noting that in a commercial sale, "generally a form invoice is not . . . intended [as a final expression of agreement], at least not as to the preprinted, non-negotiated terms").

[198] 4 P.3d 1149, 1153–55 (Kan. 2000); see supra Subsection I.B.2.

[199] *Wilkinson*, 4 P.3d at 1162–64.

[200] Id. at 1163.

[201] Id.

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Importantly, the most permissive forms of contextualism would consider extrinsic evidence even in the face of ironclad disclaimers. The most well-crafted disclaimers often contain language disavowing prior evidence, echoing the boilerplate merger clauses included in more formal contracts to reinforce the parol evidence bar. But under the contextual approach to interpretation, a document cannot prove its own completeness.[202] In *Wilkinson*, the plaintiff's terms of rehire were determined in separate conversations with two different Shoney's managers, and he received and was shown several documents upon starting work.[203] As a factual matter, multiple sources of terms undermine boilerplate recitals of the exclusivity in any single document. A merger-like clause in a handbook should not preclude individually negotiated terms, such as salary and title, that would "naturally" appear in a separate offer letter.[204] Nor should courts enforce a merger-like clause in an offer letter that is but one of many documents received and acknowledged by the employee in the course of beginning employment.[205]

In addition to oral and written sources, contextualism would also admit evidence of employer behavior. The Uniform Commercial Code's exceptionally permissive approach to extrinsic evidence provides that parties' past practices as well as industry standards are *always* admissible to explain or supplement a writing, irrespective of its purported finality.[206] In the employment context, a comparable rule

[202] See supra notes 146–47 and accompanying text.

[203] *Wilkinson*, 4 P.3d at 1153–54.

[204] Restatement (Second) of Conts. § 216(2)(b) (A.L.I. 1981) (stating that an agreement is not completely integrated if parol evidence "might naturally be omitted").

[205] See, e.g., Roberson v. Wal-Mart Stores, Inc., 44 P.3d 164, 166–67 (Ariz. Ct. App. 2002) (involving multiple documents, including a written job application, employee handbook, managers' operations manual, and bonus plan agreement). Technically, if the handbook and other onboarding documents are presented after the offer letter, their terms can be viewed as modifications not subject to the parol evidence rule or a written merger clause. At least some courts take this approach. See, e.g., Reynolds v. Gentry Fin. Corp. & Royal Mgmt., 2016 UT App 35, ¶¶ 19–22, 368 P.3d 96 (disregarding integration clause in offer letter because handbook updates were modifications rather than parol evidence). Yet cases involving the enforceability of onboarding documents, such as noncompetes and arbitration agreements (usually in litigation *against* the employee), often treat the already accepted job offer as the underlying consideration for the employee's promise. See Arnow-Richman, Modifying At-Will Contracts, supra note 124, at 439–49. These contradictory analyses reveal the limited descriptive power of formal contract principles in the face of employment's hyper-relational features.

[206] U.C.C. § 2-202(a) (A.L.I. & Unif. L. Comm'n 2023).

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would presumably permit the introduction of the employer's history of terminating only for cause, the prevalence of career employment in the industry, or assurances made to the employee or the workforce, among other evidence.[207] At a minimum, it would reject elevated treatment of written disclaimers and consider credible oral or contextual terms that might reasonably be construed as exceptions to an employer's general at-will policy.

3. A Reasonable Expectations Alternative

The previous Subsection explored how a contextualist approach to extrinsic evidence could justify minority judicial decisions that espouse a more holistic treatment of disclaimers. However, like textualism, contextualism starts from the premise that admission of extrinsic evidence depends on a threshold finding that the otherwise governing writing is ambiguous or less than fully integrated. By considering all evidence, it seeks to elucidate the actual (and ostensibly shared) intent of the parties.

In some disclaimer cases, the facts might support the conclusion that, notwithstanding the boilerplate recitals of at-will status, *both* parties had something different in mind. This might occur where supervisors or other higher-ups make representations that they genuinely intend, even if they vary from the paperwork supplied by HR.[208] But, in other situations, the employer is acting strategically. The employer makes general assurances that create employee expectations, but wishes to remain unbound.[209]

[207] These are not perfect parallels, as individual employees and their employer generally do not have successive contracts or performances that would fall within the technical understanding of course of dealing or performance. See id. § 1-303. But the employer's general practices with respect to its overall workforce and industry expectations are reasonably analogous.

[208] *Wilkinson v. Shoney's, Inc.* is just such an example. The regional director who hired Wilkinson and recruited him back to the company assured him that "Shoney's had changed," implying that his past employment history would not be an issue in his new management position. *Wilkinson*, 4 P.3d at 1153; see also Lopez v. Kline, 953 P.2d 304, 308 (N.M. Ct. App. 1997) (finding it to be a jury question whether a supervisor's representations contractually bound the employer not to terminate plaintiff due to her illness notwithstanding an at-will disclaimer in the employee handbook). The question will often be a factual one. Thus, both the textualist and contextualist approaches make it appropriate to examine all the available evidence. See supra notes 181–97 and accompanying text.

[209] Courts adopting the deferential view of disclaimers often justify their decisions by asserting the disclaimer shows the employer's intent was different from the employee's

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In such situations, appeals to party intent, even through the more permissive, contextualist approach, may seem disingenuous. This is particularly so where the disclaimer is well-lawyered. Even contextualist courts may be unwilling to find a breach of any legally enforceable obligation where the employer manifests the clear intention to maintain an at-will relationship in ironclad language. Thus, an interpretive approach that more fully acknowledges its pro-employee cast may be preferable.

The seemingly acontractual treatment of handbook claims by late-twentieth-century courts provides a model. Courts appealed to the reasonable expectations of employees rather than relying on formal rules of contract formation. They recognized that employees, given their relative lack of sophistication, would naturally assume the employer's policies to be binding. Accordingly, the employer, whatever its true intent, should not be permitted to benefit from such expectations while simultaneously avoiding any enforceable legal obligation.[210]

Courts taking the deferential approach to disclaimers often assert that employees cannot reasonably expect their employer's promises to be binding in the face of exculpatory language.[211] But that conclusion is neither empirically supported nor doctrinally compelled. Research testing employees' understanding of employment-at-will substantiates the gap between doctrine and perception.[212] Similarly, studies of consumers show they do not read or understand the boilerplate that accompanies their purchases.[213]

understanding. See, e.g., Forbes v. Kinder Morgan, Inc., 172 F. Supp. 3d 1182, 1200 (D. Kan. 2016) ("Because [plaintiff's] unilateral expectations provide the only evidence to negate the parties' agreed-upon disclaimers, those disclaimers legally determine the parties' intent."), *aff'd*, 686 F. App'x 552 (10th Cir. 2017).

[210] See Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1258 (N.J. 1985).

[211] See, e.g., Leikvold v. Valley View Cmty. Hosp., 688 P.2d 170, 174 (Ariz. 1984) (explaining that a handbook containing clear and conspicuous at-will recitals "instill[s] no reasonable expectations of job security and do[es] not give employees any reason to rely on representations in the manual").

[212] Kim, supra note 109, at 133–34 (finding that eighty-nine percent of respondents wrongfully believed an employer cannot fire an employee due to personal dislike of that employee).

[213] See, e.g., Daniel Schwarcz, Brenda J. Cude, Kyle D. Logue & German Marquez Alcala, Read But Not Understood? An Empirical Analysis of Consumer Comprehension in Homeowners Insurance, 112 Va. L. Rev. 727, 738–41, 759 (2026) (summarizing existing data and finding that the language in homeowner insurance policies had little to no effect on the accuracy of participants' understanding of coverage).

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Recognizing these realities, courts interpreting certain adhesion contracts at times have developed more protective rules. In the mid- to late twentieth century in the insurance context, some courts adopted a "reasonable expectations" rule that favors unsophisticated policyholders in disputes with their carriers.[214] Judicial application of this concept varies by jurisdiction and has evolved over the years, but in its strongest form, the doctrine permits an individual insured's reasonable expectation of coverage to trump a literal reading of the policy.[215] Thus, a court might refuse to apply an exclusion buried in fine print that was not pointed out to the policyholder.[216] Or, it may refuse to apply a counterintuitive definition of covered circumstances.[217] Importantly, the most generous applications of the doctrine do not require a finding of ambiguity in the written text.[218] Rather, the touchpoint is that the otherwise clear language erodes expectations inculcated by statements or omissions of the insurance provider or by more salient policy language.[219]

There have been some attempts to expand the reasonable expectations rule beyond its origins to address adhesion contracts more generally. A conceptually similar but less powerful form of the reasonable expectations doctrine was incorporated in the Restatement (Second) of

[214] See Kenneth S. Abraham, A Theory of Insurance Policy Interpretation, 95 Mich. L. Rev. 531, 547 (1996).

