

Chapter 1

Employment Contracts Express and Implied

1-1 INDIVIDUAL CONTRACTS

1-1:1 The Employment Relationship

Determining whether an employment relationship exists is fundamental to determining the scope of employment rights and obligations under both federal and state law. The determination of the relationship of master and servant is a question of fact not susceptible to exact definition.¹ “It cannot . . . be defined in general terms with substantial accuracy.”² Whether one is an employee—as opposed to an independent contractor—can change obligations under tax laws, tort laws, discrimination and whistleblower laws, plant-closing statutes, leave laws, wage payment laws, and wage and hour laws. The existence of an employment or master-servant relationship creates far greater bilateral obligations on the parties than does an arms-length relationship between independent entities.

1-1:2 The Employment Relationship at Common Law

Under common law, the existence of the master-servant relationship imposes unique rights and obligations on the parties. A master has the right to control the servant but also must answer

¹ *Beaverdale Mem'l Park, Inc. v. Danaher*, 127 Conn. 175, 181 (1940).

² *Hanson v. Transp. Gen., Inc.*, 245 Conn. 613, 630 (1998) (quoting 1 Restatement (Second) of Agency, § 220, comment (1)(c) (1958)).

for actions taken by the servant on behalf of the master. Similarly, servants have a cognizable duty to serve the master's interests to the exclusion of all others. Failure on the part of either to comply with their obligations gives rise to claims for damages. For example, a servant has an obligation to exercise the utmost good faith, loyalty and honesty toward his or her master throughout the existence of the relationship, and the servant may not compete with the master for the duration of the relationship. Breach of that duty of loyalty exposes the servant to liability for any damage suffered by the master.³

The employment relationship can be created by contract, or it can arise by implication under various legal standards. If a statutory scheme does not “provide a framework for determining whether an individual qualifies as an ‘employee,’” Connecticut courts will typically apply the common law test.⁴ Under common law, whether an employment relationship exists depends on the master's right to control the performance of the services in issue. The common law relationship has been described by Connecticut courts as follows:

One is an employee of another when he renders a service for the other and when what he agrees to do, or is directed to do, is subject to the will of the other in the mode and manner in which the service is to be done and in the means to be employed in its accomplishment as well as in the result to be attained The controlling consideration in the determination whether the relationship of master and servant exists or that of independent contractor exists is: Has the employer the general authority to direct what shall be done and when and how it shall be done—the right of general control of the work?⁵

³ *Town & Country House & Homes Serv., Inc. v. Evans*, 150 Conn. 314, 318 (1963). See Chapter 2.

⁴ *Young v. City of Bridgeport*, 135 Conn. App. 699, 704 (2012) (Appellate Court affirmed the trial court's application of the common law test to determine that an elected city sheriff who performed services for the municipality on a fee basis was not an employee under Connecticut General Statutes § 31-51m, one of Connecticut's whistleblower statutes).

⁵ *Hanson v. Transp. Gen., Inc.*, 45 Conn. App. 441, 444 (1997), *aff'd*, 245 Conn. 613 (1998) (citing *Kaliszewski v. Weathermaster AlSCO Corp.*, 148 Conn. 624, 629 (1961)).

The common law test, however, may not apply at all unless and until a finding has been made that the individual in question “was hired for any purpose at all.”⁶ The Connecticut Supreme Court when faced with the need to make this determination in a case of first impression under the Connecticut Fair Employment Practices Act applied the federal “remuneration test,” which explores whether the “putative employee” can establish that he or she has received “direct or indirect remuneration from the alleged employer.”⁷ Proving indirect remuneration requires a showing that the individual received “numerous job-related benefits,” such as “health insurance, vacation, sick pay, a disability pension, survivors’ benefits, group life insurance, scholarships for dependents upon death, or other ‘indirect but significant remuneration.’”⁸ Such benefits also must be more than those that are “merely incidental to the activity performed.”⁹

1-1:3 Joint Employment

In some cases, employees seek to hold more than one entity responsible as an employer. The two common approaches for doing so focus on the interrelationship of the entities involved. Some employees argue that two entities are so integrated they comprise a single employer. The four factors that are typically applied to determine whether two entities are a single employer are “(1) the degree of interrelated operations; (2) the degree of common management; (3) the degree of centralized control of labor relations; and (4) the degree of common ownership and control.”¹⁰

Employees may also seek to hold two entities responsible for employment obligations under a joint employment theory. The

⁶ *CHRO v. Echo Hose Ambulance*, 322 Conn. 154 (2016) (applying federal “remuneration test” court held that individual working as a precept and then as a member of an ambulance company could not bring claim under Connecticut Fair Employment Practices Act because she was never hired to perform services by the ambulance company).

⁷ *CHRO v. Echo Hose Ambulance*, 322 Conn. 154, 161-62 (2016).

⁸ *CHRO v. Echo Hose Ambulance*, 156 Conn. App. 239, 251 (2015), *aff’d*, 322 Conn. 154 (2016).

⁹ *CHRO v. Echo Hose Ambulance*, 322 Conn. 154, 162 (2016).

¹⁰ *Sowell v. DiCara*, No. UWYCV126016087S, 2015 Conn. Super. LEXIS 70, at *14 (Conn. Super. Ct. Jan. 13, 2015) (citing *Lenoble v. Best Temps, Inc.*, 352 F. Supp. 2d 237, 243 (D. Conn. 2005)).

following elements have been found significant in considering joint employment: “whether the alleged joint employer ‘(1) did hiring and firing; (2) directly administered any disciplinary procedures;¹¹ (3) maintained records of hours, handled the payroll or provided insurance; (4) directly supervised the employees; or (5) participated in the collective bargaining process.’”¹² Joint employment obligations may also be created or defined by statute.¹³

1-1:4 Employee or Independent Contractor?

Provided the “antecedent question ‘of whether the person was hired for any purpose at all’” is answered in the affirmative, whether an individual is an employee or an independent contractor depends on the purpose for the determination and the applicable legal standard.¹⁴ Under all tests for determining whether an individual is an employee or an independent contractor, the “right to control” is an important factor in finding in favor of employee status. Even if the right to control is never exercised, the right to interfere with the way a task is accomplished “makes the difference between an independent contractor and a servant.”¹⁵

¹¹. Simply providing information that leads to disciplinary action has been held insufficient to establish a joint employment relationship in at least one case. *Varley v. First Student, Inc.*, 158 Conn. App. 482 (2015) (court held that school district that shared negative information about a bus driver that led to disciplinary action being taken against the employee was not the employee’s employer for purposes of a claim brought under Connecticut General Statutes § 31-51q).

¹². *Sowell v. DiCara*, No. UWYCV126016087S, 2015 Conn. Super. LEXIS 70, at *29 (Conn. Super. Ct. Jan. 13, 2015) (citing *AT&T v. NLRB*, 67 F.3d 446, 451 (2d Cir. 1995)); see also *Clinton’s Ditch Co-op., Co. v. NLRB*, 778 F.2d 132 (2d Cir. 1995)).

¹³. See, e.g., 29 C.F.R. § 825.106 (delineating obligations under the Family and Medical Leave Act for situations where two or more businesses exercise control over a single employee).

¹⁴. *CHRO v. Echo Hose Ambulance*, 322 Conn. 154 (2016).

¹⁵. *Standard Oil of Conn., Inc. v. Adm’r*, 320 Conn. 611, 623 (2016) (citing *Latimer v. Adm’r*, 216 Conn. 237, 248 (1990)) (court noted that the test for determining whether someone is an employee or independent contractor depends on the “right to control” as opposed to actual control); See also *Gagliano v. Advanced Specialty Care, P.C.*, 329 Conn. 745, 757 (2018) (in the context of a hospital’s liability for the negligence of a resident, the Court held the hospital vicariously liable under the Restatement (Second) and the Restatement (Third) stating: “[I]t is only the general right to control, and not the actual exercise of specific control, that must be established” to assess liability against the employer/principal for the acts of an employee or agent); *Tianti v. William Raveis Real Estate, Inc.*, 231 Conn. 690, 697 (1995) (citing *Latimer v. Adm’r*, 216 Conn. 237, 248 (1990); *Caraher v. Sears, Roebuck & Co.*, 124 Conn. 409, 413-14 (1938)).

The master-servant relationship is described in the Restatement (Second) of Agency¹⁶ § 2 as follows:

- (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
- (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.

Although control is a critical factor in determining whether one is a servant or an independent contractor, the following factors are relevant to the inquiry:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;

¹⁶ The Restatement (Second) of Agency has been superseded by the Restatement (Third) of Agency, but Connecticut courts continue to apply the principles of the Restatement (Second) to determine the status of employer-employee and independent contractor. See, e.g., *Gagliano v. Advanced Specialty Care, P.C.*, 329 Conn. 745 (2018); *Bellsite Dev., LLC v. Town of Monroe*, 155 Conn. App. 131, 143 (2015); *Calderoni v. Gissas*, No. HHBCV156030914S, 2016 Conn. Super. LEXIS 1111, at *22-23 (Conn. Super. Ct. Apr. 26, 2016). The Restatement (Third) does not address some issues addressed by the Restatement (Second) and, in other areas, the difference between the two Restatements is immaterial or negligible. That said, the Restatement (Third) of Agency is also followed by Connecticut courts. See, e.g., *Cefaratti v. Aranow*, 321 Conn. 593, 607 (2016) (citing Restatement (Third) Agency for the proposition that the principal will be vicariously liable for the torts of a person with apparent authority); *Joseph Gen. Contracting, Inc. v. Couto*, 317 Conn. 565, 582 (2015) (citing Restatement (Third) Agency for the proposition that a “third party’s knowledge of an agent’s capacity, obtained from prior transactions, is deemed to continue” for subsequent similar transactions between the same parties); *Ackerman v. Sobol Family P’ship, LLP*, 298 Conn. 495, 512 (2010) (citing Restatement (Third) of Agency for proposition that an agent will be assumed to be acting for principal when “acts consistent with the agent’s position” are taken).

- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.¹⁷

In contrast, the Restatement (Second) of Agency defines an independent contractor as “a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.”¹⁸ An agreement for services that can be terminated without liability is “not consistent with the concept of an independent contract.”¹⁹

Typically, the scope of obligations between an independent contractor and a principal is governed by the terms of the contract between them.²⁰ An employment relationship, on the other hand, gives rise to myriad obligations beyond the scope of what the parties may contractually agree to do for each other.

Whether an employer-employee or independent contractor relationship exists will determine whether an individual has claims under the laws that govern the employment context. For the most

¹⁷. Restatement (Second) of Agency § 220 (1958).

¹⁸. Restatement (Second) of Agency § 2(3) (1958).

¹⁹. *Tianti v. William Raveis Real Estate, Inc.*, 231 Conn. 690, 698 (1995) (citing *Latimer v. Adm’r*, 216 Conn. 237, 249 (1990)) (court determined that real estate agents were employees for purposes of Connecticut General Statutes §§ 31-72 and 31-73, enabling them to bring action for unpaid wages).

²⁰. A written contract, however, is not required to form a binding agency relationship to exist. All that is needed is the “manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” *Bellsite Dev., LLC v. Town of Monroe*, 155 Conn. App. 131, 142 (2015) (court found that first selectman was not an agent of municipality).

part, the common law definitions of employee and independent contractor apply when determining whether an individual is covered under most laws affecting the workplace, including the various anti-discrimination statutes, such as the Connecticut Fair Employment Practices Act (CFEPA), Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act (ADA).²¹

1-1:4.1 Employee Status for Payroll Tax Purposes

Although the common law test applies for purposes of determining when an individual is an employee for federal tax purposes, the Internal Revenue Service considers certain factors when interpreting the common law test, focusing on the following: “behavioral control, financial control, and the type of relationship of the parties.”²²

Behavioral control takes into consideration the right to direct and control how a worker does a task, including but not limited to the level of instruction and training provided. Financial control takes into consideration the extent of the worker’s investment, if any, in the endeavor, the extent to which the worker has unreimbursed expenses, the extent to which the worker is able to perform services for others in the marketplace, how the worker is paid, and the

²¹ It is possible, however, that an individual may be considered an independent contractor for some employment purposes and an employee for others. This is especially true in situations where an individual claims rights under laws applying the common law definitions, like state fair employment practices laws, and also seeks protection under unemployment laws that typically apply a much more restrictive test for independent contractor status. *See* § 1-1:4.2.

²² *See* Internal Revenue Service Publication 15-A (2018) Employer’s Supplemental Tax Guide (Supplement to Pub. 15 Employer’s Tax Guide), available at www.irs.gov/publications/p15a (last visited June 22, 2020). In addition to individuals meeting the common law test, certain individuals are treated as “statutory employees” for tax purposes if they fall into one of the following four categories: (1) drivers who distribute beverages (other than milk) or meat, vegetable, fruit or bakery products; or who pick up and deliver laundry or dry cleaning, if drivers are paid on commission; (2) a full-time life insurance sales agent whose principal business activity is selling life insurance or annuity contracts, or both, primarily for one life insurance company; (3) an individual who works at home on materials or goods that are supplied by the statutory employer and that must be returned to the statutory employer or a person named by the statutory employer if specifications for the work to be done are provided; and (4) a full-time traveling or city salesperson who works on behalf of a statutory employer and turns in orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments. Additional requirements may apply, and full information regarding statutory employees is available in Publication 15-A. Other groups of employees are considered “statutory nonemployees” for federal tax purposes: direct sellers, licensed real estate agents and certain companion sitters.

extent to which the worker can realize a profit or loss. The type of relationship is determined by looking at written contracts, the permanency of the relationship, what benefits are provided, and whether the services provided are an integral part of the business of the party contracting for the services.²³ Connecticut follows the federal law in determining whether income is subject to state income tax withholding.²⁴

1-1:4.2 Employee Status for Unemployment Compensation Purposes

The Connecticut Unemployment Compensation Act determines whether an individual is an employee or independent contractor by applying what is commonly referred to as “the ABC test.”²⁵ The ABC test is the most demanding of any standard by which employment status is determined, but one which “should not be construed unrealistically in order to distort its purpose.”²⁶ Under the ABC test, an individual is considered an employee unless the following three criteria are satisfied:

- (1) The individual “has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact;” and
- (2) “[S]uch service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the

²³ For a complete summary of the considerations taken into account by the Internal Revenue Service in interpreting the common law standards for determining the employer-employee relationship, see Internal Revenue Service Publication 15-A (2018) Employer’s Supplemental Tax Guide (Supplement to Pub. 15 Employer’s Tax Guide), for use in 2018, available at www.irs.gov/publications/p15a (last visited June 22, 2020).

²⁴ Circular CT Connecticut Employer’s Tax Guide effective January 1, 2016, which is published by the Connecticut Department of Revenue Services and is available at <https://portal.ct.gov/-/media/DRS/Publications/pubsip/2016/IP20161pdf.pdf?la=en> (last visited June 22, 2020).

²⁵ *Kirby of Norwich v. Adm’r*, 328 Conn. 38 (2018); *JSF Promotions, Inc. v. Adm’r*, 265 Conn. 413, 418 (2003) (citing *Mattatuck Museum-Mattatuck Historical Soc’y v. Adm’r*, 238 Conn. 273, 277-78 (1996)).

²⁶ See *Standard Oil of Conn., Inc. v. Adm’r*, 320 Conn. 611, 616 (2016) (quoting *F.A.S. Int’l, Inc. v. Reilly*, 179 Conn. 507, 516 (1980)).

places of business²⁷ of the enterprise for which the service is performed;” and

- (3) “[S]uch individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.”²⁸

The ABC test is conjunctive. If any of the three criteria is not satisfied, the individual is an employee for unemployment compensation purposes.²⁹

1-1:4.3 Employee Status for Workers’ Compensation Purposes

Connecticut’s Workers’ Compensation Act³⁰ defines “employee,” inter alia, as any person who “[h]as entered into or works under any contract of service or apprenticeship with an employer, whether the contract contemplated the performance of duties within or without the state.”³¹ The definition of employee specifically excludes certain classifications of individuals who perform services, including but not limited to “[a]ny person to whom articles or material are given to be treated in any way on premises not under the control or management of the person who gave them out” or “[o]ne whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer’s trade or business.”³² If a dispute as to an individual’s status arises, the

²⁷ For an in depth discussion of the meaning of the term “place of business,” see *Standard Oil of Conn., Inc. v. Adm’r*, 320 Conn. 611 (2016).

²⁸ Conn. Gen. Stat. § 31-222(a)(1)(B). A complete review of the law applicable to unemployment compensation is provided in Chapter 9.

²⁹ See *Kirby of Norwich v. Adm’r*, 328 Conn. 38 (2018).

³⁰ Conn. Gen. Stat. §§ 31-275 et seq.

³¹ Conn. Gen. Stat. § 31-275(9)(A)(i).

³² Conn. Gen. Stat. § 31-275(9)(B)(i) and (ii). These provisions are intended to reflect the difference between an independent contractor and an employee. Although the language used is archaic, the critical concept intended to be conveyed is the issue of control over the “means and methods of work.” See *Normandie v. Scheinost*, No. CV065000552S, 2007 Conn. Super. LEXIS 3387, at *4 (Conn. Super. Ct. Dec. 13, 2007). Connecticut General Statutes § 31-275(9)(B) provides as follows:

(B) “Employee” shall not be construed to include: (i) Any person to whom articles or material are given to be treated in any way on premises not under the control or management of the person who gave them out; (ii) One whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer’s trade or business; (iii) A member of the employer’s family dwelling in his house; but, if, in any contract of insurance, the wages or salary of a member of the employer’s family dwelling in his house is included in the payroll on which

Connecticut Workers' Compensation Commission and reviewing courts apply the common law "right to control" test to determine if an individual is an employee for purposes of the Connecticut Workers' Compensation Act.

In *Hanson v. Transportation General, Inc.*,³³ the Connecticut Supreme Court was asked to adopt an alternative test but rejected the invitation to do so. The Court noted that the right to control test has been applied to workers' compensation cases since 1913, and, therefore, that it imposed limitations on the court's "judicial authority." Absent legislative action, the Commission and reviewing courts are bound to apply the right to control test.³⁴

The *Hanson* Appellate Court decision described the right to control test as follows:

One is an employee of another when he renders a service for the other and when what he agrees to do, or is directed to do, is subject to the will of the other in the mode and manner in which the service is to be done and in the means to be employed in its accomplishment as well as in the result to be attained The controlling consideration in the determination of whether the relationship of master and servant exists or that of independent contractor exists is: Has the employer the general authority to direct what shall be done and when

the premium is based, then that person shall, if he sustains an injury arising out of and in the course of his employment, be deemed an employee and compensated in accordance with the provisions of this chapter; (iv) Any person engaged in any type of service in or about a private dwelling provided he is not regularly employed by the owner or occupier over twenty-six hours per week; (v) An employee of a corporation who is a corporate officer and who elects to be excluded from coverage under this chapter by notice in writing to his employer and to the commissioner; or (vi) Any person who is not a resident of this state but is injured in this state during the course of his employment, unless such person (I) works for an employer who has a place of employment or a business facility located in this state at which such person spends at least fifty per cent of his employment time, or (II) works for an employer pursuant to an employment contract to be performed primarily in this state.

³³ *Hanson v. Transp. Gen., Inc.*, 245 Conn. 613 (1998).

³⁴ See § 1-1:2 discussing the common law test enunciated in *Hanson v. Transp. Gen., Inc.*, 245 Conn. 613 (1998).

and how it shall be done—the right of general control of the work?³⁵

In applying the right to control test, the fact-finder must consider the “totality of the evidence.”³⁶ The determination of whether an employment relationship exists for purposes of workers’ compensation is a factual question to be resolved by the Commissioner, and the Commissioner’s determination is accorded great deference by reviewing courts.³⁷ The right to remove or terminate an individual from an assignment, in and of itself, does not provide a sufficient basis for finding employee status.³⁸ Improperly treating an employee as an independent contractor may result in the assessment of penalties under the Workers’ Compensation Act.³⁹

In recent years, the applicability of *Hanson* has been called into question by some lower courts in situations where an employee has been lent from one employer to another, e.g., when an employer

³⁵ *Hanson v. Transp. Gen., Inc.*, 45 Conn. App. 441, 444 (1997), *aff’d*, 245 Conn. 613 (1998) (citing *Kaliszewski v. Weathermaster AlSCO Corp.*, 148 Conn. 624, 629 (1961)).

³⁶ *Hanson v. Transp. Gen., Inc.*, 245 Conn. 613, 624 (1998). In *Hanson*, the Court found the following facts significant to the determination that the owner operators were independent contractors: drivers could set their own hours, work anywhere in the service area, refuse to accept dispatch calls, and hire a second driver. Drivers also “had sole responsibility for all expenses related to operation of their cabs.” *Hanson v. Transp. Gen., Inc.*, 245 Conn. 613, 624-25 (1998); *see also Normandie v. Scheinost*, No. CV065000552S, 2007 Conn. Super. LEXIS 3387, at *6 (Conn. Super. Ct. Dec. 13, 2007) (noting that factors such as the method of payment, whether or not an individual supplies his or her own tools and whether an individual has the right to discharge the worker are all relevant considerations, but noting that “[t]he determination of general control is not always a simple problem. Many factors are ordinarily present for consideration, no one of which is, by itself, necessarily conclusive.”).

³⁷ *Dowling v. Slotnik*, 244 Conn. 781, 797-98 (1998).

³⁸ *Compassionate Care, Inc. v. Travelers Indem. Co.*, 147 Conn. App. 380, 394 (2013) (In reversing a trial court decision in favor of workers compensation insurance carrier finding that health care professionals (HCPs) were employees for workers compensation purposes, the appellate court found it significant that the HCP “provided his or her own transportation, tools, and supplies and controlled the manner in which they cared for the client.” In these circumstances, the “ability to remove an HCP from an assignment,” though evincing “indirect influence” did not provide “a sufficient basis for the trial court’s conclusion that [the HCPs were] employees because such an influence falls too short of evidence of the right to control the *mode and manner* in which the HCPs performed their duties.”).

³⁹ Connecticut General Statutes § 31-288(g) provides that an employer who “(A) knowingly misrepresents one or more employees as independent contractors, or (B) knowingly provides false, incomplete or misleading information to [an insurance company insuring liability under the Workers’ Compensation Act] concerning the number of employees, for the purpose of paying a lower premium on a policy obtained from such company, shall be guilty of a Class D felony and shall be subject to a stop work order issued by the Labor Commissioner in accordance with section 31-76a.”

uses a temporary agency, and the borrowing employer seeks the benefit of the exclusivity provision in the Workers' Compensation Act. No appellate court has ruled on the issue as of the date of publication and until that happens whether or not the right to control test will apply to borrowed employees remains uncertain.⁴⁰

1-1:5 Joint Enforcement Commission for Worker Misclassification

In June 2008, Connecticut established a Joint Enforcement Commission for Worker Misclassification,⁴¹ which is composed of representatives from various state agencies for the express purpose of combatting employee misclassification.⁴² In addition to increasing employer audits conducted by various state agencies, the Joint Commission was successful in passing legislation to increase the penalties for each day a fraudulently misclassified individual performs work without proper workers' compensation coverage.⁴³ The Joint Commission also has "developed coordinated enforcement and data sharing strategies" working with other states and the federal government to further its objective of ensuring that individuals are properly classified under all applicable laws.⁴⁴

Connecticut is also one of several states to sign a Common Interest Agreement with the United States Department of Labor Wage and Hour Division, OSHA and the United States Employee

⁴⁰. See *Dalomba v. BML Tool & Mfg. Corp.*, No. D.N. FBT CV 15-6051716 S, 2017 Conn. Super. LEXIS 1378 (Conn. Super. Ct. Feb. 24, 2017) (discussing the split of authority); compare *Crespo v. Bagl, LLC*, No. FBTCV095021661S, 2009 Conn. Super. LEXIS 3325 (Conn. Super. Ct. Dec. 15, 2009). For a full discussion of this issue, see Chapter 9.

⁴¹. The Joint Enforcement Commission consists of the Labor Commissioner, the Commissioner of Revenue Services, the Chairperson of the Workers' Compensation Commission, the Insurance Commissioner, the Commissioner of Consumer Protection, the Attorney General and the Chief State's Attorney. Conn. Gen. Stat. § 31-57h.

⁴². Conn. Gen. Stat. § 31-57h. When employees are misclassified as independent contractors, the state loses revenue from payroll taxes that are paid by employers on employees. For this reason, many states, including Connecticut, are taking measures aimed at eliminating worker misclassification.

⁴³. Conn. Gen. Stat. §§ 31-69a and 31-288 (increasing the monetary penalty for fraudulent employee misclassification by recognizing a violation for each day that an employer is engaged in such fraudulent misclassification).

⁴⁴. See Conn. Dep't of Labor, Connecticut Joint Enforcement Commission for Worker Misclassification, available at www.ctdol.state.ct.us/wgwkstnd/JEC/JEC.htm (last visited June 22, 2020).

Benefits Security Administration to exchange information to the extent possible for the mutual benefit of the agencies involved.⁴⁵

1-1:6 Volunteers

Many businesses and organizations utilize the services of volunteers. Obligations to volunteers differ significantly from obligations to employees and independent contractors. In *CHRO v. Echo Hose Ambulance*, the Connecticut Supreme Court rejected CHRO's claim that a female volunteer who was allegedly harassed on the basis of her race and color was an employee for purposes of the Connecticut Fair Employment Practices Act because Echo Hose exercised sufficient control over the manner in which the volunteer performed services to meet the common law definition of employee. Relying on federal law, the Court ruled that an individual cannot be an employee unless he or she receives "direct or indirect remuneration from the alleged employer."⁴⁶ The Court held that satisfying the "remuneration test" is antecedent to a finding of an employment relationship based on the amount of control exercised over the individual in question.⁴⁷

1-1:7 Interns

In recent years, the question of whether interns are employees for various employment purposes has been in contention. In 2015, the United States Court of Appeals for the Second Circuit, which includes Connecticut, set forth the standard applicable under the federal Fair Labor Standards Act for determining whether an intern is entitled to remuneration as an employee. In *Glatt v. Fox*

⁴⁵ U.S. Dep't of Labor, Wage & Hour Div., State Enforcement and Outreach Coordination, *available at* www.dol.gov/agencies/whd/about/state-coordination (last visited June 22, 2020).

⁴⁶ *CHRO v. Echo Hose Ambulance*, 322 Conn. 154, 162 (2016). *See also* *Consiglio v. Our Lady of Pompeii Church*, No. CV176067338S, 2018 Conn. Super. LEXIS 3218 (Conn. Super. Ct. Oct. 10, 2018) (court applied *Echo Hose* two-step analysis to Youth and Eucharistic Minister and determined her to be a volunteer).

⁴⁷ *CHRO v. Echo Hose Ambulance*, 322 Conn. 154 (2016). The *Echo Hose* analysis has also been applied to situations involving staffing agency employees. In *Tryon v. EBM-Papst, Inc.*, No. HHBCV176037028S, 2017 Conn. Super. LEXIS 4857 (Conn. Super. Ct. Nov. 9, 2017) (the court, noting that the Connecticut appellate courts had not yet addressed whether an employee of a staffing agency firm was, for purposes of determining coverage under the Connecticut Fair Employment Practices Act, also an employee of the firm for whom the employee was providing services, applied the *Echo Hose* factors and determined that neither the remuneration nor the control requirements were satisfied by the complaint allegations).

Searchlight Pictures,⁴⁸ the Second Circuit held that the central question for determining one’s internship status is whether the intern or the employer is the primary beneficiary of the relationship. In applying this “primary beneficiary test,”⁴⁹ the court set forth the several non-exhaustive factors that should be considered when “weighing and balancing all of the circumstances”:

1. The extent to which the individual and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.
5. The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern’s work complements, rather than displaces, the work of paid employees

⁴⁸ *Glatt v. Fox Searchlight Pictures*, 811 F.3d 528 (2d Cir. 2016). See also *Vlad-Berindan v. N.Y. City Metro. Transp. Auth.*, 779 Fed. Appx. 774 (2d Cir. 2019) (extending *Glatt* holding to public sector employer) and *Vaughn v. Phoenix House N.Y., Inc.*, 957 F.3d 141 (2d Cir. 2020) (extending *Glatt* holding to a former resident of a drug and alcohol facility who was not paid for services).

⁴⁹ In *Glatt v. Fox Searchlight Pictures*, 811 F.3d 528, 536 (2d Cir. 2016), the court noted that the primary beneficiary test has “three salient features:” (1) it “focuses on what the intern receives in exchange for his work;” (2) it allows courts to examine the economic realities of the relationship between the intern and the employer; and (3) “it acknowledges that the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship because the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment.”

while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.⁵⁰

The *Glatt* decision and the factors to be considered are technically only applicable to determining internship status for purposes of the FLSA.⁵¹ These factors, however, are similar (though not identical) to the standard for determining an individual's intern status under the Connecticut Fair Employment Practices Act, which was expanded to protect interns from discrimination in the workplace as of October 1, 2015.⁵² To date, the Connecticut Department of Labor has not issued a regulation defining interns for state wage and hour purposes, and it remains to be seen whether the factors set forth in the Connecticut General Statutes § 31-40y or the "primary beneficiary" standard set forth in *Glatt* are adopted by the Connecticut DOL.

1-2 EMPLOYMENT CONTRACTS

At the most fundamental level, and no matter how an employment relationship is established, the relationship is contractual in nature. As the Connecticut Supreme Court has stated, "[A]ll employer-employee relationships not governed by express contracts involve some type of implied 'contract'

⁵⁰ *Glatt v. Fox Searchlight Pictures*, 811 F.3d 528, 536 (2d Cir. 2016).

⁵¹ On January 5, 2018, the U.S. Department of Labor endorsed the "primary beneficiary" test in order to "eliminate unnecessary confusion among the regulated community," available at <https://www.dol.gov/newsroom/releases/whd/whd20180105> (last visited June 22, 2020). See also Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act, available at <https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships> (last visited June 22, 2020).

⁵² Under CFEPA, "Intern" means an individual who performs work for an employer for the purpose of training, provided (A) the employer is not committed to hire the individual performing the work at the conclusion of the training period; (B) the employer and the individual performing the work agree that the individual performing the work is not entitled to wages for the work performed; and (C) the work performed (i) supplements training given in an educational environment that may enhance the employability of the individual, (ii) provides experience for the benefit of the Individual, (iii) does not displace any employee of the employer (iv) is performed under the supervision of the employer or an employee of the employer, and (v) provides no immediate advantage to the employer providing the training and may occasionally impede the operations of the employer. Conn. Gen. Stat. § 31-40y(a)(3).

of employment.”⁵³ The Court went on to observe that “[t]here cannot be any serious dispute that there is a bargain of some kind; otherwise, the employee would not be working.”⁵⁴

1-2:1 Employment at Will or Employment for a Definite Term?

The terms of a contract of employment can be specified by the parties through an express contract, either written or verbal, or can be determined by applying legal principles. Absent a written or verbal agreement to the contrary, permanent employment or employment for an indefinite period is deemed to be “at will,” meaning that either the employer or the employee can terminate the relationship at any time, for any reason, with or without notice.⁵⁵ In *Magnan v. Anaconda Industries, Inc.*,⁵⁶ the Connecticut Supreme Court explained: “The [employment at will] rule . . . reserved to the employer absolute power to dismiss the employee, and was considered necessary to preserve the autonomy of managerial discretion in the work place and the freedom of the parties to make their own contract.”⁵⁷ Although there exist multiple legal exceptions to the employment at-will doctrine, employment at-will is the “default rule” in Connecticut unless it can be shown that an exception applies.⁵⁸

In contrast, Connecticut courts have found that employment agreements for a definite term may be terminated only upon a showing of cause for dismissal unless the contract expressly states otherwise.⁵⁹

^{53.} *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 13 (1995).