[215] Several commentators have taxonomized the differing judicial approaches. See Daniel Schwarcz, Narrowing the Frame: Consumer Insurance Policies and the Limits of the Restatement of Consumer Contracts, 15 Harv. Bus. L. Rev. 439, 444–45 (2025); Stephen J. Ware, A Critique of the Reasonable Expectations Doctrine, 56 U. Chi. L. Rev. 1461, 1467 (1989) (distilling three versions of the doctrine from the case law). See generally 7 Corbin, supra note 143, § 29.9 (explaining the varying interpretations taken by courts). According to at least one scholar, contemporary courts have retreated from the strongest forms of the reasonable expectations rule in insurance disputes and have instead applied an especially "muscular" version of *contra proferentem* in interpreting policies. See Schwarcz, supra, at 446–47.

[216] See, e.g., Phila. Indem. Ins. Co. v. Barerra, 21 P.3d 395, 403 (Ariz. 2001) (holding a rental car insurance policy exclusion inapplicable where it was not pointed out and circumstances did not reasonably permit purchaser to review full policy terms).

[217] The canonical example is a policy defining covered burglary to require visible marks of forced entry. See Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co., 366 N.W.2d 271, 278–79 (Minn. 1985).

[218] See Schwarcz, supra note 215, at 446.

[219] Professor Robert Keeton, who is credited with first articulating the doctrine, put it this way: "The objectively reasonable expectations of applicants and intended beneficiaries . . . will be honored even though painstaking study of the policy provisions would have negated those expectations." Keeton, Part 1, supra note 155, at 967.

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Contracts. Under Section 211, the more sophisticated party to a transaction may not enforce a written term that it has reason to believe the less-informed party would not have agreed to.[220] The court should instead "seek to effectuate the reasonable expectations of the average member of the public."[221] Section 211 has garnered more scholarly attention than judicial uptake. However, the inaugural Restatement of Consumer Contracts has attempted to breathe new life into this doctrine. Under Section 4(d), standardized terms are to be "interpreted in a manner that effectuates the reasonable expectations of the consumer."[222]

Although Section 4(d) is clearly more robust than Section 211, it is uncertain whether it is intended to be as protective of consumers as some historical applications of the "reasonable expectations" doctrine were to insureds.[223] And it remains to be seen whether courts will adopt Section 4(d) or any other part of the new Restatement. However, both sections reflect a scholarly consensus that supports constraining a more powerful party's ability to undermine the expectations of a weaker party through boilerplate language.[224] These provisions support a more overtly pro-employee approach to disclaimers that does not require a finding of textual ambiguity.

IV. IMPOSING SUBSTANTIVE LIMITS ON DISCLAIMERS

The previous Part argued that the deferential approach to disclaimers is out of sync with contemporary contract interpretation principles. Courts should reject the *pro proferentem* approach in favor of a broader understanding of the parties' contract that recognizes enforceable exceptions to employment-at-will based on context. But like our

[220] Restatement (Second) of Conts. § 211(3) (A.L.I. 1981) ("Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.").

[221] Id. § 211 cmt. e.

[222] Restatement of Consumer Conts. § 4(d) (A.L.I. 2024).

[223] The Comments and Reporters' Notes to Section 4(d) discuss reasonable expectations both as a means of addressing ambiguity and as a freestanding concept. See id. § 4 cmt. 5 ("The protection of consumers' reasonable expectations is also central to the determination of the legal effect of standard contract terms, even when the meaning of those standard contract terms is not uncertain or has otherwise been ascertained."); Schwarcz, supra note 215, at 444–45 (noting the drafters' allusions to the more generous version of the doctrine).

[224] See David A. Hoffman, Consumers' Unreasonable Textual Expectations, 15 Harv. Bus. L. Rev. 405, 409 (2025) (asserting that the reasonable expectations approach to consumer boilerplate "has plausible roots in the relevant jurisprudential community, whether or not legions of cases back it up").

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boilerplate critique, the interpretation critique has its limits. The most ironclad disclaimers not only evince the employer's desire to maintain an at-will relationship but also purport to supersede and foreclose any contrary commitment, and indeed, any contractual obligation whatsoever. Even courts sympathetic to our contextualist proposal may be unwilling to disregard written language that clearly and emphatically disavows all other sources of terms.

In this Part, we examine this facet of ironclad disclaimers through the lens of regulatory limits on employer drafting. Our treatment aligns with broader calls for more aggressive regulation of the terms of consumer sales and services that respond to the insufficiency of disclosure-based reforms. In addition to possible legislative solutions, well-known common law guardrails constrain parties' ability to impose egregiously one-sided terms. We focus on two such doctrines—unconscionability and good faith. We argue that boilerplate terms through which one party insulates itself from all contractual liability at the expense of the other violate both principles.

A. Contracting Out of Contract?

Recall the evolution of employer-drafted disclaimers we discussed in Part I. Initially, employers sought to preclude implied job security claims based on their written policies. The core of any disclaimer is thus its reaffirmation of employees' at-will status. But the goal of contemporary, ironclad disclaimers is, as the label suggests, to "disclaim" *all* contractual obligation to the employee, regardless of its content or source. Employees must trust their employer will abide by workplace norms; they enjoy no legal remedy for a seeming breach.

Employers use a strategic combination of clauses to accomplish this one-sided derogation of contractual rights. As illustrated by the SHRM disclaimer in Part I, these include language that voids past promises, forecloses future commitments, and reserves the right to alter employment terms at any time. Some disclaimers more bluntly assert that the policy or handbook in which the disclaimer appears is not a contract, or simply that no contract of any kind exists between the parties.

Consider the profound implications of these clauses. Language disclaiming *past* promises would expunge all prior commitments to the

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employee, such as those made during the course of recruitment and hiring,[225] even those terms and assurances that elicited the employee's acceptance.[226] Conversely, language constraining *future* promises purports to prophylactically deny the legal significance of any new commitments.[227] This enforcement bar includes promised promotions, raises, or other benefits or opportunities, even if offered to induce a particular performance.[228] The clause reserving a right to alter terms is the belt to these suspenders. If somehow the employer *were* to make an enforceable commitment—for instance, through a definitively expressed policy—that statement is, in any event, subject to unilateral change.

Collectively, these clauses, if enforced as written, would allow employers to "contract out" of contract. Whether the parties to an agreed-upon exchange can avoid the rules of contract by mere declaration is an open—perhaps existential—question for mainstream contract law.[229] Few if any analogs exist, and those that do differ in important respects. In some transactional settings, for example, parties

[225] As discussed in Part III, this clause resembles a merger clause and aims to preclude the introduction of parol evidence. However, such clauses are not dispositive under a contextualist approach to contract interpretation. See Restatement (Second) of Conts. § 213 (A.L.I. 1981); supra Part III.

[226] See, e.g., Levitan v. Apple Comput., Inc., No. H024191, 2003 WL 1914274, at *3–6 (Cal. Ct. App. Apr. 18, 2003) (refusing to enforce employer's promise during recruitment to allow an employee to work partially remotely).

[227] These clauses are sometimes drafted to allow only written changes by specific high-level employees. See SHRM Disclaimer, supra note 46. In this way, they resemble no-oral-modification clauses in commercial contracts. The common law deems such clauses unenforceable, although the UCC supersedes this rule for sales of goods. U.C.C. § 2-209(2) (A.L.I. & Unif. L. Comm'n 2023). See generally Wis. Knife Works v. Nat'l Metal Crafters, 781 F.2d 1280, 1286 (7th Cir. 1986) (characterizing the UCC drafters' decision to enforce parties' preference for written and signed modification as providing an additional backstop against "extortionate modifications").

[228] A recurring scenario involves employees who turn down other job offers in reliance on such assurances. See, e.g., Cocchiara v. Lithia Motors, Inc., 297 P.3d 1277, 1280 (Or. 2013). Under such facts, a minority of jurisdictions have sometimes allowed a promissory estoppel claim despite their unwillingness to recognize a contractual obligation. See id. at 1285; cf. Peters v. Gilead Scis., Inc., 533 F.3d 594, 600–01 (7th Cir. 2008) (recognizing a promissory estoppel claim for an employer's failure to honor a written promise to permit the plaintiff to take medical leave despite not recognizing a contractual obligation). But see Swider v. Ha-Lo Indus., Inc., 134 F. Supp. 2d 607, 619–20 (D.N.J. 2001) (rejecting both oral contract and promissory estoppel claims seeking enforcement of employer's oral promises of job security where employer was unaware of outside employment offer).