^{54.} *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 13 (1995) (citing 1 H. Perritt, *Employee Dismissal Law and Practice* (3d Ed. 1992) § 4.32, p. 326).

^{55.} *D’Ulisse-Cupo v. Bd. of Dirs. of Notre Dame High Sch.*, 202 Conn. 206, 211 n.1 (1987).

^{56.} *Magnan v. Anaconda Indus., Inc.*, 193 Conn. 558 (1984).

^{57.} *Magnan v. Anaconda Indus., Inc.*, 193 Conn. 558, 563 (1984). The oft-cited *Magnan* opinion provides a detailed history of the employment-at-will rule as well as exceptions to the rule.

^{58.} See *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 15 (1995) (citing *D’Ulisse-Cupo v. Bd. of Dirs. of Notre Dame High Sch.*, 202 Conn. 206, 211 n.1 (1987)); *Trombley v. Convalescent Ctr. of Norwich*, No. 543772, 1999 Conn. Super. LEXIS 1688, at *4 (Conn. Super. Ct. June 29, 1999) (to overcome “default rule of employment at will” plaintiff must prove by a fair preponderance of the evidence that the employer agreed to undertake an actual contractual commitment not to terminate without just cause).

^{59.} *Slifkin v. Condec Corp.*, 13 Conn. App. 538, 549 (1988). In *Clark v. Univ. of Bridgeport*, No. CV106010582S, 2011 Conn. Super. LEXIS 1977, at *6 (Conn. Super. Ct. July 29, 2011),

1-2:2 Express Contracts

Parties to an employment relationship may choose to enter into an express agreement to memorialize or modify an employee's at-will status. Parties also may enter into agreements governing certain aspects of the employment relationship, such as the compensation and benefits to which an employee is entitled. To create contractual obligations in the employment context, general principals of contract law apply. Actual agreement evidenced by words, action, or the conduct of the parties is required before any contractual obligation can be recognized.⁶⁰ "The intention of the parties manifested by their words and acts is essential to determine whether a contract was entered into and what its terms were."⁶¹ "A mere expression of intention or general willingness to do something on the happening of a particular event or in return for something to be received" is insufficient evidence of a contract.⁶² Similarly, contracts cannot be "created by evidence of customs and usage."⁶³ Determining what the parties intended is the ultimate goal in any contract dispute and is typically considered a question of fact.

the alleged contract was based on an offer letter that, according to the court, contained internal inconsistencies. Because the offer letter detailed several reasons that the plaintiff could be discharged during the multi-year term of the employment agreement, the court declined to rule as a matter of law that the plaintiff's employment was at will despite the fact that the offer letter contained clear language that "this position [was] 'at-will' which means the University can discharge [employee] or [employee] can resign at any time." Implicit in the court's ruling is recognition that an employer can terminate an employee at will for no reason. Therefore, giving the employee in an offer letter a list of reasons that the employment can be terminated for cause is evidence of a relationship that is *not* at will. Based upon the internal inconsistencies, the court denied the employer's motion for summary judgment on a breach of contract claim.

⁶⁰ *Franco v. Yale Univ.*, 238 F. Supp. 2d 449, 453 (D. Conn. 2002).

⁶¹ *Finley v. Aetna Life & Cas. Co.*, 202 Conn. 190, 199 (1987), *overruled on other grounds by Curry v. Burns*, 225 Conn. 782 (1993) (citing *Hydro-Hercules Corp. v. Gary Excavating, Inc.*, 166 Conn. 647, 652 (1974)); *see also Coelho v. Posi-Seal Int'l, Inc.*, 208 Conn. 106, 112 (1988).

⁶² *Borden v. Skinner Chuck Co.*, 21 Conn. Supp. 184, 191 (1958) (citing 1 Williston, *Contracts* (Rev. Ed.) § 26).

⁶³ *Christensen v. Bic Corp.*, 18 Conn. App. 451, 456 (1989). In *Christensen*, the plaintiff argued that the past practice of paying a bonus to him contractually obligated Bic to continue to pay him a bonus even after he had ceased his employment with the company. The plaintiff also relied on various documents distributed to employees regarding the manner in which bonuses were to be paid. The court rejected plaintiff's argument, noting that "[t]he mere fact that the plaintiff believed the guidelines to constitute a contract does not bind Bic without some evidence that it intended to be bound to such a contract." *See also Reynolds v. Chrysler First Commercial Corp.*, 40 Conn. App. 725, 731 (1996) (court rejected plaintiff's claim that the defendant's "continuous, routine and ordinary use of its progressive disciplinary measures with its employees gave rise to an implied contract.").

Generally, “the determination of what the parties intended to encompass in their contractual commitments is a question of the intention of the parties, and an inference of fact.”⁶⁴ In appropriate circumstances, however, the existence of a contract is determined by the court as a matter of law.⁶⁵ In particular, “where there is definitive contract language . . . the determination of what the parties intended by their contractual commitments is a question of law.”⁶⁶ Courts will not disturb the intent of the parties unless the contract is “voidable on grounds such as mistake, fraud, or unconscionability,” and a contract does not meet this standard simply because it was entered into unwisely.⁶⁷

The terms of employment agreements are interpreted like any other contract.⁶⁸ The Connecticut courts have long recognized that:

A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its

^{64.} *Bead Chain Mfg. Co. v. Saxton Prods., Inc.*, 183 Conn. 266, 274-75 (1981); see also *Coelho v. Posi-Seal Int'l, Inc.*, 208 Conn. 106, 112-13 (1988); *Finley v. Aetna Life & Cas. Co.*, 202 Conn. 190, 198 (1987), *overruled on other grounds by Curry v. Burns*, 225 Conn. 782 (1993).

^{65.} See *Tallmadge Bros., Inc. v. Iroquois Gas Transmission Sys., L.P.*, 252 Conn. 479, 498 (2000).

^{66.} *Cruz v. Visual Perceptions, LLC*, 311 Conn. 93, 102 (2014) (quoting *Tallmadge Bros., Inc. v. Iroquois Gas Transmission Sys., L.P.*, 252 Conn. 479, 495 (2000)) (applying plenary standard of review, court held that trial court erred in concluding that contract was clearly and unambiguously for a definite term).

^{67.} *Geysen v. Securitas Sec. Servs. USA, Inc.*, 322 Conn. 385 (2016) (court noted that it “must enforce the contract as drafted by the parties and may not relieve a contracting party from anticipated or actual difficulties undertaken pursuant to the contract”).

^{68.} See, e.g., *Slifkin v. Condec Corp.*, 13 Conn. App. 538, 544 (1988).

terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms.⁶⁹

Courts must interpret employment contracts in accordance with the terms employed by the parties and cannot “revise, add to, or create a new agreement.”⁷⁰

If a contract is ambiguous, i.e., “susceptible to more than one reasonable interpretation,”⁷¹ the ambiguity must be resolved by considering the extrinsic evidence and making factual findings as to the parties intent.⁷²

In *Cruz v. Visual Perceptions, LLC*,⁷³ the Connecticut Supreme Court examined a letter agreement that explicitly stated that its terms would “cover the [thirty-six] month period starting April 1, 2007 and ending March 31, 2010.” The plaintiff-employee was terminated on October 16, 2008, and sued for breach of contract. The employer argued that the letter agreement simply established the level of wages and benefits applicable to plaintiff's at-will employment if she remained employed during the defined period. The trial court and appellate court agreed with the plaintiff, but the Supreme Court reversed concluding that the letter agreement could be “interpreted as evincing *either* an intent to create a definite term of employment *or* an intent to set the terms and conditions of an at-will employment contract.”⁷⁴ The letter agreement was, therefore, susceptible to more than one meaning, and the trial court could not determine its meaning as a matter of law. Instead, the trial court was required to “resolve the ambiguity as to the

⁶⁹ *Clark v. Univ. of Bridgeport*, No. CV106010582S, 2011 Conn. Super. LEXIS 1977, at *4 (Conn. Super. Ct. July 29, 2011) (citing *Tallmadge Bros., Inc. v. Iroquois Gas Transmission Sys., L.P.*, 252 Conn. 479, 498 (2000), in turn quoting *Pesino v. Atl. Bank of N.Y.*, 244 Conn. 85, 91-92 (1998) (citations omitted)).

⁷⁰ *Slifkin v. Condec Corp.*, 13 Conn. App. 538, 545-46 (1988) (citing *Collins v. Sears, Roebuck & Co.*, 164 Conn. 369, 374 (1973)). The *Slifkin* court noted that it was improper to add a condition of satisfactory performance into a contract of employment for a definite term.

⁷¹ *United Illuminating Co. v. Wisvest-Conn., LLC*, 259 Conn. 665, 671 (2002).

⁷² *Cruz v. Visual Perceptions, LLC*, 311 Conn. 93, 107 (2014).

⁷³ *Cruz v. Visual Perceptions, LLC*, 311 Conn. 93 (2014).

⁷⁴ *Cruz v. Visual Perceptions, LLC*, 311 Conn. 93, 103 (2014).

parties' intent on the basis of the extrinsic evidence."⁷⁵ The Court further held that, in so doing, the trial court could not construe the agreement against the drafter unless "there is no sound basis for choosing one contract interpretation over another."⁷⁶

1-2:3 Implied Contracts

Connecticut also recognizes implied employment agreements. Like express contracts, [a]n implied contract depends upon the existence of an actual agreement between the parties, the terms of which are "sufficiently certain . . . to enable the court to understand what the promisor undertakes."⁷⁷ It is the plaintiff's burden to prove, by a preponderance of the evidence, that the defendant had agreed by either words or deeds to recognize and undertake a contractual commitment.⁷⁸ However, implied contracts are "examined in light of legal rules governing unilateral contracts" and do not require a mutuality of obligations between the parties.⁷⁹ All that is necessary to establish an implied contract is evidence of an offer or promise of some benefit and acceptance of that offer through performance.⁸⁰

In *Torosyan v. Boehringer Ingelheim Pharmaceuticals Inc.*,⁸¹ the Connecticut Supreme Court upheld the trial court's determination that an implied contract of employment between plaintiff and defendant existed. Plaintiff, a chemist, was employed by defendant for three years. He was discharged in 1985 ostensibly for falsifying expense reports, which he denied. Following his termination, plaintiff filed a claim alleging, inter alia, that defendant terminated him by violating express and implied contracts. The trial court

⁷⁵ *Cruz v. Visual Perceptions, LLC*, 311 Conn. 93, 107 (2014).

⁷⁶ *Cruz v. Visual Perceptions, LLC*, 311 Conn. 93, 107 (2014) (The Court noted that "[i]t would make absolutely no sense to require the trial court to construe the agreement against the defendant if the extrinsic evidence showed that it was more likely than not that the parties had a contrary intent.").

⁷⁷ *Christensen v. Bic Corp.*, 18 Conn. App. 451, 458 n.2 (1989) (citing 1 S. Williston, *Contracts* (3d Ed.) § 24).

⁷⁸ *Morrissey-Manter v. St. Francis Hosp. & Med. Ctr.*, 166 Conn. App. 510 (2016) (court ruled that plaintiff had burden of proving through "words or action or conduct" that a contractual commitment was made and that absence of such proof along with evidence that employment was at will supported summary judgment in favor of defendant).

⁷⁹ *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 13 (1995).

⁸⁰ *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 14 (1995).

⁸¹ *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1 (1995).

concluded that he had established a claim for an implied contract, and the Court agreed.

Plaintiff's implied contract claim was based on statements made to him during the interview process and statements made by the company in personnel policies that were distributed to him at the beginning of his employment. Plaintiff, who was recruited by defendant while employed as a radiochemist for a company in California, claimed that he made clear to defendant that he was seeking "long term" employment and would not move his family to Connecticut "unless the defendant could guarantee him job security." According to the plaintiff, one interviewer told him that, if he did a good job, the company would "take care of him." Another interviewer allegedly told plaintiff that "he hoped that the plaintiff would stay forever" and suggested that plaintiff review the company's personnel manual to determine whether it "provided the guarantees that he sought."⁸²

Based on these comments, plaintiff accepted the position and relocated from California to Connecticut. Upon arriving in Connecticut, plaintiff, for the first time, received the company personnel manual, which contained a provision that stated: "[t]he company recognizes its right and obligation to operate and manage its facilities. This includes the right to hire, *discharge for cause*, promote, demote, reclassify and assign work to employees." (Emphasis added.) The manual also contained an "Open Door" policy that provided employees with access to senior management for the purpose of addressing problems encountered on the job. Plaintiff claimed at trial that "[t]he provisions in the manual were material to [his] decision to continue to work for the defendant."⁸³

Based on these facts, and over defendant's argument that the statements in issue were "merely expressions of expectations" and not manifestations to undertake contractual obligations, the trial court found, and the Supreme Court agreed, that there were "contractual agreements that: (1) the plaintiff's employment would be terminable only for cause; and (2) the plaintiff would have a

⁸². *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 7 (1995).

⁸³. *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 9 (1995).

right to speak to an executive officer of the company before any termination was finalized.”⁸⁴

In so finding, the Supreme Court recognized that the plaintiff received an offer letter that did not state that plaintiff’s employment would be terminated only for cause, but the Court also noted that the offer letter was silent on the grounds for termination and did not state that it contained all the terms of the plaintiff’s employment contract or superseded prior verbal representations. Based on the Court’s dicta in this regard, it is reasonable to conclude that clear and prominent disclaimers in the offer letter and other hiring documents likely would have changed the outcome of the case. Indeed, both before and after *Torosyan*, Connecticut courts have rejected claims for implied contract when such disclaimers exist.⁸⁵

1-2:4 Covenant of Good Faith and Fair Dealing

Connecticut does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing in cases involving at-will employees unless the at-will employee is discharged in violation of an important public policy.⁸⁶ In essence, the claim for breach of the covenant of good faith and fair dealing in the employment-at-will context is identical to the common law claim for wrongful discharge.⁸⁷ In both cases, the plaintiff must allege and prove that his or her discharge from employment was “demonstrably improper” and violated an explicit statutory or constitutional provision.⁸⁸ In situations where an express

⁸⁴. *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 15 (1995).

⁸⁵. See, e.g., *Gaudio v. Griffin Health Servs. Corp.*, 249 Conn. 523, 535, 556 (1999) (employers can protect themselves from claims of implied contract based on personnel manual by including appropriate disclaimers and “eschewing language that could be reasonably considered a basis for a contractual promise”); *Wormley v. Blue Cross & Blue Shield of Conn., Inc.*, No. 368735, 1996 Conn. Super. LEXIS 1550, at *3 (Conn. Super. Ct. Mar. 12, 1996) (court entered judgment for defendant on breach of contract claim where statement in handbook “located on a separate page” in a “conspicuous font” provided that the “handbook [did] not create any express or implied contract rights and that the Company may at any time add, modify or change the policies and provisions contained in the handbook”). See also § 1-3:2.

⁸⁶. *Magnan v. Anaconda Indus., Inc.*, 193 Conn. 558, 572 (1984); *Datto Inc. v. Braband*, 856 F. Supp. 2d 354, 373-74 (D. Conn. 2012).

⁸⁷. *Morrissey-Manter v. St. Francis Hosp. & Med. Ctr.*, 166 Conn. App. 510, 540 (2016) (court noted that at will contracts are “unenforceable when violative of public policy,” but absent such showing “a party cannot ordinarily be deemed to lack good faith in exercising [the] contractual right” to terminate at will).

⁸⁸. *Morris v. Hartford Courant Co.*, 200 Conn. 676, 679 (1986) (citing *Sheets v. Teddy’s Frosted Foods, Inc.*, 179 Conn. 471, 475 (1980)). See Chapter 3, § 3-2.

or implied contract for a definite term exists, the covenant of good faith and fair dealing has been applied to ensure that “the reasonable expectations of the contracting parties” are fulfilled. If a party to an employment contract for a definite term acts in bad faith or with an intent to mislead, deceive or refuse to “fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive,” a viable claim for breach of the covenant of good faith and fair dealing may exist.⁸⁹

1-2:5 Lifetime Contracts

As noted in § 1-2:1, contracts for permanent or indefinite employment are deemed to be at-will contracts. In some circumstances, however, statements about employment for life can give rise to implied contracts, but even in such situations the courts have been reluctant to conclude that the employer was unable to terminate the employee for any reason.⁹⁰ In *Fisher v. Jackson*,⁹¹ for example, the Court declared: “In the absence of a consideration *in addition to the rendering of services* incident to the employment, an agreement for a permanent employment is no more than an indefinite general hiring, terminable at the will of either party without liability to the other.”⁹²

^{89.} *Walters v. Generation Fin. Mortg., LLC*, No. 3:10cv647 WVE, 2013 U.S. Dist. LEXIS 171480, at *17 (D. Conn. Dec. 5, 2013) (citing *De La Concha of Hartford, Inc. v. Aetna Life Ins. Co.*, 269 Conn. 424, 433 (2004)). See also *Geysen v. Securitas Sec. Servs. USA, Inc.*, 322 Conn. 385, 403 (2016) (“An employer’s action or inaction that attempts to avoid the spirit of the bargain or which evinces a dishonest purpose, however, would violate the implied covenant of good faith and fair dealing as it relates to the contractual provision for payment of commissions.”).

^{90.} See *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 10-11 (1995) (statement that an interviewer “hoped” plaintiff would “stay forever” was, *inter alia*, considered evidence of a promise that he would be terminated only for just cause); see also *McCullough v. Crown Sheet Metal & Roofing Co.*, 28 Conn. Supp. 63 (1968) (alleged statements promising lifetime employment were deemed to be “merely an expression of rosy vaticination rather than a promise or action justifying” reliance on the part of the plaintiff).

^{91.} *Fisher v. Jackson*, 142 Conn. 734 (1955).

^{92.} *Fisher v. Jackson*, 142 Conn. 734, 736 (1955) (citing *Carter v. Bartek*, 142 Conn. 448, 450 (1955)) (emphasis added) (contract for permanent employment supported only by the rendering of services is no more than a contract for indefinite term); see also *McCullough v. Crown Sheet Metal & Roofing Co.*, 28 Conn. Supp. 63 (1968) (claim of lifetime employment supported only by the consideration of services rendered deemed to be a hiring for indefinite term terminable at will); *Grieco v. Hartford Courant Co.*, No. CV 900372593S, 1993 Conn. Super. LEXIS 298, at *6 (Conn. Super. Ct. Jan. 27, 1993); *Shine v. Light Sources, Inc.*, No. CV030480442S, 2004 Conn. Super. LEXIS 1385, at *15 (Conn. Super. Ct. May 28, 2004) (although susceptible to various interpretations, ‘permanent’ or ‘lifetime employment’ is generally treated as indefinite in duration and terminable at the will of either

Moreover, the Court noted that giving up a job with another firm to accept such an offer is insufficient consideration by the employee because it is “but an incident necessary on his part to place himself in a position to accept and perform the contract; it is not consideration for a contract of life employment.”⁹³

1-2:6 Statute of Frauds

Connecticut’s statute of frauds renders unenforceable as a matter of law contracts that are “not to be performed within one year of the making thereof” unless the contract is in writing and is signed by the party to be held responsible.⁹⁴ This provision has been tried as a defense to implied employment agreements for indefinite periods, but without success. In *Finley v. Aetna Life & Casualty Co.*,⁹⁵ the Connecticut Supreme Court explained:

[O]ur most apposite precedent comports with the majority view that a contract of indefinite duration is not subject to the ‘one year’ provision of the statute of frauds.

The *Finley* Court, noting the absence of recent case law in Connecticut, referred to the Restatement (Second) of Contracts for the proposition that:

[T]he enforceability of a contract under the one year provision does not turn on the actual course of subsequent events, nor on the expectations of the parties as to the probabilities. Contracts of uncertain duration are simply excluded; the provision covers

party, in the absence of an express or implied agreement that refers to employment pending the occurrence of some event, such as the employer’s dissatisfaction with the employee’s services or some cause for termination).

⁹³ *Fisher v. Jackson*, 142 Conn. 734, 737 (1955) (citations omitted).

⁹⁴ Connecticut General Statutes § 52-550 provides: “(a) No civil action may be maintained in the following cases unless the agreement, or a memorandum of the agreement, is made in writing and signed by the party, or the agent of the party, to be charged: (1) Upon any agreement to charge any executor or administrator, upon a special promise to answer damages out of his own property; (2) against any person upon any special promise to answer for the debt, default or miscarriage of another; (3) upon any agreement made upon consideration of marriage; (4) upon any agreement for the sale of real property or any interest in or concerning real property; (5) upon any agreement that is not to be performed within one year from the making thereof; or (6) upon any agreement for a loan in an amount which exceeds fifty thousand dollars.”

⁹⁵ *Finley v. Aetna Life & Cas. Co.*, 202 Conn. 190 (1987), *overruled on other grounds by Curry v. Burns*, 225 Conn. 782 (1993).

only those contracts whose performance *cannot possibly* be completed within a year.⁹⁶

The Court reaffirmed this conclusion in *C.R. Klewin, Inc. v. Flagship Properties, Inc.*,⁹⁷ noting that the statute of frauds is looked upon “with disfavor” and should be narrowly construed.⁹⁸ To this end, unless an oral contract states “in express terms, that performance is to have a specific duration beyond one year,” that contract is, “as a matter of law, the functional equivalent of a contract of indefinite duration for the purposes of the statute of frauds” and “outside the proscriptive force of the statute regardless of how long completion of performance will actually take.”⁹⁹

1-2:7 Specific Performance

As a general rule, specific performance is not available for personal service contracts.¹⁰⁰ The reasons for this rule have been enumerated as follows:

1. the presence of an adequate remedy at law;
2. the impossibility of a court coercing the rendering of personal services;

^{96.} *Finley v. Aetna Life & Cas. Co.*, 202 Conn. 190, 197 (1987) (emphasis added), *overruled on other grounds by* *Curry v. Burns*, 225 Conn. 782, 786 (1993) and *State v. Sanchez*, 308 Conn. 64 (2013).

^{97.} *C.R. Klewin v. Flagship Props., Inc.*, 220 Conn. 569 (1991).

^{98.} *C.R. Klewin v. Flagship Props., Inc.*, 220 Conn. 569, 577 (1991).

^{99.} *C.R. Klewin v. Flagship Props., Inc.*, 220 Conn. 569, 583-84 (1991); *see also* *Limberger v. Burke Ridge Constr., LLC*, No. HHDCV126037168S, 2015 Conn. Super. LEXIS 3000, at *13-14 (Conn. Super. Ct. Dec. 3, 2015) (relying on *C.R. Klewin*, the court ruled that breach of employment agreement claim was not barred by statute of frauds because there was no evidence that the oral employment contract was intended to last for more than one year because defendant argued that no contract existed at all); *Tabora v. Amdour, Inc.*, No. CV000091875, 2002 Conn. Super. LEXIS 939, at *5 (Conn. Super. Ct. Mar. 25, 2002) (plaintiff conceded that the alleged oral contract forming the basis for both an oral contract and a promissory estoppel claim was “not to be performed within one year” and therefore was unenforceable under Connecticut General Statutes § 52-550).

^{100.} *William Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 363-64 (1890); *see also* *Burns v. Gould*, 172 Conn. 210, 214-15 (1977) (holding that oral contract for exchange of personal services and stock and option to purchase stock was a contract for sale of securities and subject to statute of frauds governing contracts for sales of securities; but that where holder had performed personal services, he was entitled to as much stock as he had paid for; and that if, on remand, holder’s duties were too vague to permit allocation and determination of portion performed, holder would be relegated to claim in quantum meruit); *see* *Eyges v. Herrmann*, No. CV010810973, 2001 Conn. Super. LEXIS 3356, at *8-9 (Conn. Super. Ct. Nov. 28, 2001) (specific performance of law firm shareholder’s employment agreement may be appropriate where firm is closely held, shares are difficult to value, and employment agreement is silent as to share buyout price).

3. the aura of involuntary servitude associated with the compulsion of services;
4. the difficulty of judicial supervision over such a decree;
5. the inexpediency of attempting to enforce such a decree; and
6. the continuation of hostile, intolerable employment relationships.¹⁰¹

Although the rule against specific performance is almost “universally applied,” there are limited exceptions to it.¹⁰² In situations where the services provided under a contract are “special, unique or extraordinary,” and “where it would be difficult, if not impossible, to replace a person’s services; and where damages would be inadequate to remedy the loss,” a court may enforce the contract for either the party engaging the services or the party providing the services.¹⁰³

1-2:8 Damages

Damages for breach of an employment contract, like all other contracts, are “designed to place the injured party, so far as can be done by money, in the same position as that which he would have been in had the contract been performed.”¹⁰⁴ As long as the damages for the alleged loss can “fairly and reasonably be considered [as] arising naturally” from the breach, the non-breaching party may recover. Thus, if an employee is discharged from employment in violation of an employment agreement and is, therefore, prevented from fully performing, the employee can recover wages he would have earned but for the termination, “as long as they are limited to a reasonable time and are supported by the evidence.”¹⁰⁵

¹⁰¹. *Lark v. Post-Newsweek Stations, Conn., Inc.*, No. CV940705326, 1994 Conn. Super. LEXIS 3055, at *18-19 (Conn. Super. Ct. Nov. 28, 1994) (citing 71 Am. Jur. 2d, Specific Performance § 164) (court refused to grant employee’s application for injunctive relief seeking to stop television station from replacing him on the air).

¹⁰². *Lark v. Post-Newsweek Stations, Conn., Inc.*, No. CV940705326, 1994 Conn. Super. LEXIS 3055, at *19 (Conn. Super. Ct. Nov. 28, 1994).

¹⁰³. *Lark v. Post-Newsweek Stations, Conn., Inc.*, No. CV940705326, 1994 Conn. Super. LEXIS 3055, at *19-20 (Conn. Super. Ct. Nov. 28, 1994).

¹⁰⁴. *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 32 (1995).

¹⁰⁵. *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 33-34 (1995).

Typically, in an employment case the “normal rule” is that:

When the employee is prevented from fully performing because the employer wrongfully fires him, the employee can recover the wages he would have earned under the contract, minus any wages which he has earned or could have earned elsewhere, and the burden of proof of the latter is on the employer.¹⁰⁶

Punitive damages “are rarely allowed” for breach of contract claims.¹⁰⁷ Unless there is evidence that the breach of contract also constitutes a termination that violates an important public policy, punitive damages are not recoverable.¹⁰⁸

1-3 EMPLOYEE HANDBOOKS

1-3:1 When Is a Handbook a Contract?

The Connecticut Supreme Court has recognized that representations made in employee handbooks may give rise to contractual obligations under appropriate circumstances.¹⁰⁹ Whether handbook provisions are contractually binding is a “question of the intention of the parties, and an inference of fact.”¹¹⁰ If, however, employers make clear “by eschewing language that could reasonably be construed as a basis for a contractual promise, or by including appropriate disclaimers of the intention to contract,” they can preclude the possibility that employees will

^{106.} *Barry v. Posi-Seal Int'l, Inc.*, 40 Conn. App. 577, 581 (1996).

^{107.} *Barry v. Posi-Seal Int'l, Inc.*, 40 Conn. App. 577, 584 (1996) (court reversed award of punitive damages on plaintiff’s claim sounding in contract).

^{108.} *Barry v. Posi-Seal Int'l, Inc.*, 40 Conn. App. 577, 588 (1996).

^{109.} *Finley v. Aetna Life & Cas. Co.*, 202 Conn. 190, 198 (1987), *overruled on other grounds by Curry v. Burns*, 225 Conn. 782, 786 (1993) (citing *Magnan v. Anaconda Indus., Inc.*, 193 Conn. 558, 564 (1984); *Dolak v. Sullivan*, 145 Conn. 497, 503 (1958); and *Tilbert v. Eagle Lock Co.*, 116 Conn. 357, 361-63 (1933)); and *State v. Sanchez*, 308 Conn. 64 (2013); see also *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 16-17 (1995) (court held that manual that “explicitly qualified the defendant’s right to discharge with the words ‘for cause’ ” was contractually binding even though the defendant issued a subsequent handbook removing the language).

^{110.} *Finley v. Aetna Life & Cas. Co.*, 202 Conn. 190 (1987), *overruled on other grounds by Curry v. Burns*, 225 Conn. 782, 786 (1993) (quoting *Bead Chain Mfg. Co. v. Saxton Prods., Inc.*, 183 Conn. 266, 274-75 (1981)) and *State v. Sanchez*, 308 Conn. 64 (2013)); but cf. *Moffett v. Kimberly-Clark Corp.*, No. 3:97CV1390 (WWE), 1998 U.S. Dist. LEXIS 15980, at *9 (D. Conn. Aug. 6, 1998) (the initial determination as to whether an employee handbook creates contractual obligations is a question of law for the court).

successfully claim that a handbook or manual is a contract.¹¹¹ The fact that an employee thinks a handbook or manual is contractually binding is of little importance. To establish a contract claim based on a handbook or manual, an employee would have to show that the employer “intended to be bound” by the representations made in the handbook or manual.¹¹² Employees also cannot “pluck phrases out of context” from employer publications to support the existence of a contract. No matter what the contract is based on, there must always be evidence of a meeting of the minds between the parties.¹¹³

Numerous Connecticut courts have held that contract claims must fail if an employee handbook contains an “effective” disclaimer.¹¹⁴ However, a disclaimer, in and of itself, may not be enough to defeat otherwise colorable contract claims. If an employer makes contradictory statements that would themselves be contractually binding, the disclaimer in an employee handbook would not defeat a breach of contract claim.¹¹⁵

¹¹¹. *Finley v. Aetna Life & Cas. Co.*, 202 Conn. 190, 199 n.5 (1987), *overruled on other grounds by Curry v. Burns*, 225 Conn. 782, 786 (1993) and *State v. Sanchez*, 308 Conn. 64 (2013).

¹¹². *Gaudio v. Griffin Health Servs. Corp.*, 249 Conn. 523, 535, 556 (1999) (employers can protect themselves from claims of implied contract based on personnel manual by including appropriate disclaimers and “eschewing language that could be reasonably considered a basis for a contractual promise”); *Wormley v. Blue Cross & Blue Shield of Conn., Inc.*, No. 368735, 1996 Conn. Super. LEXIS 1550, at *9 (Conn. Super. Ct. Mar. 12, 1996) (citing *Christensen v. Bic Corp.*, 18 Conn. App. 451, 458 (1989)).

¹¹³. *Christensen v. Bic Corp.*, 18 Conn. App. 451, 458 (1989); *Reynolds v. Chrysler First Commercial Corp.*, 40 Conn. App. 725, 730 (1996).