[229] We are not aware of research that engages this precise question. The enforceability of similar clauses in commercial contracts has at times been contested. See, e.g., U.C.C. § 2-316(1) (A.L.I. & Unif. L. Comm'n 2023) (limiting the effectiveness of written negations of prior oral warranties).

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may draft a self-styled "preliminary agreement" in anticipation of executing a formal contract.[230] Courts generally (though not always) accept parties' description of these writings as nonbinding.[231] But these instruments usually involve sophisticated parties bargaining at arm's length over complex business or commercial transactions.[232] In most cases, parties have expressed an intent merely to defer the point at which they will be bound. And in all cases, the effect of the designation is mutual: *neither* party is bound.

Nothing about these relatively exceptional situations warrants an extension to the employment setting. Unlike these bespoke documents that are formally executed by the parties, disclaimers are unilaterally drafted, self-serving language imposed on employees, often without their awareness. Judicial deference to a one-sided exculpation under such circumstances is normatively indefensible. It is also doctrinally suspect considering the hyper-relational quality of employment. As discussed in Part III, there is no reason to grant disclaimers particular weight in a contractual relationship whose terms are constantly evolving, especially when an employee produces persuasive evidence of agreement. Indeed, courts sometimes disregard the recitals of sophisticated parties to ostensibly nonbinding preliminary agreements where the facts indicate an intent to be bound despite such assertions.[233]

In short, the use of ironclad disclaimers calls out for judicial or regulatory intervention. A recent Seventh Circuit decision in a wage-payment-law dispute illustrates how a court could impose hard limits on disclaimers. In *Das v. Tata Consultancy Services Ltd.*, the employer offered an annual bonus payment plan for top sales personnel.[234] From

[230] Such agreements go by a variety of labels, including "memoranda of understanding" and "letters of intent." See Albert H. Choi & George Triantis, Designing and Enforcing Preliminary Agreements, 98 Tex. L. Rev. 439, 440 (2020).

[231] See, e.g., Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc., 145 F.3d 543, 545 (2d Cir. 1998); Empro Mfg. Co. v. Ball-Co Mfg., Inc., 870 F.2d 423, 426 (7th Cir. 1989); In re Kaplan Breslaw Ash, LLC, 264 B.R. 309, 323–24 (Bankr. S.D.N.Y. 2001).

[232] See Choi & Triantis, supra note 230, at 456–61 (describing the multistage nature of complex contracting and the "sequenc[ing]" function of preliminary agreements).

[233] See, e.g., Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 790 (Tex. App. 1987); Bed Bath & Beyond Inc. v. IBEX Constr., LLC, 860 N.Y.S.2d 107, 109 (App. Div. 2008); Turner Broad. Sys., Inc. v. McDavid, 693 S.E.2d 873, 875, 878–79 (Ga. Ct. App. 2010). Such binding preliminary agreements are often referred to as "Type 1" agreements as initially characterized by the district court in *Teachers Insurance & Annuity Ass'n of America v. Tribune Co.*, 670 F. Supp. 491, 498 (S.D.N.Y. 1987). See, e.g., Choi & Triantis, supra note 230, at 445–47.

[234] 118 F.4th 903, 906 (7th Cir. 2024).

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conversations with company leaders and the employer's slide presentation, the plaintiff understood that he could earn over $400,000 if he met certain sales targets.[235] Although the plaintiff ultimately exceeded those targets, the employer awarded him less than $100,000.[236]

The plaintiff sued under the Illinois Wage Payment and Collection Act ("Wage Act"), and the employer moved to dismiss based on its written bonus plan, which contained a variety of disclaimers.[237] These terms asserted that the plan was not a contract and that the employer retained full discretion concerning bonus payment.[238] The employer argued that these statements vitiated any agreement between the parties and precluded the plaintiff's claim that the company had failed to pay earned compensation.

The Seventh Circuit disagreed. Although its holding arose under the state statute, the court's analysis relied on contract law.[239] The "key inquiry," according to the court, was "whether . . . disclaimers are incompatible with mutual assent."[240] It cited state agency regulations rejecting the dispositive role of disclaimers in Wage Act claims and asserted that "other sources can establish that a contract was formed despite the drafter's inclusion of that language."[241] This evidence could include a past practice of paying bonuses under plans containing disclaimers. The question is simply whether such an agreement was actually reached.[242]

Das illustrates a regulatory approach to disclaimers, one that rejects the notion that such language magically defeats an otherwise binding agreement. *Das*'s precedential value is confined to Illinois wage claims. But its analysis speaks more broadly to the potential for substantive limits on disclaimers in contract law generally. In the next Section, we consider how courts might implement a similar principle for such disputes.

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[235] Id.

[236] Id.

[237] This "formal" version of the plan was provided to the plaintiff in an email subsequent to the slide show. Id.

[238] Id.

[239] Id. at 907 ("To state a claim under the Wage Act, an employee must 'demonstrate that [he is] owed compensation from defendants pursuant to an employment agreement.'" (alteration in original) (quoting Enger v. Chi. Carriage Cab Corp., 812 F.3d 565, 568 (7th Cir. 2016))).

[240] Id.

[241] Id. at 908–09.

[242] Id. at 910.

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B. Contract Law's Limiting Doctrines

The most direct path to defusing ironclad disclaimers would be to void them legislatively. Alternatively, a state could legislatively overrule judicial deference to disclaimers, codifying our more holistic approach to determining contract rights. Either intervention would restore baseline contract rights and enable employee contract claims whenever the facts show an enforceable employer obligation.

States in recent years have been active in enhancing statutory protection for employees. Among other things, they have instituted new minimum labor standards[243] and enhanced employees' ability to pursue certain antidiscrimination claims.[244] In contrast, we have seen almost no legislation directed toward disclaimers specifically (or employee contract rights generally) and only a few modest efforts to legislatively supersede employment-at-will.[245] The only state statute of which we are aware that specifically addresses disclaimers points in the other direction, validating their use.[246]

Fortunately, contract law itself incorporates guardrails against both unfair contract terms and strategic behavior in contract relationships. Unconscionability offers the weaker party a defense against overly harsh terms. The implied duty of good faith and fair dealing ("good faith")

[243] Two areas where states have been active include fair scheduling laws and paid leave requirements. On fair scheduling laws, see, e.g., Oregon Fair Work Week Act, Or. Rev. Stat. §§ 653.412–490 (2025). See generally Charlotte Alexander, Anna Haley-Lock & Nantiya Ruan, Stabilizing Low-Wage Work, 50 Harv. C.R.-C.L. L. Rev. 1, 20–30 (2015) (discussing guaranteed-pay provisions). On paid leave requirements, see, e.g., Maryland Time to Care Act of 2022, Md. Code Ann., Lab. & Empl. §§ 8.3-101–1001 (LexisNexis 2026). See generally Madeleine Gyory, Legislating Flexibility in the Post-Pandemic Workplace, 69 Vill. L. Rev. 209 (2024) (discussing state paid family and medical leave laws).

[244] Several states have made it easier for employees to pursue sexual harassment and equal pay claims, largely in response to the MeToo movement of the prior decade. See, e.g., Colorado Equal Pay for Equal Work Act, Colo. Rev. Stat. § 8-5-102 (2026) (prohibiting employer requests for pay history and requiring pay transparency); N.Y. Exec. Law § 296(1)(h) (McKinney 2026) (rejecting requirement that actionable sexual harassment be severe or pervasive). See generally Jamillah Bowman Williams, Elizabeth C. Tippett & Anu Ramdin, Mind the Gap(s): Mitigating Harassment in a Post-#MeToo Workplace, 98 S. Cal. L. Rev. 881 (2025) (analyzing effects of harassment law and policy reforms).

[245] There have been a few narrow examples of at-will reform at the local level, but these are limited to particular industries and do not appear to reflect a more general trend. See, e.g., N.Y.C., N.Y., Admin. Code § 20-1272 (2026) (applying to fast food workers); Phila., Pa., Code § 9-4702 (2026) (applying to parking lot attendants).

[246] S.C. Code Ann. § 41-1-110 (2025); cf. Ariz. Rev. Stat. Ann. § 23-1501(A)(2) (2026) (permitting alteration of the at-will default only by writing, which, in the case of a handbook, must "express[] the intent that it is a contract of employment"); see supra Section I.B.