¹¹⁴. *See, e.g., Davis v. Liberty Mut. Ins. Co.*, 218 F. Supp. 2d 256, 261 n.1 (D. Conn. 2002) (collecting cases); *Walonoski v. Goodrich Pump & Engine Control Sys., Inc.*, No. 3:07-CV-00198 (PCD), 2009 U.S. Dist. LEXIS 16923, at *17 (D. Conn. Mar. 5, 2009); *Perugini v. Stryker Orthopaedics*, No. 3:08cv404 (MRK), 2009 U.S. Dist. LEXIS 93813, at *15-16 (D. Conn. Oct. 6, 2009); *Amici v. First Union Nat’l Bank*, No. CV020459754, 2003 Conn. Super. LEXIS 1037, at *5-6 (Conn. Super. Ct. Apr. 15, 2003); *Acevedo v. Ledgecrest Health Care*, No. CV00509027, 2001 Conn. Super. LEXIS 3001, at *5 (Conn. Super. Ct. Oct. 18, 2001); *Markgraf v. Hospitality Equity Investors, Inc.*, No. 30 85 01, 1993 Conn. Super. LEXIS 426, at *4 (Conn. Super. Ct. Feb. 18, 1993); *Schermerhorn v. Mobil Chem. Co.*, No. 3:99 CV 941 (GLG), 2001 U.S. Dist. LEXIS 519, at *21 (D. Conn. Jan. 17, 2001); *Marfiak v. Blue Cross & Blue Shield of Conn., Inc.*, No. CV 940368007S, 1997 WL 724514, at *2 (Conn. Super. Ct. Nov. 3, 1997); *Schain v. Blue Cross Blue Shield of Conn., Inc.*, No. CV93 0349216, 1996 Conn. Super. LEXIS 2762, at *7 (Conn. Super. Ct. Oct. 21, 1996).

¹¹⁵. In *Thompson v. Revonet, Inc.*, for example, the court held that a disclaimer in an employee handbook was insufficient to defeat a claim based on representations allegedly made by defendant during the course of negotiating an employment contract that incorporated by reference the terms of an employee handbook. While recognizing that the disclaimers might be “adequate to preclude contractual liability based on the handbook alone,” the court noted that the disclaimer did “not necessarily immunize the company

1-3:2 Disclaimers

The Connecticut Supreme Court has stated “with unambiguous clarity”¹¹⁶ that employers can protect themselves from contract claims based on employee handbooks and other employer publications through the use of express and prominent disclaimers.¹¹⁷ Disclaimers in published policies have also been used to defeat claims of an implied contract.¹¹⁸ To be effective, the disclaimer must be “clear and unequivocal” and “sufficiently obvious as to be readily observable to any employee reviewing the manual.”¹¹⁹ Connecticut state and federal courts have regularly granted summary judgment in cases where the personnel manual on which a breach of contract claim is based contains such an express disclaimer.¹²⁰ Courts considering the sufficiency of a

from contractual liability based on its alleged promise to the plaintiff in the course of negotiations.” *Thompson v. Revonet, Inc.*, No. 3:05-CV-168 (RNC), 2005 U.S. Dist. LEXIS 29129, at *6-7 (D. Conn. Nov. 21, 2005), citing *Holt v. Home Depot, U.S.A., Inc.*, No. 3:00CV1578 (RNC), 2004 U.S. Dist. LEXIS 824, at *3-4 (D. Conn. Jan. 22, 2004) (employer’s assurances that employees who availed themselves of open door policy would not be penalized could be viewed as binding, notwithstanding general disclaimer in employee handbook), *aff’d*, 135 Fed. Appx. 449 (2d Cir. 2005); *Rodriguez v. Host Int’l, Inc.*, No. CV990585323, 2000 Conn. Super. LEXIS 3575, at *16 (Conn. Super. Ct. Dec. 22, 2000) (“The existence of disclaimer language in an employee handbook, therefore, does not always defeat a claim for breach of an express or implied contract, particularly under circumstances where other representations have been made independent of a handbook which are not themselves disclaimed.”); *Harrop v. Allied Printing Servs.*, No. CV 980583561, 2000 Conn. Super. LEXIS 774, at *5 (Conn. Super. Ct. Mar. 24, 2000) (denying motion for summary judgment despite handbook disclaimer because of representations allegedly made by employer during employment negotiations).

¹¹⁶ *Gaudio v. Griffin Health Servs. Corp.*, 249 Conn. 523, 535 (1999).

¹¹⁷ *Gaudio v. Griffin Health Servs. Corp.*, 249 Conn. 523, 535 (1999) (citing *Finley v. Aetna Life & Cas. Co.*, 202 Conn. 190, 199 n.5 (1987), *overruled on other grounds by Curry v. Burns*, 225 Conn. 782 (1993)) (hospital’s handbook failed to include disclaimer, thereby allowing the jury to decide whether the terms of the employee handbook were contractually binding); *see also Schermerhorn v. Mobil Chem. Co.*, No. 3:99 CV 941 (GLG), 2001 U.S. Dist. LEXIS 519, at *20-21 (D. Conn. Jan. 17, 2001).

¹¹⁸ *Morrissey-Manter v. St. Francis Hosp. & Med. Ctr.*, 166 Conn. App. 510 (2016) (court found disclaimer in employer’s policies making clear that employment was at will defeated plaintiff’s claim that she had a contract of employment that could only be terminated with cause).

¹¹⁹ *Cardona v. Aetna Life & Cas.*, No. 3:96 CV 1009 (GLG), 1998 U.S. Dist. LEXIS 7246, at *17 (D. Conn. May 8, 1998) (handbook contained disclaimer stating that it was “not intended to create, nor should you interpret it to be, a contract or agreement of any type between the company and you”).

¹²⁰ *See, e.g., Chen v. Pitney Bowes Corp.*, 195 F. Supp. 2d 368, 373 (D. Conn. 2002) (handbook disclaimer stated that employees were “at will” and that “statements or promises to the contrary are not to be relied upon.”); *Davis v. Liberty Mut. Ins. Co.*, 218 F. Supp. 2d 256, 261 (D. Conn. 2002) (granting employer’s motion for summary judgment on contract claim because “Liberty Mutual expressly disclaimed any intent to contract with its employees by stating in clear terms in the Introduction section of the Employee Handbook:

disclaimer have considered such characteristics as the location within the handbook, the size and color of the font used, and the specificity with which contract formation is disclaimed. Disclaimers appearing in fine print, not referenced in the table of contents, or appearing at the end of a handbook have been deemed ineffective.¹²¹ Disclaimers also can be negated by contradictory statements made by an employer.¹²²

Absent a clear and prominent disclaimer, employers must include the “eschewing” language (essentially a disclaimer) referred to in *Finley v. Aetna Life & Casualty Co.*¹²³ The absence of both a

‘This handbook is not and should not be considered an employment contract . . . it is not intended to alter the at-will employment relationship between Liberty Mutual and any employee.’”); *Cowen v. Fed. Express Corp.*, 25 F. Supp. 2d 33, 37 (D. Conn. 1998) (Federal Express repeatedly disclaimed intention to contract through manual); *Manning v. Cigna Corp.*, 807 F. Supp. 889, 893 (D. Conn. 1991) (manual stated it was “not an employment contract”); *Wallace v. Gaylord Farm Assoc.*, No. CV 89-0233770S, 1992 Conn. Super. LEXIS 2397, at *3 (Conn. Super. Ct. Aug. 10, 1992) (manual contained language stating it should not be construed as a contract); *Lombardi v. Marketing Corp. of Am.*, No. CV910293281, 1994 Conn. Super. LEXIS 1383, at *6-7 (Conn. Super. Ct. May 23, 1994); *Markgraf v. Hospitality Equity Investors, Inc.*, No. 30 85 01, 1993 Conn. Super. LEXIS 426, at *6 (Conn. Super. Ct. Feb. 18, 1993) (manual stated: “the contents of the handbook are presented as a matter of information only, and are not meant to be a contract.”); *Grieco v. Hartford Courant Co.*, No. CV 900372593S, 1993 Conn. Super. LEXIS 298, at *7 (Conn. Super. Ct. Jan. 27, 1993) (handbook stated: “the handbook and any of the statements made herein are not to be construed as nor is it a contract”).

^{121.} *Elliff v. H. Vincent’s Med. Ctr.*, 10 Conn. L. Rptr. 507 (Jan. 31, 1994); *Wasilewski v. Warner-Lambert Co.*, No. CV93 04 44 45, 1995 Conn. Super. LEXIS 1830, at *11 (Conn. Super. Ct. June 19, 1995) (disclaimer appeared on last page of handbook, was untitled and lacked specificity).

^{122.} In *Thompson v. Revonet, Inc.*, No. 3:05-CV-168 (RNC), 2005 U.S. Dist. LEXIS 29129, at *6-7 (D. Conn. Nov. 21, 2005), plaintiff claimed that, in the course of negotiating an employment agreement, his employer agreed to incorporate a progressive disciplinary policy into the contract. Although the court found the disclaimer in the handbook to be “adequate to preclude contractual liability based on the handbook alone, it did not “immunize the company from contractual liability based on its alleged promise to the plaintiff in the course of negotiations.” See also *Holt v. Home Depot, U.S.A., Inc.*, No. 3:00CV1578 (RNC), 2004 U.S. Dist. LEXIS 824, at *3-4 (D. Conn. Jan. 22, 2004); *Rodriguez v. Host Int’l, Inc.*, No. CV990585323, 2000 Conn. Super. LEXIS 3575, at *16 (Conn. Super. Ct. Dec. 22, 2000); *Harrop v. Allied Printing Servs.*, No. CV 980583561, 2000 Conn. Super. LEXIS 774, at *4 (Conn. Super. Ct. Mar. 24, 2000); *Clark v. Univ. of Bridgeport*, No. CV106010582S, 2011 Conn. Super. LEXIS 1977, at *4-6 (Conn. Super. Ct. July 29, 2011) (in context of offer letter, court held that disclaimer, though unambiguous on its face, conflicted with statements made about cause for termination and created a factual dispute warranting the denial of summary judgment).

^{123.} *Gaudio v. Griffin Health Servs. Corp.*, 249 Conn. 523, 535-37 (1999) (Court upheld jury verdict that employee handbook promised that employees would not be terminated unless they either committed repeated violations of work rules or engaged in serious misconduct, noting that employer did not eschew contract intention and instead “promised to hold itself to more rigorous standard.”)

disclaimer or other language negating contract formation leaves open the issue of contract formation for the trier of fact.¹²⁴

1-3:3 Distribution

Courts that have considered the issue have refused to recognize that employee manuals that are not distributed to employees are contractually binding.¹²⁵ In so holding, the courts have noted the need to meet “traditional contractual requirements” and have concluded that such manuals are not contractually binding because employees could not demonstrate that they accepted employment relying on the representations in the manual.¹²⁶

1-3:4 Modifying Employee Handbooks

In *Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc.*,¹²⁷ the Connecticut Supreme Court addressed an employer’s right to modify an existing employee handbook and whether continuation of employment is sufficient consideration for the modification. In *Torosyan*, the plaintiff had been given one version of an employee handbook that limited the employer’s right to terminate employment at will. The plaintiff provided evidence that he had

¹²⁴. See, e.g., *Byrne v. Yale Univ., Inc.*, No. 3:17-CV-1104 (VLB), 2020 U.S. Dist. LEXIS 53584, at *38-39 (D. Conn. Mar. 27, 2020) (“In the absence of express language that definitively states the parties’ obligations, the determination of what the parties intended to encompass as their contractual commitments and compliance therewith are questions of fact for the jury.”); *Trombley v. Convalescent Ctr. of Norwich*, No. 543772, 1999 Conn. Super. LEXIS 1688, at *5 (Conn. Super. Ct. June 29, 1999) (employer’s handbook contained neither a disclaimer nor eschewing language and instead contained language “evinced[ing] an obligation on the part of the defendant to follow the terms contained therein”).

¹²⁵. *Carbone v. Atl. Richfield Co.*, 204 Conn. 460, 472 (1987) (manual that was distributed only to supervisory personnel, which the plaintiff was not, held not to be contractually binding); *Sivell v. Conwed Corp.*, 666 F. Supp. 23, 27 (D. Conn. 1987) (manual distributed only to management personnel held not to be contractually binding).

¹²⁶. *Sivell v. Conwed Corp.*, 666 F. Supp. 23, 27 (D. Conn. 1987) (manual distributed only to management personnel held not to be contractually binding because employee could not have relied upon it). In *Owens v. American National Red Cross*, 673 F. Supp. 1156, 1166 (D. Conn. 1987), the court held that plaintiff could not rely on a supervisor’s manual to form the basis for an enforceable contract because it was not provided to employees or intended for distribution. However, an employee handbook was distributed to employees, and it contained certain statements that could have been contractually binding. The court noted: “In the absence of ‘definitive contract language’ . . . ‘the determination of what the parties intended to encompass in their contractual commitments is a question of the intention of the parties, and an inference of fact’ . . . properly to be determined by the jury.” (citing *Finley v. Aetna Life & Cas. Co.*, 202 Conn. 190, 199 (1987), *overruled on other grounds by Curry v. Burns*, 225 Conn. 782, 786 (1993); and *State v. Sanchez*, 308 Conn. 64 (2013)).

¹²⁷. *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1 (1995).

relied upon the representations in the handbook, which confirmed statements upon which he relied in accepting the company's offer. The plaintiff testified that he read the handbook immediately on his first day of employment to "ensure that it was consistent with [the company's] representations" before he accepted.

Two years later, the company issued a new version of the employee handbook that provided the company with discretion to terminate employment for any number of reasons other than cause. The new handbook also stated that it was subject to change without notice. The company argued that, by continuing his employment after the handbook was distributed, the plaintiff agreed to accept its terms. The Court disagreed holding that:

When an employer issues an employment manual that *substantially interferes* with an employee's legitimate expectations about the terms of employment, however, the employee's continued work after notice of those terms cannot be taken as conclusive evidence of the employee's consent to those terms.¹²⁸

In contrast, when a manual "confers on an employee *greater* rights than he or she previously had, the employee's continued work . . . ordinarily demonstrates that the employee has accepted that offer of new rights."¹²⁹

It should be noted, however, that an employer can retain the right to amend or revoke a policy and avoid problems with subsequent modifications. In *Fenn v. Yale University*,¹³⁰ for example the court

^{128.} *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 18 (1995) (emphasis added). The Court refused to decide whether continued employment would be enough to establish agreement in situations where the change in the terms of the handbook does not materially interfere with the employee's legitimate expectations about the terms of his or her employment.

^{129.} *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 18 (1995) (emphasis added). The *Torosyan* Court left open the question of whether continued employment would be sufficient consideration for a change in a manual that "does not materially interfere" with the employee's legitimate expectation about the terms of the employment. *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 19, n.7 (1995). See also *Wood v. Conn. Gen. Life Ins. Co.*, No. CV 9866592S, 1998 Conn. Super. LEXIS 3054, at *6 (Conn. Super. Ct. Oct. 28, 1998) (court refused to enforce arbitration agreement distributed to plaintiff after the start of employment, noting that an employee can accept a benefit conferred by an employer absent consideration but not a change that substantially interferes with legitimate expectations regarding the terms of employment).

^{130.} *Fenn v. Yale Univ.*, 283 F. Supp. 2d 615, 629-30 (D. Conn. 2003).

distinguished the *Torosyan* facts and determined as a result that Yale's amendment of policies did not substantially interfere with the plaintiff's legitimate expectations because the policies in issue "explicitly provided that Yale could revoke or amend . . . at any time."¹³¹

1-3:5 Promissory Estoppel

1-3:5.1 Elements

A cause of action for promissory estoppel

is predicated on proof of two essential elements: the party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe that certain facts exist and to act on that belief; and the other party must change its position in reliance on those facts, thereby incurring some injury.¹³²

The promise on which a claim is based must be "clear and definite," and "a promisor is not liable to a promisee who has relied on a promise if, judged by an objective standard, he had no reason to expect any reliance at all."¹³³ The reliance can take the form of action or forbearance.¹³⁴

In *D'Ulisse-Cupo v. Board of Directors of Notre Dame High School*,¹³⁵ plaintiff alleged that she had relied to her detriment on representations that she would receive a new employment contract. Specifically, plaintiff claimed that the principal told her during an annual review that "there would be no problem with her teaching

^{131.} *Fenn v. Yale Univ.*, 283 F. Supp. 2d 615, 629 (D. Conn. 2003).