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prohibits parties from acting opportunistically to defeat the other party's expectations. We turn next to the application of these doctrines to ironclad disclaimers.

1. Structural Unconscionability and the Ironclad Disclaimer

The traditional vehicle for imposing substantive limits on contract terms is the unconscionability defense. As famously articulated by Judge J. Skelly Wright in *Williams v. Walker-Thomas Furniture Co.*, the doctrine voids contract terms that evince a combination of "procedural" and "substantive" unconscionability.[247] The former examines the legitimacy of the contract formation process, while the latter looks at the terms of the agreement themselves to determine if they are egregiously one-sided.[248]

Disclaimers, much like other exculpatory boilerplate, squarely fit the criteria for procedural unconscionability.[249] They are unilaterally drafted by the employer, required as a condition of employment, and appear in relationships of extreme power imbalance. This is enough in some jurisdictions to make a threshold showing of procedural unconscionability.[250] For workers, these dynamics are compounded by

[247] 350 F.2d 445, 449–50 (D.C. Cir. 1965). The concepts of "procedural" and "substantive" unconscionability are generally attributed to Arthur Leff. See Arthur Allen Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 487 (1967). See generally 8 Williston, supra note 61, § 18:10 (using this terminology). Although most common law articulations of the doctrine require both elements, the relevant UCC provision does not reference the distinction. See U.C.C. § 2-302 (A.L.I. & Unif. L. Comm'n 2023); see also Cordova v. World Fin. Corp. of N.M., 208 P.3d 901, 908 (N.M. 2009) (asserting that while the case for invalidating a contract is strongest when there is both procedural and substantive unconscionability, both elements are not required).

[248] See *Walker-Thomas Furniture Co.*, 350 F.2d at 449 (describing unconscionability as the "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party"). See generally 8 Williston, supra note 61, § 18:15 (discussing these elements).

[249] For instance, courts have cited the adhesive quality of exculpatory clauses in consumer contracts in voiding them as unconscionable or contrary to public policy. See, e.g., Bagley v. Mt. Bachelor, Inc., 340 P.3d 27, 45 (Or. 2014).

[250] A number of cases in California, for instance, find that adhesiveness alone is strong evidence of procedural unconscionability. See, e.g., Sanchez v. Valencia Holding Co., 353 P.3d 741, 751 (Cal. 2015); Jenkins v. Dermatology Mgmt., LLC, 328 Cal. Rptr. 3d 402, 409 (Ct. App. 2024) ("[T]here is a minimum degree of procedural unconscionability that is always present with an adhesive contract." (internal quotation marks omitted)); see also Antkowiak v. TaxMasters, 455 F. App'x 156, 159 (3d Cir. 2011) ("Contracts of adhesion are *per se* procedurally unconscionable . . . ."); State ex rel. King v. B & B Inv. Grp., 2014-NMSC-024, ¶¶ 26–29, 329 P.3d 658 (finding procedural unconscionability in part

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the mechanics of onboarding, the delayed presentation of disclaimers (often post-hire), and employment's hyper-relational qualities, which diminish the importance of written terms.[251] Indeed, one might describe employment as embodying a type of *structural* unconscionability that makes most, if not all, employer-drafted boilerplate procedurally unconscionable.

The substantive dimension of unconscionability has proved more elusive.[252] Common articulations include that the terms are shockingly one-sided or oppressive, deviate from expected standards, or cause undue surprise or hardship.[253] It is this component of the defense that has prompted most scholarly criticism of the doctrine. Critics contend unconscionability is too malleable to yield predictable results, disrupts settled expectations (of the drafting party), harms those it seeks to help (for instance by raising prices for consumers), and generally destabilizes contract law.[254] As a result, it has long been viewed as a doctrine of last resort.[255]

Despite these age-old concerns, substantive unconscionability has endured and is enjoying a heyday in the contemporary jurisprudence of mandatory consumer and employment arbitration agreements. Many

"[b]ecause these contracts are prepared entirely by Defendants, who have superior bargaining power, and are offered to the weaker party on a take-it-or-leave-it basis"); Brown v. Genesis Healthcare Corp., 729 S.E.2d 217, 228 (W. Va. 2012) ("Procedural unconscionability often begins with a contract of adhesion.").

[251] See supra Section II.A.

[252] See 7 Corbin, supra note 143, § 29.1 (describing unconscionability as "one of the most amorphous terms in the law of contracts").

[253] See U.C.C. § 2-302 cmt. 1 (A.L.I. & Unif. L. Comm'n 2023); 8 Williston, supra note 61, § 18:10.

[254] See generally Jacob Hale Russell, Unconscionability's Greatly Exaggerated Death, 53 U.C. Davis L. Rev. 965, 993–96 (2019) (summarizing critical scholarship); 8 Williston, supra note 61, § 18:11 ("The ad hoc approach under the [UCC] almost necessarily precludes standardized rules concerning any determination of unconscionability . . . .").

[255] See, e.g., Amy J. Schmitz, Embracing Unconscionability's Safety Net Function, 58 Ala. L. Rev. 73, 90–94 (2006). But see Kevin A. Kordana & David H. Tabachnick, Rawls and Contract Law, 73 Geo. Wash. L. Rev. 598, 626–29 (2005) (arguing that substantive unconscionability doctrine aligns with principles of justice that antecedently define the contours of contractual freedom); Sabine Tsuruda, Race, Unconscionability, and Contractual Equality, 60 Harv. C.R.-C.L. L. Rev. 159, 203–04 (2025) (proposing that unconscionability should become a routine tool for protecting the basic interests and inalienable rights of contracting parties). See generally Babette E. Boliek, Upgrading Unconscionability: A Common Law Ally for a Digital World, 81 Md. L. Rev. 46, 49–50 (2021) ("[A]lthough taught in every law school in the United States, commentators claim that the application of unconscionability is so rare that it is, so to speak, the last refuge of fools.").

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courts have refused to enforce (or severed) arbitration agreements on unconscionability grounds.[256] Courts sometimes find these dispute resolution processes inadequate, costly, or simply unfair to the consumer or employee.[257] Under this "access-to-justice" version of the doctrine,[258] courts have voided agreements or clauses that, among other things, impose onerous fees, set restrictive deadlines, truncate discovery, require appearances in distant locations, create procedural obstacles to access, or are otherwise unduly favorable to the defendant.[259]

The ubiquity of unconscionability findings in arbitration disputes owes in part to Federal Arbitration Act preemption, which precludes most other challenges to enforcement.[260] Still, there are several justifications for extending contemporary unconscionability jurisprudence to ironclad disclaimers. First, the animating concern in arbitration is whether litigants will be able to vindicate their claims in

[256] See generally Susan Landrum, Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements, 97 Marq. L. Rev. 751 (2014) (empirically evaluating case law); Willy E. Rice, Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees' Contractual Rights?—Legal and Empirical Analyses of Courts' Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses Under the Federal Arbitration Act, 1800–2015, 25 B.U. Pub. Int. L.J. 143 (2016) (same).

[257] See, e.g., Gabriel v. Island Pac. Acad., Inc., 400 P.3d 526, 537–39 (Haw. 2017); OTO, L.L.C. v. Kho, 447 P.3d 680, 696–98 (Cal. 2019); McKee v. AT&T Corp., 191 P.3d 845, 858 (Wash. 2008).

[258] Professor Jacob Hale Russell uses this term to distinguish such cases from what he calls "rotten-deal unconscionability," which focuses on unfair "price." See Russell, supra note 254, at 974.

[259] See, e.g., *Gabriel*, 400 P.3d at 537–40 (finding a cost-splitting provision to be unconscionable); Ramirez v. Charter Commc'ns, Inc., 551 P.3d 520, 531–44 (Cal. 2024) (finding time limit on filing claims and attorney-fee provisions to be unconscionable); *McKee*, 191 P.3d at 859–60 (same).

[260] The Federal Arbitration Act limits litigants to contract defenses of general applicability in challenging arbitration agreements. See 9 U.S.C. § 2 (permitting nonenforcement of otherwise valid arbitration agreements only "upon such grounds as exist at law or in equity for the revocation of any contract"). Federal preemption thus has largely foreclosed first-principles debates about the appropriateness of substituting a private forum for the judicial process. See Aaron-Andrew P. Bruhl, The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law, 83 N.Y.U. L. Rev. 1420, 1436–37 (2008); Jeffrey W. Stempel, Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism, 19 Ohio St. J. on Disp. Resol. 757, 773–75 (2004).

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the forum provided.[261] Disclaimers escalate this concern by eliminating claims altogether. To be sure, the nature of the underlying rights is different. Those at stake in arbitration cases are usually premised on nonwaivable statutory entitlements.[262] But employment contract rights are still rights, and they are of critical importance to employees when employment protection legislation is absent or ineffective.[263] A forced waiver therefore should be void as unconscionable if exacted under circumstances of considerable procedural unconscionability.[264]

Second, finding ironclad disclaimers substantively unconscionable aligns with precedents outside the arbitration context that invalidate terms preventing individuals from effectively vindicating their rights. For example, courts frequently void as unconscionable contract provisions that shorten the applicable statute of limitations or restrict otherwise available remedies in employment and commercial settings.[265] The motivating concern in such cases is the de facto waiver of existing substantive rights.[266] Disclaimers, by comparison, involve an express prospective waiver of any contract rights that would otherwise accrue.

[261] See Nesbitt v. FCNH, Inc., 811 F.3d 371, 377–79 (10th Cir. 2016); Shankle v. BG Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1233–35 (10th Cir. 1999); Morrison v. Cir. City Stores, Inc., 317 F.3d 646, 663–65 (6th Cir. 2003).

[262] The key Supreme Court cases involve claims under federal antidiscrimination and wage and hour laws. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23–24 (1991); Epic Sys. Corp. v. Lewis, 584 U.S. 497, 514 (2018).

[263] The importance of employee contract rights is reflected in the federal and state labor law protections that aim to facilitate collective bargaining between employers and employees on fair terms. See 29 U.S.C. § 151 (declaring it "the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of their employment").

[264] Our critique here aligns with Professor Cynthia Estlund's description of "conditionally waivable rights." See Estlund, supra note 13, at 382. She asserts that employees should be permitted to waive certain rights only with substantive limits and under appropriate procedural safeguards. Id. at 417–20. Although her discussion concerns noncompetes and arbitration agreements, Estlund contemplates its possible extension to waivers of contract rights to job security. Id. at 440.

[265] See, e.g., Tadych v. Noble Ridge Constr., Inc., 519 P.3d 199, 203–04 (Wash. 2022) (finding unconscionable a provision in a builder's contract that reduced a six-year statute of limitations for construction defect claims to one year). See generally Meredith R. Miller, Time's Up: Against Shortening Statutes of Limitation by Employment Contract, 68 Vill. L. Rev. 221 (2023) (discussing this use of the unconscionability doctrine).

[266] See *Tadych*, 519 P.3d at 203 (noting that a shortened statute of limitations provision "effectively abolishes a plaintiff's statutory right . . . to bring a claim"); Ronderos v. USF Reddaway, Inc., 114 F.4th 1080, 1095 (9th Cir. 2024) (finding that a shortened statute of limitations provision was a "vehicle for the waiver of [plaintiff's] statutory rights" (quoting Martinez v. Master Prot. Corp., 12 Cal. Rptr. 3d 663, 672 (Ct. App. 2004))).

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Third, imbalance is a prominent, recurring consideration in assessing substantive unconscionability, and ironclad disclaimers are a flagrant example of a one-sided term. It is sometimes said that a term must not unjustifiably benefit one party at the expense of another.[267] Courts often void arbitration agreements that do not equally bind both parties. For example, the employer may retain the ability to control or alter arbitral rules or the right to eliminate the agreement unilaterally.[268] A common fact pattern involves an arbitration agreement that carves out the types of claims employers typically bring, but consigns employees' claims to be resolved exclusively in an arbitral forum.[269] Ironclad disclaimers create a similar situation of inequity. The employee must give up contract protection, while the employer benefits from the regular rules of contract enforcement.

This situation raises a fourth justification for deeming ironclad disclaimers substantively unconscionable. Ironclad disclaimers make at-will employment a far more one-sided bargain, particularly when paired with rights-limiting provisions like restrictive covenants that limit workers' ability to obtain better terms of employment.[270] Though many contemporary unconscionability cases involve access-to-justice limitations like arbitration agreements, a robust body of "rotten deal" unconscionability cases exists in the consumer context.[271] Such

[267] See Horizon Ventures of W. Va., Inc. v. Am. Bituminous Power Partners, L.P., 857 S.E.2d 33, 39 (W. Va. 2021) ("[U]nconscionability means that, because of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written." (quoting Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 261 (W. Va. 2011))); cf. Cordova v. World Fin. Corp. of N.M., 208 P.3d 901, 911 (N.M. 2009) ("The FAA . . . is not a license for businesses to take advantage of consumers by the imposition of one-sided, unfair, and legally unconscionable arbitration schemes.").

[268] See, e.g., Totten v. Kellogg Brown & Root, LLC, 152 F. Supp. 3d 1243, 1253 (C.D. Cal. 2016); Ramirez-Baker v. Beazer Homes, Inc., 636 F. Supp. 2d 1008, 1022 (E.D. Cal. 2008); Ingle v. Cir. City Stores, Inc., 328 F.3d 1165, 1172–73 (9th Cir. 2003).

[269] See Gurganus v. IGS Sols. LLC, 338 Cal. Rptr. 3d 36, 44–45 (Ct. App. 2025) (finding unconscionable an arbitration agreement that excluded intellectual property and unfair competition claims); *Ronderos*, 114 F.4th at 1096 (finding unconscionable an arbitration agreement containing one-sided preliminary injunction carve-out).

[270] That arrangement diminishes employees' ability to work elsewhere while foreclosing any ability to establish contractual protection in the job they hold. See Katherine V.W. Stone, The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law, 48 UCLA L. Rev. 519, 592 (2001) (discussing the incongruence and unfairness of contractual restraints on employee mobility in an era of decreased job stability).

[271] See Russell, supra note 254, at 978.

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decisions void or sever consumer contracts based on the quality of the exchange, considering salient terms like price.[272] The Restatement of Consumer Contracts cautiously embraces this use of the doctrine. It affirmatively declares certain access-to-justice limitations unconscionable and recognizes the possibility of using "rotten deal" unconscionability to void especially harsh terms, particularly when coupled with procedural irregularities.[273]

In sum, disclaimers are a "rotten deal" term. They undo what little contractual protection at-will employees can hope to secure, while preserving employers' contractual rights and freedoms. Existing case law has not explored the potential unconscionability of disclaimers, and there is little to no judicial application of "rotten deal" unconscionability to employment terms.[274] We suggest, however, that existing arbitration jurisprudence and consumer law's more evaluative version of the doctrine justify such an extension. The harshness of ironclad disclaimers offers a strong basis for declaring them unconscionable.

2. Good Faith and Fair Dealing

The implied duty of good faith and fair dealing likewise could impose substantive limits on disclaimers.[275] While unconscionability directly voids unduly one-sided terms, good faith constrains how a party exercises its contract rights. The doctrine prevents either party from abusing contractually reserved discretion by denying its transactional partner the anticipated fruits of a deal.[276] Applied to employment, good faith could prevent an employer from using an ironclad disclaimer to foreclose ostensible contract rights or to justify discretionary behavior that defeats employees' legitimate expectations.

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[272] Russell argues that there has been a resurgence in judicial reliance on this form of unconscionability in evaluating consumer lending terms since 2008. See id. at 980–81 (speculating that such cases reflect judicial distrust of the industry in the wake of the Great Recession).

[273] See Restatement of Consumer Conts. § 6 cmt. 8 (A.L.I. 2024).

[274] Outside of the arbitration and other access-to-justice contexts, there appear to be just a few employment cases involving forfeiture-of-compensation clauses that raise unconscionability defenses. See, e.g., Ellis v. McKinnon Broad. Co., 23 Cal. Rptr. 2d 80, 84–86 (Ct. App. 1993). At least one employment scholar has called for the use of the doctrine to void training repayment provisions. See Harris, supra note 9, at 755.

[275] See U.C.C. § 1-304 (A.L.I. & Unif. L. Comm'n 2023); Restatement (Second) of Conts. § 205 (A.L.I. 1981).

[276] This canonical description is generally attributed to *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163, 165, 168 (N.Y. 1933).

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Good faith currently plays a very limited role in employment contract law.[277] A few jurisdictions use it to constrain employment-at-will in narrowly defined circumstances, primarily involving deferred compensation.[278] In the paradigmatic cases, employers terminate at-will employees who have achieved a sales goal or another milestone that would entitle them to a bonus or commission if still employed.[279] Courts that accept this theory hold that such a discharge—if intended to deprive an employee of already-earned compensation—violates good faith, notwithstanding employment-at-will.[280] Under this reading, the implied duty limits an employer's otherwise unfettered power to terminate for any reason.