^{132.} *Chotkowski v. State*, 240 Conn. 246, 268 (1997). The Restatement (Second) of Contracts states that under the doctrine of promissory estoppel "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." 1 Restatement (Second) of Contracts § 90 (1981).

^{133.} *D'Ulisse-Cupo v. Bd. of Dirs. of Notre Dame High Sch.*, 202 Conn. 206, 213 (1987); see also *Miller v. United Techs. Corp.*, No. CV940365249, 2001 Conn. Super. LEXIS 3105, at *7 (Conn. Super. Ct. Oct. 26, 2001) (statements about plaintiff's suitability for a position were no more than the "usual representations made during the hiring process indicating that defendant wanted to hire [him]." None of the representations were clear and definite promises upon which plaintiff reasonably relied.).

^{134.} *Stewart v. Cendant Mobility Servs. Corp.*, 267 Conn. 96, 112 (2003).

^{135.} *D'Ulisse-Cupo v. Bd. of Dirs. of Notre Dame High Sch.*, 202 Conn. 206 (1987).

certain courses and levels the following year, that everything looked fine for rehire for the next year, and that she should continue her planning for the exchange program” that she ran. The principal also posted a notice on a bulletin board that said “all present faculty members will be offered contracts for next year.” The Court ruled that such statements were not “sufficiently promissory” or “sufficiently definite” to provide the basis for an actionable promissory estoppel claim. Rather, the Court concluded that “[t]he statements alleged to be actionable . . . were, on their face, no more than representations indicating that the defendants intended to enter into another employment contract with the plaintiff at some time in the future.”¹³⁶

In contrast, in *Stewart v. Cendant Mobility Services Corp.*,¹³⁷ the plaintiff alleged that she had been told that she would not be fired if her husband (a former employee of the same company) accepted employment with a competitor. Plaintiff claimed that she relied on that promise to her detriment by forgoing other job opportunities. The jury found in plaintiff’s favor, and the Connecticut Supreme Court affirmed the jury’s decision, noting:

The plaintiff testified that: (1) she had approached [defendant] because she was concerned that her husband’s employment with a competitor would have a negative effect on her employment with Cendant; (2) she expressed that concern in plain terms to [defendant]; and (3) [defendant] responded in equally unambiguous terms . . . that the plaintiff had no need to worry because her husband’s future employment with a competitor would pose ‘no problems whatsoever’ for her. On the basis of this testimony, the jury reasonably could have found that [defendant’s] representations to the plaintiff constituted a clear and definite promise that her position with Cendant would not be affected adversely if her

^{136.} *D’Ulisse-Cupo v. Bd. of Dirs. of Notre Dame High Sch.*, 202 Conn. 206, 213 (1987).

^{137.} *Stewart v. Cendant Mobility Servs. Corp.*, 267 Conn. 96 (2003).

husband were to secure employment with a competing firm.¹³⁸

Given the similarity between the fact patterns in *D'Ulisse-Cupo* and *Stewart*, it is clear that the line between what is and is not sufficiently promissory or sufficiently definite is blurry at best. The outcome of any case may depend upon the peculiarities and proclivities of the fact-finder.

1-3:5.2 “Clear and Definite Promise” Is Required

A “clear and definite promise” on which the promisor reasonably could have expected that another would rely is a “fundamental element of promissory estoppel.”¹³⁹ Therefore, the promisor will not be liable to a promisee who has relied on the promise “if, judged by an objective standard,” the promisor should not have expected reliance in the first instance.¹⁴⁰ Nonetheless, even though the promise must be clear and definite, it does not need to rise to the level of an offer to enter into a contract.¹⁴¹ The promise, however, “must reflect a present intent to commit as distinguished from a mere statement of intent to contract in the future” or a “mere expression of intention, hope, desire, or opinion, which shows no real commitment.”¹⁴² Whether a representation rises to the level of a promise is generally a question of fact, to be determined in light of the circumstances under which the representation was made. In situations where the plaintiff fails to produce evidence demonstrating a “clear commitment” on the part of the promisor to perform some act, summary judgment may be appropriate.¹⁴³

¹³⁸. *Stewart v. Cendant Mobility Servs. Corp.*, 267 Conn. 96, 106 (2003).

¹³⁹. *Stewart v. Cendant Mobility Servs. Corp.*, 267 Conn. 96, 104 (2003).

¹⁴⁰. *Stewart v. Cendant Mobility Servs. Corp.*, 267 Conn. 96, 105 (2003).

¹⁴¹. *Stewart v. Cendant Mobility Servs. Corp.*, 267 Conn. 96, 105 (2003); *see also Aitable v. 1 Burr Road Operating Co., II, LLC, No. FSTCV095012806S*, 2011 Conn. Super. LEXIS 2633, at *32 (Conn. Super. Ct. Oct. 7, 2011) (court ruled that language of a Code of Conduct contained in an employee handbook fell “far short of a ‘clear and definite’ promise” that the plaintiff reasonably could have relied upon).

¹⁴². *Stewart v. Cendant Mobility Servs. Corp.*, 267 Conn. 96, 105 (2003).

¹⁴³. *Rotzal v. Jewish Home for the Elderly*, No. CV0404120V65, 2006 Conn. Super. LEXIS 1666, at *18 (Conn. Super. Ct. May 26, 2006).

1-3:5.3 Reasonable Reliance Is Required

To maintain a claim for promissory estoppel, “it is not enough that a promise was made; reasonable reliance thereon, resulting in some detriment to the party claiming the estoppel, also is required.”¹⁴⁴ Reasonable reliance is judged by an objective standard. If, through the exercise of due diligence, the party claiming estoppel could have determined that the statements on which he or she relied were insupportable or unreliable, the claim for promissory estoppel will fail.¹⁴⁵

1-3:5.4 Preemption

Although Connecticut courts permit a plaintiff to plead alternative forms of relief, a claim for promissory estoppel can only be pursued “after it has been established that no express contract exists.”¹⁴⁶ Additionally, some courts have held that claims for promissory estoppel are precluded or preempted by other remedial schemes.¹⁴⁷ In situations where an alternative remedy exists, a promissory estoppel claim may be non-viable.

1-3:5.5 Damages

The nature of the relief provided for promissory estoppel claims may be “limited as justice requires.”¹⁴⁸

[T]he same factors that bear on whether any relief should be granted also bear on the character and extent of the remedy. In particular, relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee’s reliance rather than by the terms of the promise.¹⁴⁹

^{144.} *Ferrucci v. Middlebury*, 131 Conn. App. 289, 305, *cert denied*, 302 Conn. 944 (2011).

^{145.} *Spear-Newman, Inc. v. Modern Floors Corp.*, 149 Conn. 88, 91 (1961).

^{146.} *Datto Inc. v. Braband*, 856 F. Supp. 2d 354, 374 (D. Conn. 2012) (citing *Suffield Dev. Assoc. v. Soc’y of Savings*, 243 Conn. 832 (1998)).

^{147.} *Parete v. Stop & Shop Supermarket Co. LLC*, No. 3:10cv625, 2013 U.S. Dist. LEXIS 40551, at *18 (D. Conn. Mar. 22, 2013) (citing *Ferrucci v. Town of Middlebury*, 131 Conn. App. 289, 305 (2011)) (for purposes of promissory estoppel claim, promises are binding only if “injustice can be avoided only by enforcement of the promise”).

^{148.} *Goldstein v. Unilever*, No. 397881, 2004 Conn. Super. LEXIS 1126, at *21 (Conn. Super. Ct. May 3, 2004) (citing Restatement (Second) of Contracts § 90).

^{149.} *Goldstein v. Unilever*, No. 397881, 2004 Conn. Super. LEXIS 1126, at *21 (Conn. Super. Ct. May 3, 2004).

As in contract actions, damages for promissory estoppel are also limited by the plaintiff's duty to mitigate.¹⁵⁰

**1-4 OTHER CONTRACTS COMMON IN THE
EMPLOYMENT RELATIONSHIP**

1-4:1 General Contract Principles

The enforcement of agreements in the employment context is judged by the same principles that apply to contracts generally. In employment contracts, like all contracts, “[i]t is a fundamental principle of contract law that the existence and terms of a contract are to be determined from the intent of the parties.”¹⁵¹ It is critical to employment contracts, like all contracts, that there be a meeting of the minds with respect to the terms of the agreement and sufficient consideration for the agreement.¹⁵² Contract avoidance and defenses to breach of agreements in the employment context, likewise, are judged by general contract law principles.¹⁵³

There do exist some exceptions to the general rule. For example, an employer and employee cannot contractually agree to pay compensation to the employee that is less than minimum wage or to forgo the payment of overtime. Similarly, employees cannot enter into waivers of claims for wages they are owed in accordance with Connecticut or federal wage and hour or wage payment laws without approval from the state or federal departments of labor.¹⁵⁴

^{150.} *Goldstein v. Unilever*, No. 397881, 2004 Conn. Super. LEXIS 1126, at *22 (Conn. Super. Ct. May 3, 2004).

^{151.} *Baron v. Maxam Initiation Sys., LLC*, No. WWMCV095005218S, 2011 Conn. Super. LEXIS 2327, at *3 (Conn. Super. Ct. June 20, 2011) (citing *Aquarian Water Co. of Conn. v. Beck Law Prods. & Forms, LLC*, 98 Conn. App. 234, 239 (2006)).

^{152.} *Baron v. Maxam Initiation Sys., LLC*, No. WWMCV095005218S, 2011 Conn. Super. LEXIS 2327, at *3 (Conn. Super. Ct. June 20, 2011) (citing *Aquarian Water Co. of Conn. v. Beck Law Prods. & Forms, LLC*, 98 Conn. App. 234, 239 (2006)).

^{153.} *A.O. Sherman, LLC v. Bokina*, No. CV075006582, 2011 Conn. Super. LEXIS 2016, at *12-15 (Conn. Super. Ct. Aug. 12, 2011).

^{154.} *Cheeks v. Freepart Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015) (court held that settlement of FLSA claims requires approval from a court or the Department of Labor), *cert. denied*, 136 S. Ct. 824 (2016); *but see Gaughan v. Rubenstein*, 261 F. Supp. 3d 390 (S.D.N.Y. 2017) (court held that the pre-litigation waiver of FLSA claims was enforceable and that *Cheeks* only applies in the context of Fed. R. Civ. P. 41 settlements). The Second Circuit has not yet ruled on this issue, and there is a split in the federal judicial districts. *Compare Martin v. Spring Break '83 Prods., LLC*, 688 F.3d 247 (5th Cir. 2012) (pre-litigation waiver is effective), *with Lynni's Food Stores, Inc. v. United States*, 679 F.2d 1350 (11th Cir. 1982) (pre-litigation waiver is ineffective). *But see Mei Xing Yu v. Hasaki Rest., Inc.*, 944

Certain claims under the Age Discrimination in Employment Act cannot be waived no matter what the parties put in an agreement. And, with limited exception, employers cannot enter into an agreement to collectively bargain with a union that is not properly selected by the employees the union will be representing. While rules applicable to every contract in the employment setting cannot be detailed in this volume, the contracts described below and in Chapter 2 are the most common agreements entered into by employers and employees.

1-4:2 Arbitration Agreements

In an arbitration agreement, the employer and employee give up their right to a trial and, instead, agree to have their disputes resolved by a neutral arbitrator. Section 52-408 of the Connecticut General Statutes expressly validates arbitration agreements,¹⁵⁵ and such agreements are favored in Connecticut.¹⁵⁶ In this regard, Connecticut law is consistent with the Federal Arbitration Act, which provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.”¹⁵⁷ District courts sitting

F.3d 395 (2d Cir. 2019) (offers of judgment under Fed. R. Civ. P. 68 are not subject to approval requirements even if accepted).

^{155.} Connecticut General Statutes § 52-408 states, in relevant part:

An agreement in any written contract, or in a separate writing executed by the parties to any written contract, to settle by arbitration any controversy thereafter arising out of such contract, or out of the failure or refusal to perform the whole or any part thereof . . . , or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit . . . shall be valid, irrevocable and enforceable, except when there exists sufficient cause at law or in equity for the avoidance of written contracts generally.

^{156.} See, e.g., *AFSCME, Council 4, Local 2663 v. Dep’t of Children & Families*, 317 Conn. 238 (2015) (quoting *Harty v. Cantor Fitzgerald & Co.*, 275 Conn. 72 (2005)) (“Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution.”); *Nussbaum v. Kimberly Timbers, Ltd.*, 271 Conn. 65, 71 (2004) (“Connecticut has adopted a clear public policy in favor of arbitrating disputes”); *State v. AFSCME, Council 4, Local 387*, 252 Conn. 467, 473 (2000) (“We have consistently stated that arbitration is the favored means of settling differences”); *Pomposi v. Gamestop, Inc.*, No. 3:09-cv-340 (VLB), 2010 U.S. Dist. LEXIS 1819, at *3 (D. Conn. Jan. 11, 2010). See also *Wanamaker v. Westport Bd. of Educ.*, 899 F. Supp. 2d 193 (D. Conn. 2012). “Connecticut courts have consistently enforced provisions of employment agreements unilaterally imposed at the time of hire.” *Williamson v. Public Storage, Inc.*, No. 3:03CV1242, 2004 U.S. Dist. LEXIS 3799, at *4 (D. Conn. 2004) (citing *Powers v. United Healthcare*, 2001 Conn. Super. LEXIS 711, No. HHDCV0399925 (Conn. Super. Ct. Mar. 2, 2001)).

^{157.} 9 U.S.C. § 2.

in Connecticut have ruled that the FAA “mandates that district courts *shall* direct the parties to proceed to arbitrate on issues as to which an arbitration agreement has been signed.”¹⁵⁸

In May 2018, the United States Supreme Court further endorsed the enforceability of individual arbitration provisions in *Epic Systems Corp. v. Lewis*.¹⁵⁹ There the Court upheld contracts between the employer and its employees requiring individualized arbitration proceedings to resolve disputes between them. The employees attempted to avoid this contractual obligation to join in class and collective actions. The Court rejected the National Labor Relations Board’s opinion that individualized arbitration agreements that preclude the right to participate in class and collective actions violate Section 7 of the National Labor Relations Act (NLRA) and upheld individual arbitration under the FAA.

Like all contracts, arbitration agreements must be supported by consideration, which is generally found whenever employment is conditioned on the execution of the agreement. With regard to arbitration agreements entered into after the commencement of employment, courts are split as to whether continued employment, in and of itself, is sufficient consideration.¹⁶⁰

1-4:2.1 Unconscionability

Arbitration provisions can be nullified if they are deemed to be unconscionable. An arbitration agreement can be procedurally or substantively unconscionable. Procedural unconscionability

^{158.} *Pomposi v. Gamestop, Inc.*, No. 3:09-cv-340 (VLB), 2010 U.S. Dist. LEXIS 1819, at *3 (D. Conn. Jan. 11, 2010). See also *Wanamaker v. Westport Bd. of Educ.*, 899 F. Supp. 2d 193 (D. Conn. 2012).

^{159.} *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

^{160.} *Compare Norton v. Commercial Credit Corp.*, No. CV 980578441S, 1998 Conn. Super. LEXIS 2833, at *6 (Conn. Super. Ct. Oct. 6, 1998) (“continued employment is not sufficient consideration to support a modification to a contract”) (citing *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1 (1995)), with *Pomposi v. Gamestop, Inc.*, No. 3:09-cv-340 (VLB), 2010 U.S. Dist. LEXIS 1819, at *17 (D. Conn. Jan. 11, 2010) (“Where an individual’s employment is at will, continued employment is sufficient consideration to render an arbitration agreement binding”) (internal quotation and citation omitted). The *Norton* decision was criticized in *Murphy v. Glencore Ltd.*, No. 3:18-cv-01027 (CSH), 2019 U.S. Dist. LEXIS 21930 (D. Conn. Feb. 11, 2019) for the ruling that the arbitration provision does not require a written waiver of a jury trial, noting that the *Norton* decision “heavily emphasized the fact that the plaintiff’s employer fraudulently induced her into agreeing to arbitrate”). See also *Antollino v. Morgan Stanley & Co. LLC*, No. 17-cv-1777 (VLB), 2018 U.S. Dist. LEXIS 234925, at *7 (D. Conn. May 11, 2018) (“a party may assent to a provision through passive acquiescence.”).

focuses on contract formation and exists if a party can demonstrate “an absence of meaningful choice” with respect to the decision to execute the agreement.¹⁶¹ Substantive unconscionability exists if the terms of the arbitration agreement are “unreasonably favorable” to one party over another.”¹⁶² In *Williamson v. Public Storage, Inc.*, for example, plaintiff argued that the arbitration agreement was procedurally unconscionable because she was not given a meaningful opportunity to read the agreement before she signed it.¹⁶³ Substantive unconscionability focuses on the arbitration provision itself and whether it imposes “prohibitive costs” or provisions that assess fees to the losing party in contravention of applicable law, provisions that make arbitration less onerous on a party or those that limit the arbitrator’s authority to award damages available to a party in contravention of applicable law.¹⁶⁴

1-4:2.2 Grounds for Vacating Arbitration Award

After an arbitration award issues, a party may seek to vacate the award, though grounds for doing so are limited given the public policy favoring the enforcement of arbitration agreements. Additionally, the grounds for challenging an arbitration award differ depending on whether the submission to the arbitrator was restricted or unrestricted.¹⁶⁵ A submission is restricted if the parties by agreement limit the arbitrator’s authority to decide certain

^{161.} *Williamson v. Public Storage, Inc.*, No. 3:03CV1242, 2004 U.S. Dist. LEXIS 3799, at *4 (D. Conn. 2004).

^{162.} *Williamson v. Public Storage, Inc.*, No. 3:03CV1242, 2004 U.S. Dist. LEXIS 3799, at *4 (D. Conn. 2004).

^{163.} *But see Murphy v. Glencore Ltd.*, No. 3:18-cv-01027 (CSH), 2019 U.S. Dist. LEXIS 21930, at *21 (D. Conn. Feb. 11, 2019) (“In Connecticut, the general rule is that where a person of mature years signs or accepts a formal written contract affecting his pecuniary interests, it is his duty to read it and notice of its contents will be imputed to him if he negligently fails to do so.”)

^{164.} *Williamson v. Public Storage, Inc.*, No. 3:03CV1242, 2004 U.S. Dist. LEXIS 3799, at *5 (D. Conn. 2004) (quoting *Emlee Equip. Leasing Corp. v. Waterbury Transmission, Inc.*, 31 Conn. App. 455, 463-64 (1993)) (“Unconscionability has both procedural and substantive components, requiring a demonstration of ‘an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.’”).

^{165.} *Harty v. Cantor Fitzgerald & Co.*, 275 Conn. 72 (2005) (Court reviewed in detail the standards for reviewing arbitration decision depending upon the nature of the submission). *See also Asselin & Vieceli P’ship, LLC v. Washburn*, 194 Conn. App. 519 (2019) (copy of judicial review defined by whether submission was restricted or unrestricted); and *A Better Way Wholesale Autos, Inc. v. Gause*, 184 Conn. App. 643 (2018) (discussing claim that arbitrator exceeded authority and basis for the same).

issues or award certain damages.¹⁶⁶ If a submission is restricted, an arbitrator's award can be overturned if the arbitrator exceeds the authority granted to him or her.¹⁶⁷ A submission is unrestricted if an arbitrator has unfettered authority to decide all legal and factual issues relating to the parties dispute. In such cases, an award may still be challenged and vacated if it was (1) "procured by corruption, fraud or undue means," (2) there has been "evident partiality or corruption on the part of the arbitrator," (3) the arbitrator commits misconduct in statutorily specified ways, or (4) the arbitrator exceeds his or her powers so "imperfectly" that a "mutual, final and definite award upon the subject matter submitted was not made," such as when the arbitrator's award violates public policy.¹⁶⁸ If the parties do not expressly limit the submission, "arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds

^{166.} *Harty v. Cantor Fitzgerald & Co.*, 275 Conn. 72 (2005) (Court reviewed in detail the standards for reviewing arbitration decision depending upon the nature of the submission).

^{167.} *A Better Way Wholesale Autos, Inc. v. Gause*, 184 Conn. App. 643, 648 (2018), ("[A] claim that the arbitrator exceeded their powers may be established under § 52-418 in either one of two ways: (1) the award fails to conform to the submission or, in other words, falls outside the scope of the submission; or (2) the arbitrator manifestly disregarded the law").

^{168.} Connecticut General Statutes § 52-418 provides:

Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

For a discussion on the application of defect (4) above, see *State of Conn. v. Conn. Emps. Union Independent*, 322 Conn. 713 (2016) (in affirming arbitration decision rejecting employer's decision to terminate employee for smoking marijuana during a work shift, Court set forth factors for determining whether arbitration award violates public policy); *Burr Rd. Operating Co. II v. New Eng. Health Care Emps. Union*, 316 Conn. 618 (2015) (Court held that arbitration award did not violate public policy because the public policy involved did not mandate termination as a form of discipline for the misconduct in issue); *AFSCME, Council 4, Local 1565 v. Dep't of Correction*, 298 Conn. 824 (2010) (Court held that arbitrator's reliance on employee's acceptance of accelerated rehabilitation to establish that misconduct actually occurred violated public policy). See also *Bridgeport Bd. of Educ. v. NAGE, Local RI-200*, 160 Conn. App. 482, 491 (2015) (applying a two-step analysis to determine if arbitration award violates public policy: (1) court "must determine whether the award implicates any explicit, well-defined and dominant public policy;" and (2) if so, "whether the contract, as construed by the arbitration award, violates that policy").

that . . . the interpretation of the agreement by the arbitrators was erroneous.”¹⁶⁹

1-4:3 Collective Bargaining Agreements

The National Labor Relations Act (NLRA)¹⁷⁰ provides a mechanism for employees to elect a representative, such as a labor union, to collectively bargain on their behalf with their employer. Once a bargaining representative has been duly designated, the NLRA prohibits employers from entering into individual contracts with represented employees. An attempt by the employer to sidestep the collective bargaining process may constitute an unfair labor practice enforceable by the National Labor Relations Board (NLRB).

Once a union and an employer enter into a collective bargaining agreement, federal law controls, and the agreement may not be enforced in state court.¹⁷¹ Employees with individual contracts that predate a collectively bargained agreement may enforce such agreements in state court but only if the individual agreements provide greater benefits “in addition” to those provided by the collective bargaining agreement and do not otherwise conflict with it.¹⁷² Otherwise, such claims will be deemed preempted by Section 301 of the Labor Management Relations Act (LMRA).¹⁷³

^{169.} *Industrial Risk Insurers v. Hartford Steam Boiler Inspection & Ins. Co.*, 273 Conn. 86, 93 (2005) (internal quotation marks omitted) questioned by *Girolametti v. Michael Horton Assocs., Inc.*, 332 Conn. 67, 81 n.6 ((2019) (“a submission of a dispute to arbitration is unrestricted . . . when the parties’ arbitration agreement contains no language restricting the breadth of issues, reserving explicit rights or conditioning the award on court review.”). See also *Comprehensive Orthopaedics & Musculoskeletal Care, LLC v. Axtmayer*, 293 Conn. 748, 759 (2009) (“[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of authority, the award must be enforced.”); see also *AFSCME, Council 4, Local 2663 v. Dep’t of Children & Families*, 317 Conn. 238, 252 (2015) (noting that “as long as the arbitrator is even arguably construing or applying the contract,” even “serious error” is insufficient to overturn the arbitrator’s decision).

^{170.} 29 U.S.C. §§ 151 et seq.

^{171.} 29 U.S.C. § 185, which codifies § 301 of the Labor Management Relations Act (also known as the Taft-Hartley Act), provides that “[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . , or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.”

^{172.} *Barbieri v. United Techs. Corp.*, 255 Conn. 708 (2001).

^{173.} 29 U.S.C. §§ 141-197.

In *Barbieri v. United Technologies Corp.*,¹⁷⁴ the employees sought to enforce individual contracts they entered into while outside the bargaining unit (i.e., not represented by the union) for employment positions that were inside the bargaining unit. The individual contracts provided wage supplements above the maximum rate allowed under the collective bargaining agreement. The Connecticut Supreme Court found that the employees' claims were not preempted by the LMRA because the individual contracts provided rights that were greater than those in the collective bargaining agreement.¹⁷⁵ Nevertheless, the Court ruled that their claims were preempted under the NLRA because the employer's conduct—contracting with the employees over positions within the bargaining unit—arguably violated the NLRA, and violations of the NLRA are within the exclusive jurisdiction of the NLRB. In dismissing the employees' claims, the Court concluded that allowing the employees to enforce their contracts in state court would create “a palpable risk that the state may enforce contracts under state law that the [Board] could deem contrary to federal labor policy.”¹⁷⁶

1-4:4 Separation Agreements

Connecticut does not have special rules to govern waivers and releases contained in separation or severance agreements. General contracting principles apply.¹⁷⁷ Normally, the question of contract interpretation is a question of fact. But if the contract contains “definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law.”¹⁷⁸ Merger or integration clauses contained in a

¹⁷⁴. *Barbieri v. United Techs. Corp.*, 255 Conn. 708 (2001).

¹⁷⁵. *Barbieri v. United Techs. Corp.*, 255 Conn. 708, 731 (2001).

¹⁷⁶. *Barbieri v. United Techs. Corp.*, 255 Conn. 708, 744-45 (2001); *but see Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), where the United States Supreme Court upheld the enforceability of individualized arbitration provisions over objections from the NLRB that such agreements violated Section 7 of the NLRA.

¹⁷⁷. *See, e.g., Stock v. Envtl. Sys. Prods., Inc.*, No. CV095026121S, 2011 Conn. Super. LEXIS 936, at *17 (Conn. Super. Ct. Apr. 6, 2011) (citing *Muldoon v. Homestead Insulation Co.*, 231 Conn. 469, 482 (1994)) (“[A] release, being a contract whereby a party abandons a claim to a person against whom that claim exists, is subject to [the] rules governing the construction of contracts.”) (internal quotation marks omitted).

¹⁷⁸. *See, e.g., Stock v. Envtl. Sys. Prods., Inc.*, No. CV095026121S, 2011 Conn. Super. LEXIS 936, at *17-20 (Conn. Super. Ct. Apr. 6, 2011) (citing *Montoya v. Montoya.*, 280 Conn. 605, 613 (2006)). In *Stock*, the court granted defendant's summary judgment motion

separation or severance agreement are critical to assisting the trier of fact in reaching the conclusion that the parties' agreement was intended to be the entire agreement between them and eliminating the possibility that evidence of prior or contemporaneous oral promises will preclude enforcement of the contract's terms.¹⁷⁹

To be enforceable, waivers and releases must be supported by sufficient consideration and "knowingly and voluntarily" entered into by the releasing party¹⁸⁰. In this regard, it should be noted that agreements that waive claims under the Connecticut Fair Employment Practices Act (CFEPA), with one exception, are reviewed consistently with agreements that waive claims under its federal counterparts.¹⁸¹ When applying federal law principles to determine whether a release of claims under the CFEPA is "knowing and voluntary," courts will consider the following factors:

- (1) The employee's education and business experience;
- (2) The amount of time the employee had possession of or access to the agreement before signing it;
- (3) The role of the employee in deciding the terms of the agreement;
- (4) The clarity of the agreement;

dismissing claims for negligent and intentional misrepresentation based on the existence of a "clear and unambiguous" severance agreement in which the plaintiff-employee had agreed to "release and forever discharge" the employer from "all causes of action or claims of any kind."

¹⁷⁹. *Tallmadge Bros., Inc. v. Iroquois Gas Transmission Sys., L.P.*, 252 Conn. 479, 502 (2000) ("[W]hen the parties have deliberately put their engagement into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their understanding, was reduced to writing.").

¹⁸⁰. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974); *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 438 (2d Cir. 1998); *Galera v. Johanns*, 612 F.3d 8, 13 (1st Cir. 2010); *Hampton v. Ford Motor Co.*, 561 F.3d 709, 716-17 (7th Cir. 2009).

¹⁸¹. *See, e.g., A.O. Sherman, LLC v. Bokina*, No. CV075006582, 2011 Conn. Super. LEXIS 2016, at *8 (Conn. Super. Ct. Aug. 12, 2011) (court applied federal principles to determining enforceability of waiver of CFEPA claims, noting that "in matters involving the interpretation of the scope of our antidiscrimination statutes, courts consistently have looked to federal precedent for guidance"). The one exception is that the waiver of age claims under the CFEPA does not require compliance with the Older Workers Benefit Protection Act, which is limited in its application to the Age Discrimination in Employment Act. *See* § 1-4:4.1.

- (5) Whether the plaintiff was represented by or consulted with counsel;
- (6) Whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law; and
- (7) Whether the employee was advised to consult with an attorney and had a fair opportunity to do so.¹⁸²

Ultimately, whether the release will be deemed to be knowing and voluntary will depend upon the “totality of the circumstances” surrounding its execution.¹⁸³ That said, the law favors the informal resolution of employment law claims, and most clearly worded and fully integrated employment agreements should be upheld by Connecticut courts.¹⁸⁴ Nonetheless, separation and severance agreements will cover only those claims they were intended to cover—as is referenced in the agreement—and can only affect a waiver of existing or past claims, rather than future claims. In *Muldoon v. Homestead Insulation Co.*,¹⁸⁵ the Connecticut Supreme Court summarized these general principles as follows:

It is well settled that a release, being a contract whereby a party abandons a claim to a person against whom that claim exists, is subject to rules governing the construction of contracts . . . The intention of the parties, therefore, controls the scope and effect of the release, and this intent is discerned from the language used and the circumstances of the transaction . . . It is similarly

¹⁸² *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 438 (2d Cir. 1998). See also *A.O. Sherman, LLC v. Bokina*, No. CV075006582, 2011 Conn. Super. LEXIS 2016, at *9 (Conn. Super. Ct. Aug. 12, 2011) (in denying defendant’s motion for summary judgment on plaintiff’s age and gender discrimination claims based on the existence of a severance agreement, the court noted that there were genuine material facts regarding whether plaintiff had knowingly and voluntarily entered into a release where she had only three hours to consider the agreement and review it, she did not speak to an attorney, and she was not advised to do so).

¹⁸³ *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 438 (2d Cir. 1998).

¹⁸⁴ *A.O. Sherman, LLC v. Bokina*, No. CV075006582, 2011 Conn. Super. LEXIS 2016, at *7 (Conn. Super. Ct. Aug. 12, 2011) (citing *Stroman v. W. Coast Grocery Co.*, 884 F.2d 458, 460-61 (9th Cir. 1989), cert. denied, 498 U.S. 854 (1990)).