A somewhat less prominent set of cases imposes a good faith limit on the administration of discretionary bonus policies.[281] These cases suggest that good faith constrains an employer's ability to deny a bonus or alter eligibility criteria despite policy language reserving that right. In *Guggenheimer v. Bernstein Litowitz Berger & Grossmann LLP*, for

[277] Two well-known theories of good faith have shaped mainstream contract law: the narrow "forgone opportunities" approach, see Steven J. Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv. L. Rev. 369, 372–74 (1980), and the broader "excluder" approach, see Robert S. Summers, The General Duty of Good Faith—Its Recognition and Conceptualization, 67 Corn. L. Rev. 810, 818–30 (1982). See generally Emily M.S. Houh, Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law, 88 Corn. L. Rev. 1025, 1034–38 (2003) (discussing these competing theories). Judicial application of good faith to at-will employment contracts aligns with the former approach. See generally Arnow-Richman, Mainstreaming Employment Contract Law, supra note 175, at 1559–60 (discussing courts' rejection of an expansive good faith duty in employment). And some courts reject the theory altogether. See, e.g., Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 91 (N.Y. 1983) (finding good faith limits "inconsistent" with an employer's "unfettered right to terminate . . . employment at any time"). See generally James J. Brudney, Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law, 32 Compar. Lab. L. & Pol'y J. 773 (2011) (discussing the theory's limited success).

[278] See, e.g., Fortune v. Nat'l Cash Reg. Co., 364 N.E.2d 1251, 1257 (Mass. 1977); Phillips v. U.S. Bank, N.A., 2010 WI App 35, ¶ 8, 324 Wis. 2d 151, 781 N.W.2d 540, *aff'd per curiam by an equally divided court*, 2010 WI 131, 329 Wis. 2d 639.

[279] See, e.g., *Fortune*, 364 N.E.2d at 1257 (permitting claim for lost commissions where an employer terminated the plaintiff after he secured a substantial sale, but prior to payout); *Phillips*, 781 N.W.2d at 544–45 (finding breach of good faith where a bank terminated the plaintiff to avoid paying accrued earnings).

[280] See, e.g., *Fortune*, 364 N.E.2d at 1257; *Phillips*, 781 N.W.2d at 544–45; Restatement of Emp. L. § 2.07 (A.L.I. 2015) (stating that good faith precludes terminating employment "for the purpose of . . . preventing the vesting or accrual of an employee right or benefit").

[281] See, e.g., Das v. Tata Consultancy Servs. Ltd., 118 F.4th 903, 910 (7th Cir. 2024); Guggenheimer v. Bernstein Litowitz Berger & Grossmann LLP, 810 N.Y.S.2d 880, 886–87 (Sup. Ct. 2006).

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example, a plaintiff-side class action firm maintained an unwritten policy granting discretionary bonuses to the initiating attorneys of up to ten percent of fees awarded on successful cases.[282] The plaintiff, an attorney at the firm, attracted and developed several high-profile cases. While they were pending, the firm issued a written version of its policy capping bonuses and stating that any award was in the "absolute and sole discretion" of the firm's management committee.[283] In a subsequent email, a partner assured the plaintiff that the cap did not apply to in-progress cases.[284] Although plaintiff's cases yielded over a million dollars in fees, ultimately the firm offered her only $50,000.[285]

The trial court rejected the firm's argument that the express reservation of discretion in the bonus policy entitled it to a dismissal.[286] Citing the general rule that contract rights must be exercised in good faith, it held that the facts could support a conclusion that the firm entered an "oral contract agreeing to exercise that discretion in plaintiff's favor."[287] Similarly, it found potential evidence of an "implied promise" based on the "course of dealing between the parties."[288] The court thus relied on these factual circumstances and the duty of good faith to disregard a term of the written policy.

These incentive-pay precedents suggest that good faith can limit reservations of the employer's right to alter policies or terminate employees at will. While these cases involve compensation, there is no conceptual reason to limit good faith to that context. Invoking a boilerplate disclaimer to deprive employees of other "fruits" of the parties' agreement should similarly violate the duty of good faith. These could include terms or conditions of employment, promised opportunities, or even forms of job security. For instance, recall *Scott v. Merck & Co.*, in which the employer issued both a whistleblower nonretaliation policy and a disclaimer purporting to deny the contractual status of its policies and preserve employment-at-will.[289] Suppose that in

[282] *Guggenheimer*, 810 N.Y.S.2d at 882–83.
[283] Id. at 883–84.
[284] Id. at 884.
[285] Id.
[286] Id. at 885–86.
[287] Id. at 886; see also Das v. Tata Consultancy Servs. Ltd., 118 F.4th 903, 907, 910 (7th Cir. 2024) (permitting a claim for breach of an implied contract to pay a bonus despite limitations contained in the written policy).
[288] *Guggenheimer*, 810 N.Y.S.2d at 886.
[289] 497 F. App'x 331, 333 (4th Cir. 2012); see supra Subsection I.B.1.

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the course of an investigation a manager calls attention to the nonretaliation policy to encourage a worker to provide information about suspected wrongdoing. She obliges and is subsequently terminated. If the employer then invokes an ironclad disclaimer to prevent enforcement of the manager's assurances, it destroys the benefit of this part of the bargain.

We contend that good faith preserves space for contractual obligation in this scenario despite the express terms of the ironclad disclaimer. Taken literally, the language of the disclaimer—saying that no policy is binding—would preclude enforcement of the employer's anti-retaliation promise. But good faith prevents the ironclad disclaimer from comprehensively negating at least this additional source of obligation. In other words, the parties' bargain includes both the disclaimer and the employer's subsequent statements that the worker will be safe from retaliation. An employee who acts on the basis of such an assurance deserves an opportunity to prove that it constituted a contractual commitment.

To be sure, according to conventional wisdom, express terms trump good faith.[290] But this assertion proves too much. The very purpose of good faith is to constrain conduct that otherwise would be permissible under the contract's express terms. In the commercial context, for example, one party to an open-quantity contract may not demand an unreasonable quantity of goods even though the contract expressly grants such discretion.[291] The parties may choose instead to incorporate exacting standards for performance that would run afoul of good faith were the matter discretionary.[292] But these are negotiated terms that make a mutually recognized deal more or less favorable to one side, not a one-sided negation of liability. Ironclad disclaimers, by contrast, eliminate *all* contractual obligation of the employer.

The jurisprudence of good faith implies that this "contracting out of contract" goes too far. Beginning with then-Judge Cardozo's famous holding in *Wood v. Lucy, Lady Duff-Gordon*, courts have held that good faith imposes a modicum of mutual obligation on parties even when they have expressly reserved absolute discretion.[293] Deferring entirely to

[290] 6 Corbin, supra note 143, § 26.8.

[291] See U.C.C. § 2-306(1) (A.L.I. & Unif. L. Comm'n 2023).

[292] These might include provisions treating minor defects as a material breach or limiting the scope of acceptable performance in ways that defy conventional trade usages.

[293] 118 N.E. 214, 215 (N.Y. 1917).

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the written terms in such cases makes the parties' agreement illusory.[294] Ironclad disclaimers suffer from the same flaw. They purport to create a nonbinding relationship in which one party is immune from contractual obligation. Yet these parties are clearly engaged in a voluntary exchange: the employee has agreed to serve, the employer to pay. And they have both agreed to various other terms and conditions of that arrangement. Given these facts, good faith imposes some implied limitations on the employer to ensure both parties receive the benefit of their de facto bargain.

To be clear, this understanding of good faith does not prevent an employer from creating specific, contemporaneous limits on obligations that arise either orally or in writing. Our argument is merely that an employer may not, through a wholesale, boilerplate assertion of no-liability, grant itself unlimited discretion to deny otherwise binding commitments.

V. TOWARD A HOLISTIC APPROACH TO DISCLAIMERS

We have developed three overlapping critical perspectives on the law of employment disclaimers. First, disclaimers are a form of exculpatory boilerplate imposed on newly hired employees who have little opportunity or incentive to read and understand those terms.[295] Second, courts currently take a textualist view of disclaimers that conflicts with the contemporary trend toward contextualist contract interpretation.[296] Third, ironclad disclaimers elevate an empty form over the substance of an ongoing employment relationship and thus allow employers to have their contractual cake and eat it too.[297]

Our critiques inspire a rich menu of potential reforms. In this Part, we consolidate these ideas into a proposal that we call a holistic approach to disclaimers. By "holistic," we mean a perspective that invites courts to consider all facets of the employment relationship, that rests on a more nuanced and doctrinally sound foundation, and that appropriately balances managerial prerogatives and worker protection. We believe

[294] See Third Story Music, Inc. v. Waits, 48 Cal. Rptr. 2d 747, 751 (Ct. App. 1995) (discussing an exception to the primacy of express terms where "imposing the duty of good faith creates a binding contract where, despite the clear intent of the parties, one would not otherwise exist").