¹⁸⁵ *Muldoon v. Homestead Insulation Co.*, 231 Conn. 469 (1994).

stated that a release, no matter how broad its terms, will not be construed to include claims not within the contemplation of the parties . . . and, where the language of the release is directed to claims then in existence, it will not be extended to cover claims that may arise in the future.¹⁸⁶

The procedure for seeking enforcement of a separation agreement was addressed by the Connecticut Appellate Court. In *Matos v. Ortiz*,¹⁸⁷ the court declined to extend the Connecticut Supreme Court's ruling in *Audubon Parking Associates Ltd. Partnership v. Barclay & Stubbs, Inc.*,¹⁸⁸ allowing a court to summarily enforce unambiguous settlement agreements, to separation agreements entered into prior to the institution of litigation. The court explained that severance agreements are distinguishable from settlement agreements because they are entered into prior to invoking the court's authority and, therefore, may only be enforced "through a motion for summary judgment or by presentation at trial as a special defense."¹⁸⁹

1-4:4.1 The Older Workers Benefit Protection Act

The Older Workers Benefit Protection Act (OWBPA),¹⁹⁰ which amended the Age Discrimination in Employment Act (ADEA),¹⁹¹ mandates that certain requirements be included in waivers and releases to effectively waive ADEA claims. Different requirements apply to releases executed in conjunction with group termination programs as opposed to individual terminations, and requirements vary depending on whether the parties are settling litigation that has already been initiated or proactively waiving rights

^{186.} *Muldoon v. Homestead Insulation Co.*, 231 Conn. 469, 482 (1994) (quoting *Chubb v. Amax Coal Co.*, 125 Ill. App. 3d 682 (1984)); see also *Moniz v. Pfizer, Inc.*, No. 550562, 1999 Conn. Super. LEXIS 2814, at *9 (Conn. Super. Ct. Oct. 19, 1999) (applying principles enunciated in *Muldoon* to a severance agreement entered into by an employee upon termination of his employment).

^{187.} *Matos v. Ortiz*, 166 Conn. App. 775 (2016).

^{188.} *Audubon Parking Assocs. Ltd. Partnership v. Barclay & Stubbs, Inc.*, 225 Conn. 804 (1993) (Court held that settlement agreements terminating litigation may be enforced using a summary enforcement procedure including issues of fact that might otherwise entitle the plaintiff to trial by jury).

^{189.} *Matos v. Ortiz*, 166 Conn. App. 775, 808 (2016).

^{190.} 29 U.S.C. § 626(f).

^{191.} 29 U.S.C. §§ 621 et seq.

that have yet to be asserted.¹⁹² The purpose of the OWBPA is to “protect the rights and benefits of older workers.”¹⁹³ It applies only to ADEA claims and does not affect the enforceability of waivers of age claims under the Connecticut Fair Employment Practices Act.¹⁹⁴

**1-4:4.2 Waivers of Claims Under the Fair Labor Standards Act
and State Wage and Hour Laws**

It is impermissible to waive claims under the Fair Labor Standards Act without the approval of the Secretary of the Department of Labor.¹⁹⁵ This principle has been extended to waivers of claims for wages under state law as well.¹⁹⁶ It is also impermissible to seek an agreement with an employee to accept less than minimum wage or to agree to forgo overtime compensation mandated under the FLSA or state law. Section 31-72 of the Connecticut General Statutes provides that agreements between

^{192.} 29 U.S.C. § 626(f).

^{193.} *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998). Among other things, the OWBPA requires that an employer provide an individual employee with 21 days to consider whether to enter into a release of claims under the ADEA and another 7 days to revoke his or her acceptance. (The time period is increased from 21 to 45 days for group-termination programs.) The OWBPA also requires that the release make clear that the employee is waiving his or her right to sue under the ADEA and prohibits an employer from interfering with an employee’s right to file an administrative charge with, or participate in proceedings conducted by, the Equal Employment Opportunity Commission. This does not mean that an employee cannot waive his or her right to accept a damages award if an administrative charge is filed or if an employee does participate in proceedings undertaken by the Commission. The OWBPA also establishes requirements regarding the provision of information about those selected for group termination programs and voluntary incentive programs. If a release is requested in conjunction with a group termination program—for example, if more than one employee is being asked to sign a release in exchange for severance benefits—the employer must divulge the ages and positions of employees being selected, the ages and positions of those not being selected, and the requirements for eligibility for the severance program. For a complete summary of the requirements for releases under the OWBPA, see 29 C.F.R. Part 1625 attached as Appendix A.

^{194.} *Moniz v. Pfizer, Inc.*, No. 550562, 1999 Conn. Super. LEXIS 2814, at *14, *20-21 (Conn. Super. Ct. Oct. 19, 1999) (citing *Butcher v. Gerber Prod. Co.*, 8 F. Supp. 2d 307, 317-18 (S.D.N.Y. 1998)); *Branker v. Pfizer*, 981 F. Supp. 862 (S.D.N.Y. 1997); *Williams v. Gen. Motors Corp.*, 901 F. Supp. 252, 255 (E.D. Mich. 1995).

^{195.} *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015) (court held that settlement of FLSA claims requires approval from a court or the Department of Labor), cert. denied, 136 S. Ct. 824 (2016); *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697 (1945) (private waivers of FLSA claims would “nullify the purposes of the Act.”). The FLSA authorizes waivers only when the Secretary of Labor oversees the process. 29 U.S.C. § 216(c). But see *Mei Xing Yu v. Hasaki Rest., Inc.*, 944 F.3d 395 (2d Cir. 2019) (offers of judgment under Fed. R. Civ. P. 68 are not subject to approval requirements even if accepted).

^{196.} *Justin v. AMA Ltd.*, No. CV92 29 33 60, 1993 Conn. Super. LEXIS 1516, at *6 (Conn. Super. Ct. June 8, 1993).

an employer and employee circumventing Connecticut's wage payment laws are not a defense to an action for wages due.

The rationale for not permitting private waivers of wage claims was summarized by the Connecticut Supreme Court in *Pereira v. State Board of Education*¹⁹⁷ in this way:

The public interest may not be waived. [When] a law seeks to protect the public as well as the individual, such protection to the state cannot, at will, be waived by any individual, an integral part thereof. The public good is entitled to protection and consideration and if, in order to effectuate that object, there must be enforced protection to the individual, such individual must submit to such enforced protection for the public good Accordingly, a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.¹⁹⁸

The Court reasoned that “[o]ne cannot give what one does not possess,” and that “[o]ne cannot waive an obligation owed by another to the public.”¹⁹⁹ Because the purpose of the wage laws is to protect the public as a whole, individual waivers are impermissible. Thus, when an obligation is “a public obligation created by statute,” it cannot be waived by any individual or group of individuals.²⁰⁰

^{197.} *Pereira v. State Bd. of Educ.*, 304 Conn. 1 (2012) followed by *Rockstone Capital, LLC v. Sanzo*, 332 Conn. 306 (2019) (a statutory right affecting a public interest cannot be waived).

^{198.} *Pereira v. State Bd. of Educ.*, 304 Conn. 1, 49-50 (2012) (quoting *In re Application for Writ of Habeas Corpus by Ross*, 272 Conn. 676, 719-20 (2005) (internal citations omitted, internal quotation marks omitted, emphasis added)) (Court ruled that mandatory training requirement in Connecticut General Statutes § 10-233e(h) could not be waived by private agreement).

^{199.} *Pereira v. State Bd. of Educ.*, 304 Conn. 1, 50 (2012).

^{200.} *Pereira v. State Bd. of Educ.*, 304 Conn. 1, 50 (2012) (internal citations omitted) (Court ruled that mandatory training requirement in Connecticut General Statutes § 10-233e(h) could not be waived by private agreement), *but see Gaughan v. Rubenstein*, 261 F. Supp. 3d 390 (S.D.N.Y. 2017) (court held that the pre-litigation waiver of FLSA claims was enforceable and that *Cheeks* only applies in the context of Fed. R. Civ. P. 41 settlements). The Second Circuit has not yet ruled on this issue, and there is a split in the federal judicial districts. *Compare Martin v. Spring Break '83 Prods., LLC*, 688 F.3d 247 (5th Cir. 2012) (pre-litigation waiver is effective), *with Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350 (11th Cir. 1982) (pre-litigation waiver is ineffective). *But see Mei Xing Yu v. Hasaki Rest., Inc.*, 944 F.3d 395 (2d Cir.

1-4:4.3 Promissory Notes

Connecticut General Statutes § 31-51r prohibits employers from requiring employees to execute promissory notes as a condition of employment.²⁰¹ This prohibition includes common provisions included in employment offer letters and agreements requiring the employee to repay his or her employer for training costs if the employee does not remain with the employer for a defined period of time. Section 31-51r specifically states that such agreements are “against public policy” and, therefore, void. Section 31-51r (c), however, does permit such agreements if they require and employee to repay sums “advanced” to an employee, relate to the sale of property to the employee or are authorized by a collective bargaining agreement.

1-5 TERMINATING THE EMPLOYMENT CONTRACT

1-5:1 Generally

Because there is a presumption in Connecticut that, absent agreements to the contrary, employment is at will, most employment relationships can be terminated for any or no reason, with or without cause or notice. The freedom to terminate at will, however, does not mean that employers have no legal obligations to the terminated employee. The wage payment laws mandate when an employee’s final compensation must be paid.²⁰² The Consolidated Omnibus Budget Reconciliation Act (COBRA) requires employers of a certain size to provide most terminated employees notice and an opportunity to continue health insurance coverage for defined periods of time following termination.²⁰³ State laws also

2019) (offers of judgment under Fed. R. Civ. P. 68 are not subject to approval requirements even if accepted).

^{201.} Connecticut General Statutes § 31-51r(b) provides:

On or after October 1, 1985, no employer may require, as a condition of employment, any employee or prospective employee to execute an employment promissory note. The execution of an employment promissory note as a condition of employment is against public policy and any such note shall be void. If any such note is part of an employment agreement, the invalidity of such note shall not affect the other provisions of such agreement.

^{202.} See Chapter 8.

^{203.} See Chapter 11.

prescribe how and when employees must be given access to their personnel files and what information an employer must provide to the Unemployment Compensation Division of the Connecticut Department of Labor.²⁰⁴ Most importantly, Connecticut General Statutes § 31-128b provides: “Each employer shall provide an employee with a copy of any documentation of any disciplinary action imposed on that employee not more than one business day after the date of imposing such action. Each employer shall immediately provide an employee with a copy of any documented notice of that employee’s termination of employment.”²⁰⁵ Most of these obligations are covered at length in other chapters of this volume. The following are some additional requirements that may apply when an employment relationship ends.

1-5:2 Job References

Employers in Connecticut are not required to provide, nor are they prohibited from providing, truthful job references. Nevertheless, employers should carefully control job references to avoid possible claims of defamation or libel.²⁰⁶ Because of concerns in this regard, many employers provide only limited reference information to prospective employers of their terminated workers and only when a release is provided by the employee.²⁰⁷

^{204.} See Chapter 9.

^{205.} Conn. Gen. Stat. § 31-128b.

^{206.} See Chapter 5.

^{207.} Although the provision of job references in Connecticut is not regulated by statute, Connecticut General Statutes § 31-134 does prohibit blacklisting. Section 31-134 provides in pertinent part:

No person or corporation, nor any agent or attorney thereof, nor any association of persons or corporations, shall maintain, subscribe to, belong to or support any bureau or agency conducted for the purpose of preserving and furnishing to any member thereof or to others information descriptive of the character, skill, acts or affiliations of any person whereby his reputation, standing in a trade or ability to secure employment may be affected, unless a complete record of such information is open at all reasonable times to the inspection of the person to whom such information relates or of his authorized agent or attorney. All items of information pertaining to each person so described shall be recorded, in reasonably clear and unambiguous terms, on a single sheet or card, and all records preserved in any such bureau or agency shall be at all times open to the inspection of the Labor Commissioner.

The law is not a general prohibition on providing job references; it applies to a very discrete set of circumstances, and it has been the subject of almost no discussion in the Connecticut courts. The only reported case discussing Connecticut General Statutes § 31-134 was decided in 1912: *State v. Lay*, 86 Conn. 141 (1912) (ruling that the statute was not unconstitutional

1-5:3 Blacklisting

Connecticut General Statutes § 31-51 prohibits “blacklisting” of former employees. “Blacklisting” refers to the practice of publishing the names of employees “for the purpose of preventing [the employees] from engaging in or securing employment” elsewhere.²⁰⁸ The law, however, does not prohibit an employer from providing “a truthful statement of any facts concerning a present or former employee” to others “who may be considering the employment of such employee.”²⁰⁹ Violations of § 31-51 are punishable by fines of between \$50 and \$200.

1-5:4 Personnel Files

Connecticut’s personnel files law requires employers to respond to an employee’s written request to inspect or copy his or her personnel file:

- Within seven business days for current employees.
- Within 10 business days for a former employee, provided the request was received within one year of the employee’s termination.²¹⁰

Employers must also:

- Provide an employee with any written documentation of disciplinary action taken within one business day of imposing the discipline on the employee.²¹¹
- Immediately provide a terminated employee with any documented notice of the employee’s termination.²¹²

and describing it as “concerning ‘blacklisting.’”). Exceptions apply to religious or charitable institutions maintained solely for humanitarian purposes, agencies maintained for the purpose of vending employment and in which persons seeking employment authorize the registration of the names and qualifications, to companies conducted solely for the purpose of preserving records and furnishing reports of financial standing and personal or business credit, and for “the private records of employees kept by any person or corporation to be used in accordance with the provisions of section 31-51.”

²⁰⁸. Conn. Gen. Stat. § 31-51.

²⁰⁹. Conn. Gen. Stat. § 31-51.

²¹⁰. Conn. Gen. Stat. § 31-128b.

²¹¹. Conn. Gen. Stat. § 31-128b.

²¹². Conn. Gen. Stat. § 31-128b.

- Include a statement in disciplinary action documents, notices of termination and performance evaluations in “clear and conspicuous language” that the employee, if s/he disagrees with any of the information in the document, may submit a written statement of the employee’s position, which will be maintained as part of the personnel file and included in any transmittal or disclosure of the personnel file to a third party.²¹³

The Connecticut Department of Labor has discretion to assess a penalty of up to \$500 for the first violation concerning an employee/former employee and a penalty of up to \$1,000 for the second violation concerning the same employee/former employee.²¹⁴ In setting the penalty, the Labor Commissioner must consider all factors the Commissioner deems relevant, including: “(1) the level of assessment necessary to insure immediate and continued compliance . . . ; (2) the character and degree of impact of the violation; and (3) any prior violations of such employer of [this chapter].”

1-5:5 WARN and Connecticut’s Plant Closing Law

In some situations where a termination results in the loss of multiple jobs or a plant closing, state and federal law require employers to provide notice or compensation in lieu of notice to affected employees. The Workers Adjustment and Retraining Notification Act²¹⁵ (WARN) requires most employers of 100 or more employees to provide 60 calendar days’ notice to employees in advance of a “plant closing” or “mass layoff.”²¹⁶ WARN itself and the regulations interpreting its requirements define plant closing and mass layoff, provide guidance for determining the number of “employees” who must be counted for purposes of determining coverage thresholds, and detail how and when notice must be provided to employees, exceptions to the notice requirement and the penalties for failing to provide

²¹³ Conn. Gen. Stat. § 31-128e.

²¹⁴ Prior to October 1, 2013, the penalties were mandatory.

²¹⁵ 29 U.S.C. §§ 2101 et seq.

²¹⁶ 29 U.S.C. § 2102.

notice as required. A full description of WARN obligations is beyond the scope of this volume. Key to coverage, however, is the occurrence of a job action that at one time, or over a 30-day period, affects at least 50 employees when the job action involves the closing of a single plant location or, in the aggregate, reduces an employer's work force by at least 33 percent. WARN is a very complex statute with multiple look-back and look-forward requirements that affect whether or not it applies to a particular plant closing or mass layoff. A full review of the statute and the U.S. Department of Labor regulations is required to fully understand its implications.²¹⁷

Connecticut employers with 100 or more employees, who close or relocate a facility to another state,²¹⁸ must also comply with Connecticut General Statutes § 31-51o, which requires such employers to "pay in full for the continuation of existing group health insurance . . . for each affected employee and his [or her] dependents . . . for a period of one hundred twenty days or until such time as the employee becomes eligible for other group coverage." Some limited exceptions apply to agricultural and construction employers as well as to closings due to bankruptcy or natural disasters.²¹⁹

²¹⁷. The Department of Labor regulations can be found at 20 C.F.R. Part 639.

²¹⁸. Conn. Gen. Stat. § 31-51n.

²¹⁹. Conn. Gen. Stat. § 31-51n(2) and (6).