[295] See supra Part II.

[296] See supra Part III.

[297] See supra Part IV.

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well-established principles of meaningful assent, contextual interpretation, and substantive limits on contracts would go far to defuse the ill effects of disclaimers. Our proposals address each of these aspects of employment contract enforcement.

We then consider three potential objections to our approach. First, employers will likely object that our approach would allow too many disputes to go to trial. Second, worker advocates will likely contend that our contract-based reforms are insufficient and that legislatures must enact stronger substantive employment rights to counteract employer domination. Finally, given historical deference to exculpatory boilerplate, one may reasonably doubt whether courts (or legislatures) will adopt our proposals.

A. Applying Contract Principles to Disclaimers

Each of our reform proposals considers employment disclaimers using a different analytical lens, but they share a common goal of applying generally applicable contract doctrine to combat employment exceptionalism. With these proposals, we offer a path that would align employment contract law more closely with a mainstream understanding of implied contracts. As we showed in Part I, most courts formalistically adhere to the at-will super-presumption and readily defer to employer-drafted disclaimers. In contrast, our holistic approach asks judges to (i) scrutinize more closely how and why workers routinely accept employers' exculpatory boilerplate, (ii) be more receptive to contextual evidence, and (iii) use unconscionability and the duty of good faith to constrain the permissible scope of employment disclaimers. These overlapping reforms would work together to combat the current hegemony of disclaimers.

First, we contend that courts should reject sham assent. Nearly all jurisdictions already require disclaimers to be clear and prominent, but the typical onboarding process nevertheless discourages workers from reading and understanding these terms. Nor can new employees realistically reject these terms since they have already begun work. Rather than accepting the mere ritual of assent, courts should instead ensure that new hires have a reasonable opportunity to review all significant employment terms before accepting a job offer. In addition, the dramatic asymmetry between legally sophisticated employers and comparatively unsophisticated workers makes the *contra proferentem* canon well suited to limit the scope and effect of disclaimers. Thus,

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judges should approach employer-drafted disclaimers skeptically and construe their exculpatory language narrowly. Doing so would preserve more space for implied contract claims based on employers' definite and specific assurances.

Second, we develop a new approach to employment contract interpretation. To reinforce reforms focused on mutual assent, we call for courts to abandon their current textualist approach to disclaimers and instead embrace contemporary contextualist interpretive tools. A contextualist approach rejects *pro proferentem* interpretation and instead uses *contra proferentem* to force employers to bear the burden of drafting with the utmost clarity. It demands a more nuanced analysis of disclaimers that considers the hyper-relational nature of employment. Workers should be free to bring implied contract claims whenever they can produce reliable evidence that reasonably led them to believe their employer made a commitment to act or refrain from acting. Contextualism also takes a skeptical view of disclaimer language purporting to preclude enforcement of prior or future assurances. Courts should reject boilerplate merger clauses and restrictions on the authority to modify. Legally unsophisticated workers have no reason to recall such clauses months or years later, even if they read them in the first place. Courts should recognize the reality that managers sometimes make statements that lead employees to reasonably believe they have received a binding contractual commitment. A contextualist approach to interpretation thus would go far to protect these reasonable expectations. Employers would no longer enjoy boilerplate immunity from workers' attempts to enforce their definite and specific assurances.

Finally, we call for some hard limits on employer drafting. Ironclad disclaimers, if enforced, create a profoundly asymmetric relationship. Employers avoid workers' contract claims entirely while preserving their contractual rights against those same employees. Outside of employment, courts have traditionally responded to overreaching behavior by imposing substantive limits on contracting parties. We suggest that using exculpatory boilerplate to contract out of contractual obligation entirely is unconscionable in the employment setting. No employer should be able to prospectively assert that any agreement they may make in the future will not be binding.

Similarly, the duty of good faith should preclude such behavior. Good faith prevents parties from using contractually conferred discretion to deprive the other party of the benefit of their bargain. Ironclad

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disclaimers are extreme delegations of discretion that employers can abuse to evade responsibility for any and all contractual commitments to their employees. Courts should assess what and how employers have communicated at the relevant stage of the employment relationship. Only by contemporaneously negating any commitment should an employer be able to avoid creating contractual obligations. These substantive constraints on disclaimers will ensure that exculpatory boilerplate does not eviscerate employment contract law entirely.

B. Meeting Potential Objections

We recognize that our holistic approach to disclaimers disrupts long-established expectations about the status of employment contract claims in most jurisdictions. In this Section, we respond to the most probable objections from management-side counsel, worker advocates, and skeptical neutrals.

1. Too Many Cases Will Go to Trial

Employer-drafted disclaimers have been highly effective at foreclosing claims. When courts interpret firms' statements and policies using an acontextual *pro proferentem* approach and impose no limits on the substantive rights disclaimers may eliminate, employers enjoy virtual immunity from employment contract claims.[298] In such an employer-friendly legal environment, only the most inept drafter will inadvertently give workers contractual grounds to challenge a termination or to question the withdrawal of a promised privilege or accommodation.

Viewed from this perspective of contractual impunity, our proposals doubtlessly appear quite radical. However, our aim is simply to restore employment-at-will to its proper place. Far from being a quasi-religious creed, the at-will rule is merely a termination provision—a single term—in a complex, multi-term, often long-lasting, hyper-relational contract. Employment contract exceptionalism has led many attorneys and judges to fetishize the utterly unconstrained right to terminate any employment contract. But in the absence of a discrete integrated writing, mainstream contract law requires courts to reconcile potential provisions

[298] See supra Part I (discussing current state of the law including at-will super-presumption and extreme deference to employers' exculpatory boilerplate).

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from multiple sources, including parol terms, to determine the parties' shared intent. Whatever meaning the court derives is also informed by implied-in-law terms such as the duty of good faith and fair dealing, which constrains parties' freedom to terminate a contract at will. We propose only that courts treat employment contracts with just as much care.

These common legal practices pose no existential threat to employment-at-will, nor will they prevent employers from freely exercising managerial discretion. Such a substantial departure from the currently prevailing employer-friendly rules, however, will undoubtedly make employment contract claims more of a threat than they currently are. Management counsel might legitimately fear that losing the impenetrable shield of an ironclad disclaimer will more frequently expose their clients to disruptive litigation. They also may worry that the fact-intensive nature of discipline and discharge will make it impossible to defeat such claims without going to trial.

Although employers will no longer get summary judgment as a matter of course, we do not expect every case to go to trial. Rather than dismiss claims automatically, a court following our approach would examine the disclaimer and the plaintiff's proffered evidence to see whether the facts could sustain a finding that the employer made a contractual commitment. Even under existing law, an employer's disclaimer might be insufficient to defeat that evidence as a matter of law because it is ambiguously worded, or insufficiently prominent, or contradicted by other language in the text.[299] Our proposals would increase employers' exposure principally by inviting courts to weigh the strength of any contextual evidence of commitment against employers' exculpatory boilerplate. But without persuasive evidence of definite and specific employer assurances, a worker's contract claim still must be dismissed. We also propose that courts should disregard disclaimer language that either (1) categorically excludes extrinsic evidence or (2) precludes enforcement of any subsequent commitments. Such ironclad clauses are so overreaching that they are both unconscionable and contrary to the duty of good faith and thus should not ensure summary judgment.

Nevertheless, concerned employers may avoid trial and win early dismissal of workers' contract claims by thoughtfully managing their employment documents and their managers. They must do more than

[299] See supra text accompanying notes 39–40 (detailing problems of "faulty drafting").

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simply avoid ambiguity and make exculpatory language more prominent. They also must ensure workers have access to all terms before they accept an offer of employment. They must draft written employment policies to explicitly negate any possible implication of commitment. They must train supervisors to avoid using language that leads employees to form a reasonable expectation of contractual obligation. They must manage the conditions of employment to eliminate contextual factors that mislead employees into expecting a contractual commitment. And they may not rely on broad exculpatory terms that negate all commitments. We acknowledge that these precautions will be effortful, but such challenges do not justify allowing formalistic boilerplate to insulate employers from the reality of their employment relationships. It may be difficult to prevent managers from making commitments to employees, but once they make such commitments, contract law requires enforcement.

As a procedural matter, these potential implied contract claims somewhat resemble the "pretext" stage of individual employment discrimination actions.[300] In this context, we anticipate that employees will allege their employer made some enforceable commitment, offering evidence of written policies, oral assurances, or conduct. The employer will defend itself by producing a written disclaimer and additional evidence tending to contradict plaintiffs' allegations of contractual commitment. At the summary judgment stage, a general disclaimer alone should not be enough to defeat such a claim. Instead, the trial court should evaluate the proffered evidence of commitment in light of the overall employment relationship. An employer should be granted judgment as a matter of law, however, whenever an employee's evidence is insufficient to justify a reasonable juror in concluding the employer has made a commitment. Workers necessarily bear the burden of overcoming both the at-will default and the employer's own

[300] We need not apply the full *McDonnell Douglas* burden-shifting framework because we have nothing analogous to the prima facie case, the burden of production never really shifts, and the framework itself is increasingly controversial. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973); see, e.g., Deborah C. Malamud, The Last Minuet: Disparate Treatment After *Hicks*, 93 Mich. L. Rev. 2229, 2236 (1995) (arguing that the *McDonnell Douglas-Burdine* structure should be abandoned). Although *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 927 (Ct. App. 1981), invokes the *McDonnell Douglas* approach, it does so only to explain how a trial court should determine whether the employer had good cause for termination. The *Pugh* court's reference assumes the question we are trying to answer: Has the employer made some sort of enforceable contractual commitment?

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exculpatory language. A court should weigh the quality of any disclaimer against the potential probative value of the employee's proffered contextual evidence. Carefully drafted, contemporaneous negation of contractual commitment can defeat a claim based on an employer's written policies. But if employers have offered definite and specific assurances of job security or other benefits, justice demands that a jury should evaluate whether employees reasonably understood them as an enforceable commitment.

2. Contract Claims Are Weak Medicine

We anticipate that worker advocates may make the opposite objection: our proposals do not go far enough. Contract claims and remedies cannot possibly counteract employer domination. Employers will respond by making their disclaimers still more ironclad, and workers will have no choice but to acquiesce due to their powerlessness. Only stronger statutory rights can possibly remedy this deeply entrenched power imbalance. Thus, we instead should call for state and federal lawmakers to enact worker-protective legislation that guarantees job security and makes employment rights nonwaivable. This impulse has long dominated scholarly commentary on employment-at-will and has motivated perennial proposals for statutory just-cause protection.[301]

Regardless of whether such statutory solutions are normatively desirable, current political realities make such aggressive legislative intervention implausible. Decades of persistent criticism have done almost nothing to displace the doctrinal dominance of employment-at-will. Reform advocates have only isolated local statutes and a decidedly moderate state law in Montana to show for their efforts.[302] Legislators clearly remain reluctant to replace employment-at-will with a just-cause regime. Thus, we must look elsewhere to find legal tools that could put workers on a more equal footing with their employers.

Employment *contract* law has been unjustly neglected as a force for shaping the employment relationship. An opportunity exists to rethink the lopsided approach many courts currently take toward employment contracts. Our proposals would also align employment law more closely

[301] See, e.g., Model Emp. Termination Act § 3(a), 7A U.L.A. 81 (1991).

[302] See, e.g., Mont. Code Ann. § 39-2-904 (2025); N.Y.C., N.Y., Admin. Code § 20-1272 (2026) (applying to fast food workers); Phila., Pa., Code § 9-4702 (2026) (applying to parking lot attendants).

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with mainstream contract doctrine. By abandoning judicial deference to disclaimers and instead treating employment contracts more like other agreements, judges can both improve the doctrinal coherence of employment contract law and give workers a reasonable chance to receive the benefit of the bargains they strike with their employers. Contract law will not solve every problem that a statute would remedy, but it still can function as one constructive check on misleading employer assurances. And the more forceful substantive principles we outline in Part IV would impose meaningful constraints on employers' efforts to contract out of contractual obligation entirely.

3. Courts Will Continue to Defer to Disclaimers

To improve workers' prospects, however, courts must be willing to reconsider their current approach to employment contracts. Based on our review of twenty-first-century employment law, one might reasonably question whether existing patterns of deference are too entrenched to be dislodged. However, many courts express a strong commitment to formal contract doctrine even as they unthinkingly defer to employers' exculpatory boilerplate. Our analysis reveals that these distinctly employer-friendly decisions rest on an outmoded and ill-fitting doctrinal foundation.

In prior work, we have criticized the incoherence of using unilateral contract theory to enforce employment contracts, an approach ostensibly dictated by formal doctrinal analysis.[303] Here again, we demonstrate that courts' highly deferential approach is out of step with contemporary thinking about contracts. Judges and scholars have increasingly expressed doubts about the enforceability of some consumer boilerplate. Moreover, the hyper-relational employment setting cries out for a contextual approach to interpretation. And both good faith and unconscionability have long constrained commercial parties who abuse their contractual power. Our work thus invites courts to reconsider their habitual deference. It also provides well-established doctrinal tools judges can use to push back against the onslaught of exculpatory clauses.

Of course, we must also consider the possibility that some deferential courts have no particular commitment to doctrinally correct contract analysis. For these jurists, formal doctrine may be merely a façade used

[303] See Arnow-Richman & Verkerke, supra note 2, at 943.

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to disguise their policy-based desire to maintain the predominance of employment-at-will. In this case, our entreaties likely will fail to persuade. Even so, our arguments could force those jurists to defend their policy preferences more directly. Once judges can no longer pretend that formal doctrine dictates these outcomes, more room exists for dissenting voices and potential change. More broadly, our critique invites all judges to rethink excessive deference to employer drafting. By legitimating minority decisions, we hope to guide courts to embrace a more doctrinally defensible approach to employment contracts.

Finally, we recognize that change is most likely to arrive gradually. Even if some progressive judges might be ready for wholesale reform, more conservative jurisdictions may proceed cautiously at first. We offer doctrinal tools that can be adopted in stages and readily adapted to varying political persuasions. In short, even if some courts adopt only a subset of our proposals, they will improve the quality of their doctrinal analysis and move employment contract law toward a more reasonable balance between the interests of workers and employers.

CONCLUSION

This Article has tackled the ubiquitous but neglected issue of disclaimers in at-will employment contracts. Since the rise of implied contract claims in the mid-1980s, disclaimers have taken on a life of their own. Sophisticated employers routinely incorporate ironclad versions of the by-now-familiar formulaic text in all manner of personnel documents. Courts, for their part, have been quick to give this boilerplate its intended exculpatory effect. They allow employers to "contract out of contract" and thus eviscerate past and potential employee rights, even those based on employers' definite and specific expressions of commitment.

We have shown why judicial deference to these liability avoidance strategies is normatively problematic and doctrinally unsupported. Our three interrelated critiques of employer disclaimers rest firmly on contemporary contract law and discourse. First, our boilerplate critique leverages long-standing concerns about adhesive consumer contracts that similarly impugn the legitimacy of employee assent to disclaimers. Second, our interpretation critique deploys established contextualist principles that expand the universe of enforceable employment terms beyond disclaimers and rejects the supremacy of any single written source in this hyper-relational contract. Third, our regulatory critique

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asserts that contract law does not countenance the use of contract tools to deprive a partner of contract rights while simultaneously imposing contractual obligations. Contract law's limiting doctrines, including unconscionability and good faith, support denying full legal effect to a one-sided disclaimer.

These mutually reinforcing critiques should provoke deep skepticism about employer-drafted exculpatory boilerplate. In lieu of excessive deference to employment disclaimers, we offer a holistic approach. We would replace the coercive consent of onboarding with advance notice and greater scrutiny of disclaimers. Our approach would substitute thoughtful contextualist interpretation for inept textualism. And we encourage courts to reject disclaimers that purport to contract entirely out of contractual obligation. In short, we aim to align the enforcement of at-will employment contracts more closely with mainstream contract theory and doctrine.

We recognize that our critical stance toward disclaimers raises many questions. Some we have begun to answer. Our analysis leads to the conclusion that courts should not award summary judgment to an employer based on the mere existence of a disclaimer but must consider whether all the evidence, examined in context, would otherwise raise a jury question. Other matters remain to be resolved. The goal of this Article has been simply to free employees and employment contract law from the tyranny of exculpatory boilerplate. Our hope is that by defusing disclaimers, we will open the door to a revitalized, more balanced, and still doctrinally legitimate understanding of employment contract law. Developing that vision more fully will be our next project.